

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Perry Fleming (Applicant)
AND Airways Corporation of New Zealand Ltd (Respondent)
REPRESENTATIVES Richard McCabe for the applicant
Stuart Dalzell for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 17 November 2006 in Auckland
DATE OF DETERMINATION 25 January 2007

DETERMINATION OF THE AUTHORITY

Mr Fleming's employment relationship problem

[1] John Perry Fleming was employed as an Air Traffic Controller by the Airways Corporation of New Zealand Ltd (Airways), from 1972 until his retirement in 2005/2006. For most, if not all, of that time Mr Fleming worked rostered shifts. In particular, from 1976 until the time of his retirement he worked a six-day shift roster. [Note: this roster is often referred to as the 4/2 roster i.e. for every 4 days worked an employee was rostered off for 2 days - sometimes the roster included two days on/one day off or six days on/three days off but always in the ratio of 4/2]. In April 2005 Mr Fleming elected, in terms of his collective employment agreement, to retire from Airways. He notified Airways that his intention was to finish work on Sunday 22 May 2005 but elected to remain an employee of Airways until the expiry of his annual leave, days in lieu, retirement leave etc.

[2] By way of a letter dated the 19th of April 2005 Airways accepted Mr Fleming's retirement notice saying:

- *As at 22 May, you will be eligible for 123 days of retirement leave, which will take you to 18 November 2005.*
- *At 18 November 2005, you will have annual leave, DILs, and recreation days which will take you to mid February 2006.*

We suggest that you give us a preferred finish date in mid-February, and then based on leave taken in the last pay period, any leave you take before the 22nd of May, and any leave you accumulate after 18 November we will do a final calculation for you.

[3] When Airways carried out their *final calculation* they advised Mr Fleming that his last day of service was 8 February 2006. As this was earlier than Mr Fleming had expected he queried their calculation. He was advised that, from the week following his last day of work, Airways had calculated all of Mr Fleming's leave based on a 7 day roster cycle i.e. five days on/two days off. This assumption, i.e. that Mr Fleming's leave should be calculated on a seven-day cycle, resulted in Mr Fleming receiving approximately eight days less salary than had these calculations been based on the six-day cycle that he had been working prior to his ceasing work.

[4] Mr Fleming claims that Airways had no right to unilaterally change his roster cycle for the purposes of calculating his retirement leave, annual leave etc. He asks that the Authority:

- Determine that Airways' interpretation and application of the Collective Employment Agreement (CEA) was in breach of that agreement.
- Order that Airways recalculate Mr Fleming's wages in terms of the correct interpretation of the CEA, and that these arrears of wages, plus interest, be paid to Mr Fleming.
- Impose a penalty on Airways for breach of the CEA.
- Make an award of costs in favour of Mr Fleming.

The issue for determination

[5] The Airline Pilots Association (ALPA/the Union), on behalf of Mr Fleming, say that Airways were not entitled to unilaterally change Mr Fleming's roster cycle for the purposes of calculating his retirement, annual and other leave. Airways say that once an employee goes on retirement leave, there is no prospect that the employee will return to work and there is no basis to keep them on the 4/2 roster cycle. Leave is therefore deducted in accordance with the 5/2 work cycle. The parties are in general agreement regarding the basic facts of this dispute. Both parties agree that the issue is one of interpretation of the CEA.

The collective employment agreement

[6] There is no dispute that Mr Fleming was entitled to give notice of his retirement in terms of clause 10 of the CEA. Clause 59 of the CEA sets out of the entitlement to **retirement leave**:

59.1 Employees eligible to retire in accordance with clause 10 of this Agreement and who have completed 15 or more years (actual) service shall be entitled to retiring leave, pro-rata, in accordance with the table below:

<i>15 years but less than 20 years</i>	<i>44-64</i>
<i>20 years but less than 25 years.....</i>	<i>65</i>
<i>...</i>	
<i>...</i>	
<i>35 years but less than 40 years</i>	<i>122-130</i>
<i>On completion of 40 years service.....</i>	<i>131</i>

Each year of operational ATC service shall, for the purposes of this clause, be taken to equate to 1.33 years of normal service for those air traffic control employees who retire in accordance with clause 10.1(c).

59.2 Employees may elect to take retiring leave as leave or be paid as a lump sum in lieu thereof.

59.3 Subject to Airways approval, an employee may apply to take accumulated retiring leave in anticipation of retirement.

59.4

In terms of sub clause 59.2 Mr Fleming elected, as he was entitled to do, to take his retiring leave as leave and received Airways approval, in terms of sub clause 59.3, to take his accumulated retiring leave in anticipation of his retirement.

[7] The parties agree that Mr Fleming, at least until he proceeded on retirement leave, was a shift worker as defined in the CEA. While there are detailed provisions in the CEA regarding the operation of the roster's and shifts the only reference to the changing of a shift roster or pattern says:

29.4.1 Rosters and amended rosters shall normally be published a minimum of 28 days prior to the effective date.

29.4.2 individual employees shall be given a minimum of 48 hours notice of any change to a rostered duty.

29.4.3 The period of notice under clause 29.4.2 may be reduced with the agreement of the employee(s) concerned.

Airways do not claim to have given Mr Fleming notice in terms of these sub clauses.

[8] In relation to the amount to be paid to employees during periods of leave, clause 41 of the CEA says:

41 Pay during leave

Pay for all paid sick leave, bereavement leave, domestic leave, public holidays and annual leave shall be calculated in accordance with the Holidays Act 2003.

Pay during any other types of leave, unless otherwise stated, shall be ordinary pay for the period or periods in question.

Leave Bank leave, when taken, shall be paid as annual leave.

Airways' arguments

[9] Airways have two main arguments as to why they believe it was appropriate to calculate Mr Fleming's retirement leave based on a 5/2 roster rather than 4/2 roster he was working up to the date of his departure.

(i) Air traffic controllers work a 4/2 roster because they are presumed to require the rest and recuperation time it afford i.e. it was devised as a health and safety measure. By electing to retire, Mr Fleming (and any other air traffic controller taking anticipated retiring leave) had no prospect of returning to work on any basis. There was no basis for maintaining the 4/2 roster and they must therefore revert to the 5/2 roster.

(ii) Mr Fleming had an entitlement to 24.6 weeks salary (123 days /5). Had he been paid based on a 4/2 roster he would have received 26.4 weeks salary which, Airways say, could not have been intended.

Mr Fleming's arguments

[10] On behalf of Mr Fleming ALPA argue that retiring leave falls into the category of *other types of leave* in terms of clause 41. Clause 31 requires that such leave shall be paid at *ordinary pay for the work period or periods in question*. ALPA submitted that the *work period* in question can only relate to the 4/2 roster cycle that Mr Fleming worked for 35 years and on which he had always received and been paid leave.

[11] ALPA points out that clause 41 of the CEA stipulates that annual leave shall be calculated in accordance with the Holidays Act 2003 and that in the Holidays Act *ordinary weekly pay* is defined as:

Meaning of ordinary weekly pay

(1) *In this Act, unless the context otherwise requires, ordinary weekly pay, for the purposes of calculating annual holiday pay, -*

(a) means of the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and

(b) Ordinary weekly pay means the amount of pay that the employee receives under his or her employment agreement for an ordinary week.

In respect to Mr Fleming's accrued annual leave ALPA say that Mr Fleming accrued this leave on a 4/2 roster, the 4/2 roster was his *ordinary week* and it follows that such leave should be calculated and paid on the same basis.

The rules of interpretation

[12] The rules to be applied when interpreting the provisions of an employment agreement are well established. These were summarised by the Employment Court in *ASTE v Chief Executive of Bay of Plenty Polytechnic*. [2002] 1 ERNZ, 491:

...Agreements should be interpreted with reference to the factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used - they must obviously be the starting point - and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

Discussion

[13] Despite the detailed submissions of the respective parties, the wording of the collective agreement provides little to resolve this dispute. There is no explicit statement regarding the basis of payment where an employee elects to take their retiring leave as leave rather than in a lump sum. It is necessary therefore to consider *the factual matrix or surrounding circumstances* (see *ASTE* above). In this regard there are three issues which need to be considered - How previous employees who have retired have been paid, the reason(s) for the 4/2 roster and whether other employees have been removed from the 4/2 roster while on leave.

[14] Airways advise that where previous employees have elected to take their retiring leave as leave that leave has been calculated using a 5/2 roster. The information supplied by Airways is that over the last six years 17 employees have retired: one received no payment, 12 elected to receive a lump sum payment and the remaining four, including Mr Fleming had the retirement leave calculated on a 5/2 basis. ALPA say that they were unaware of this practice and would have challenged this interpretation had it been brought to their attention.

[15] Airways agree that (with the exception of long service leave for which there is a special provision in the CEA) when an employee on the 4/2 roster takes any other form of leave that leave is calculated as though the employee remained on the 4/2 roster. In fact the only other time an Air Traffic Controller is removed from the 4/2 roster is if they are seconded to a "management" position i.e. for a given period are required to work a 5/2 roster in a non-operational position. Airways emphasise that the difference when an employee proceeds on retirement leave is that they will not be returning to work and should be removed from the roster as there is no longer any reason for them to be on it.

[16] There is no doubt that one of the considerations when the 4/2 roster system was put in place was the perceived requirement for air traffic controllers to receive adequate rest and recuperation i.e. over and above that of other employees. However the State Service Tribunal decision which established the rostering system specifically accepted that employees working this roster would work fewer days than employees working a traditional 5/2 roster. The corollary of this position is that the leave entitlements of employees working the 4/2 roster will result in a slightly enhanced period of leave when measured in calendar weeks. In other words it is perfectly consistent with the original intent of the roster that air traffic controllers receive an "enhanced" leave entitlement (when measured in calendar weeks). Neither the original Tribunal decision nor the current CEA suggest that, merely because they will not be returning to operational duty because of their accumulated leave entitlements, an employee should be removed from the 4/2 roster.

[17] I cannot agree with Airways practice. Mr Fleming, along with all other operational Air Traffic Controllers, was a shift worker. For the previous 30 plus years he had worked a 4/2 roster and accumulated and taken his various leave entitlements based on that roster. Whether the leave be accumulated annual leave, shift leave, days in lieu of public holidays or retiring leave, to suggest that that leave should be calculated using some different roster, merely because the employee is not going to return to work at the end of the period of leave, is not equitable, logical or tenable. Because Airways have done so on previous occasions does not make the practice legitimate.

[18] The CEA provides that the roster or amended roster will be published a minimum of 28 days prior to the effective date and if a shift worker's roster is to be changed the individual employee will be given 48 hours notice of that change. Mr Fleming was not notified of a change to his roster and on that basis alone he was entitled to assume that he continued, albeit on a pro forma basis, to be on a 4/2 roster.

Determination

Calculation of leave

[19] For the reasons set out above I find that Airways was not entitled to calculate Mr Fleming's retirement and annual leave taken immediately prior to his retirement based on a 5/2 roster. On the contrary Mr Fleming's annual and retirement leave should have been calculated in accordance with the 4/2 roster he had worked prior to commencing that leave.

Penalty for breach of collective employment agreement

[20] I do not accept that I should impose a penalty on Airways for calculating Mr Fleming's leave in the way they did. Airways misinterpreted Mr Fleming's entitlement but they did so genuinely believing that their interpretation was correct. There is no evidence that Airways deliberately set out to breach the CEA. Under all of the circumstances it is not appropriate to impose a penalty and I decline to do so.

Orders

[21] In the light of the findings set out in this determination, Airways is ordered to:

- (i) Recalculate Mr Fleming's salary and leave entitlements for the period from his last day of actual work until his final date of employment, based on a 4/2 roster cycle. Any arrears of salary due to Mr Fleming following this recalculation is to be paid to him as soon as practical and, unless otherwise agreed by ALPA and/or Mr Fleming, not later than 30 days from the date of this determination.
- (ii) Pay to Mr Fleming interest on the outstanding amount at the rate of 9% from 8 February 2006 until the date of payment.

Costs

[22] Costs are reserved to allow the parties time to settle this matter between themselves. If they are not able to do so ALPA may file and serve a submission in respect to costs within 28 days of the date of this determination. Airways will then be given 14 days in which to file and serve a response.

James Wilson
Member of Employment Relations Authority