

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA162/08
5126752

BETWEEN THE NEW ZEALAND
PUBLIC SERVICE
ASSOCIATION INC
Applicant

AND MINISTRY OF
AGRICULTURE AND
FORESTRY
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney and Catherine McNamara for Applicant
Gary Pollak for Respondent

Investigation Meeting: 26 August 2008 at Auckland

Submissions Received: By 29 October 2008

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant union represents some 42 members who work for the respondent Ministry (MAF) in its biosecurity operation. The workers affected by this application work on quarantine duties at Auckland International Airport. They have all been employed at the airport since before 1996 and, until recently, have benefited through MAF's provision of pool cars to take them to and from work. Some have had in excess of 30 years' service with MAF and have been provided with the cars to travel to Auckland International Airport since the early 1970s, when it first opened for international passengers.

[2] At issue is whether MAF was entitled, earlier this year, to remove from the workers use of the pool cars as it considered them to be an employment privilege, rather than a condition of their employment.

[3] In determining this, there are three key issues for determination:

- (a) Was the provision of pool cars inconsistent with the relevant collective employment agreement;
- (b) Was the provision of pool cars a condition of employment that commenced with the employment of each of the workers represented by the PSA; and, if not
- (c) As a result of negotiated changed hours of work, did the provision of pool cars become a condition of their employment?

The Collective Agreement

[4] The only relevant item in the collective agreement is entitled *Transport Assistance Allowance*. It states:

Where vehicles are not supplied for travel to and from work an allowance will be paid of \$8 for each return trip when no scheduled public transport is reasonably available to get to and from work.

[5] I conclude that the collective agreement neither authorises nor precludes employees having a right to use pool cars to get to and from work. The collective agreement implies that it is at MAF's discretion whether or not a vehicle is supplied to workers, but that does not preclude it from agreeing with certain workers that vehicles would always be provided.

Condition of Employment from the Outset?

[6] I have no doubt that the evidence provided by the PSA members was genuinely given. That does not make what they say would be provided to them, namely the provision of transport to and from work, a condition of employment. While the cars were provided for many years, I accept the evidence from MAF management that MAF was justifiably looking, from time to time, to remove them as a cost-cutting measure. Furthermore, the vast majority of employees were employed before the State Sector Act 1988 came into existence. There was effectively no

negotiation about terms and conditions of employment, which were set by statute and in State Services Commission and departmental manuals. There was no evidence that they covered the provision of transport to and from work. Certainly for the vast majority of public servants that has never been the case. Similarly, there were no written terms and conditions of employment covering such transport provisions. The only evidence in writing was an information sheet for interviewees provided by MAF, which stated:

Fleet transport on a pool basis is currently provided for officers rostered on airport duties.

[7] Clearly this was in place prior to 1996, as after that time new employees were not provided with access to car transport. Given the time lapses involved, that is the only safe information to rely on. I therefore conclude that the provision of such transport did not become a term of each worker's employment from the outset.

Negotiated as Part of Changes to Hours of Work?

[8] In 1994, the parties agreed on new rostered hours of work at the airport. In what appears to have been the relevant collective employment contract (although the subsequent agreement may have applied, the wording is effectively the same), hours of work were dealt with in the following manner:

Hours of work and related provisions, will be formally agreed by worksite management and staff and a PSA representative and may vary by agreement.

Negotiation of changes to hours of work and related provisions will be carried out using the consultation processes outlined in the hours of work administration guidelines (December 1992).

When new hours of work provisions are agreed the new provisions will replace in total the current hours of work (and related) provisions as found in the MAF quality management appendix of the Ministry of Agriculture and Fisheries' employment agreement registered 11-6-91. These current provisions are reprinted in the hours of work administration guidelines (December 1992). Until new hours of work are agreed, the current provisions apply.

The hours of work administration guidelines may be revised by agreement between MAF quality management and the PSA.

[9] The guidelines do not address the issue of transport, but are extensive in their coverage of what constitutes working hours and payment therefore and apply for a set period of time, although existing conditions apply until new ones are agreed.

[10] On 27 April 1994, the regional manager of MAF Quarantine Service wrote to all staff with the Ministry's proposals for major changes to shift work arrangements for workers at the Auckland International Airport. The move was to shift to a 4 x 4 shift pattern to cover for work at the airport. It covers transport in the following way, quoted verbatim:

To provide on call 24 hour coverage, transport will be provided by. MQO's will travel three to a vehicle and would remain as a unit for the purposes of transferring to and from the airport roster.

[11] While there is no written agreement to this proposal, I accept that it was agreed to and implemented for the following reasons. First, there is no doubt that the workers shifted to the 4 x 4 shift arrangement. Second, a senior manager of the Ministry at the time, Mr Fergus Small, gave evidence that the retention of the pool cars was *part of the deal*. Third, the 1996 agreement is not inconsistent with the 1994 agreement. It states:

Staff not provided with a government vehicle, are required to provide their own transport to and from the work site. A transport assistance allowance will be payable as per the CEC and car parking will be provided.

[12] The workers continued to be provided with pool vehicles and worked the new shifts thereafter.

[13] The parties signed an agreement when a number of new workers started later in 1996 and the place of work for them (and the PSA members here) became the international terminal. That agreement makes no reference to transport whatsoever, but the new workers were not provided with pool cars. A later variation to the collective agreement simply provides for transport in similar terms to the allowance in the current provision.

[14] I accept that the parties' records are incomplete and the issue for analysis is whether or not the draft agreement converted what would otherwise have been an employment privilege into a term and condition of employment. Despite the absence of a number of variations, the collective agreements and variations that have been provided do cover terms and conditions of employment in very widespread and specific terms. The absence of such a written agreement here favours MAF's interpretation of this dispute. It is therefore understandable that, when faced with an arrangement that was expensive, resource intensive, and unfair to the bulk of

quarantine officers, it decided, in the absence of written confirmation otherwise, that it could withdraw the pool cars on notice, especially as it was prepared to pay (partial at least) compensation.

[15] Mr Small's evidence that maintenance of use of the cars was *part of the deal*, together with the draft agreement, is clear evidence that MAF accepted, as part of the negotiations for new working hours arrangements in 1994, that the provision of pool cars would continue. The changes to hours were significant and it was clear that much negotiation covering many matters took place. In these circumstances I accept that the provision of pool cars became a right of the workers at that time. Consideration for this benefit was provided by agreement to the changed rostering system. Because such arrangements were to remain in place until new ones were put in place it follows that this is not the sort of condition of employment (if any exist) that can be changed, even with notice. The provisions made for new workers from 1996 constituted a new agreement, but those provisions were not, as noted above, inconsistent with existing workers (who had agreed to the 4 x 4 roster) retaining their rights to pool cars. The workers here should not, accordingly, lose the right to pool cars because of a lack of paperwork at the time by the parties' then representatives. I note also that later some MAF staff on individual agreements were provided with cars and those arrangements were committed to writing as part of their agreements, unlike here. Such staff members were not, however, part of a car pool – they all had their own vehicle.

[16] The quarantine officers at Auckland International Airport affected here have been provided with the use of cars to and from work for many decades. I have concluded that the provision of cars became a condition of their employment when major changes to their hours of work were negotiated and therefore it was not open for MAF to rescind the provision of the cars on notice. I therefore declare that the Ministry of Agriculture and Forestry was wrong to do so.

Costs

[17] Costs are reserved.

G J Wood

Member of the Employment Relations Authority