

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 186/09
5158103**

BETWEEN NEW ZEALAND ENGINEERING
 PRINTING & MANUFACTURING
 UNION INCORPORATED
 Applicant

AND ZEAL 320 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Greg Lloyd for Applicant
 David France for Respondent

Investigation Meeting: 4 May 2009

Submissions Received: 6 May 2009

Determination: 16 June 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Union (“the Union”) claims the respondent Zeal 320 Limited (formerly Freedom Air Limited) (“Zeal”) acted unjustifiably and unlawfully when it “cancelled” all “approved” annual leave in breach of a prevailing collective employment agreement and contrary to section 17 of the *Holidays Act 2003*. Zeal denies the Union’s claims. The parties were unable to resolve the problem between them by mediation.

The facts

[2] The union represents about 250 of Zeal’s employees who provide cabin crew services to Air New Zealand Limited (“Air NZ”). Zeal is a wholly owned subsidiary of Air NZ.

[3] Zeal and the Flight Attendants and Related Services Association were parties to a collective employment agreement the expired terms of which now constitute the unwritten terms and conditions of Zeal's employee Union members ("the expired collective").

[4] Clause 12.5 of the expired collective provides:-

When cabin crew are provisionally allocated leave, that leave shall be either confirmed or declined no later than one month prior to the commencement of that leave.

[5] Annual leave is primarily allocated to Zeal's employees by way of an annual leave ballot process.

[6] The Union and Zeal have been involved in bargaining for a new collective employment agreement since October 2008. The Union and its member employees of Zeal commenced industrial action in March 2009. This industrial action included a refusal by Union member employees to comply with uniform standards and a refusal to perform standby duties ("the industrial action").

[7] In response to a strike notice dated 17 March 2009 Zeal began advising individual employees that allocated provisional leave due to be taken one month later was cancelled.

[8] Zeal wrote letters dated 12 and 20 March 2009 to all employees.

The merits

[9] Zeal employees are entitled to thirty days annual leave each year. Annual leave is allocated by way of ballot system. Employees are required to bid for the full allocation of annual leave. By mid February each year, all leave is allocated for the ensuing leave year being April to April. If an employee's bid is unsuccessful, they are allocated annual leave dates by Zeal.

[10] I first note section 18 of the *Holidays Act 2003*:-

18. Taking of annual holidays

(1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.

(2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.

(3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.

(4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.

[11] By subsection (3), the time when annual leave is to be taken is by agreement between the parties. It is therefore pertinent to ascertain when agreement is reached.

[12] Zeal says that annual leave allocated by ballot is only “provisionally” so until it is either confirmed or declined at least one month prior in accordance with clause 12.5 of the expired collective.

[13] The Union argues that once leave is allocated by the ballot it is “confirmed” leave. The Union further says that confirmed leave constitutes agreement between the parties as to when the leave is to be taken, and that Zeal is not able to change, cancel or amend such leave without the employee’s agreement.

[14] The Union further argues that the word “provisionally” in clause 12.5 and “provisional” elsewhere “is of little effect”.

[15] It is true that the expired collective does not define “provisionally” and nor is there any reference to the ballot allocation process in the expired collective. Problematic is a guide to the ballot process relating to the 2009/2010 leave year. I accept the Union’s observation that that guide makes no reference to provisional leave. Quite the contrary, it contains statements “annual leave bids will be **approved**”, “By mid February you will receive an email **confirming** the dates you have been assigned” and “Your **approved** leave dates will also be viewable online through your Jetnet leave screen” (emphasis added).

[16] The references used in the guide are unfortunate and in my view are misleading because I conclude they are inconsistent with what is contemplated by the expired collective.

[17] The wording used in the ballot guide is to be contrasted with other documentation. I accept Zeal's evidence that the provisional nature of leave is made clear on leave notification forms both in hard copy and as provided on the internal intranet "Jetnet".

[18] I conclude that provisions of the expired collective must prevail over the leave ballot guide and I am therefore unable to accept the Union's argument. The word "provisional" must have some meaning. It is not redundant or superfluous. The parties to the expired collective negotiated the clause and agreed to the inclusion of the word "provisional". It cannot be ignored or interpreted to have no effect. I do not agree that the ballot process operates to constitute final and conclusive advice or notification of confirmed or declined annual leave.

[19] I find that "provisional" means "tentative". It seems to me that there can only be agreement as to when annual leave is taken, once that provisional leave is confirmed. If it remains "provisional" there is no agreement.

[20] Zeal says that unless the leave is expressly declined prior to one month out from when it is due to be taken, it "automatically crystallises" as approved leave. I do not accept that. Clause 12.5 is plain and clear. The leave must be either confirmed or declined and in my view, that means explicitly and expressly confirmed or declined. There is no default position.

[21] I do not accept the argument that to give express advice or notice of confirmation or declination is administratively onerous or burdensome. It is at the very least a courtesy but I tend more to the view it is imperative. Employees are entitled to certainty. To that end, I accept Ms Stanley's evidence that this was the intent behind the inclusion of clause 12.5 in the expired collective.

[22] I invite Zeal to reflect on its existing practice and take steps to give express notice to all employees as to whether provisionally allocated leave is confirmed or declined. I also invite Zeal to revise its cabin crew leave ballot literature to ensure such literature is consistent with the position Zeal now argues and which I find accords with the position expressed in the expired collective.

The determination

[23] I find that Zeal had not cancelled “approved” leave as alleged by the Union. For the reasons set out above, **I determine that Zeal’s actions in “cancelling” leave provisionally allocated was not unjustifiable or unlawful.**

[24] It is to be noted that Zeal must allow its employees to take their annual leave entitlement within the year following the leave falling due.

The resolution

[25] There is no case for the Authority’s intervention by way of formal orders. **The orders sought by the Union are refused.**

[26] I make it clear my views reached here relate only to leave explicitly cancelled by Zeal no later than one month before any such leave was due to be taken.

The costs

[27] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr France is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Lloyd is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority