IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 37
5576221

	BETWEEN	ANDREW DAVID DEAN Applicant
	AND	CHIEF EXECUTIVE OF THE MINISTRY FOR PRIMARY INDUSTRIES Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for Applicant Andrew Scott-Howman, Counsel for Respondent
Investigation Meeting:	23 September 2016 at Wellington
Submissions Received:	At the investigation meeting
Determination:	17 May 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about the amount payable when an eligible employee takes retirement leave.

Background

[2] The applicant, Andrew Dean, has been employed by the respondent, The Chief Executive of the Ministry for Primary Industries (MPI), and its predecessor, the Ministry of Agriculture and Forestry (MAF), since 1971. Most recently he was engaged as a senior quarantine officer.

[3] Mr Dean's terms and conditions of employment are specified in a collective employment agreement between MPI and Mr Dean's union, the New Zealand Public Service Association (PSA).

[4] The collective agreement contains an appendix entitled *Grand Parented Provisions*. The fourth such provision is *Retiring Leave* which is *... applicable only to employees who started in MAF before 1 January 2001 and to those who were covered by the MFish Collective on 2 May 2013*.

[5] The actual period of retiring leave to which an employee is eligible depends on their length of service with the entitlement being expressed *in working days*.

[6] Mr Dean is eligible and has chosen to take his leave as an anticipated entitlement. While not the normal approach this is permitted under the clause.

[7] At issue is the amount to be paid for each day of leave and what is meant by the phrase *working day*.

[8] It is Mr Dean's position he should be paid the amount he would have been paid had the day been worked which would exceed the amount payable for a normal 8 hour day.

[9] MPI's position is Mr Dean is only eligible to be paid for a normal 8 hour working day. It says the issue should *... be determined with reference to custom and practice – as it has applied to payment of this entitlement prior to 2001 (being the origin of the present "grandparented" clause). In that regard "working days" have always been calculated with reference to base salary only.*[1]

Determination

[10] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a serious thereof, existed to allow a written determination of findings at a later date.

[11] As already said the retiring leave provision is one that has been grand-parented over a number of documents for some time. It has its genesis in days when Public Service terms and conditions were *prescribed by an employing authority by*

[1] Statement in Reply at 2.4

determination.[2] In the case of the Public Service the employing Authority was the State Services Commission (SSC).

[12] Though not always, a determination usually governed the conditions applying to what was known as an occupational class, the membership of which was determined by the type of work performed and not the department within which the employee worked. To assist in administering determinations and to ensure appropriate and consistent application across all public service departments the SSC promulgated a document called The Public Service Manual of Instructions (PSM).

[13] Various relevant parts of the PSM include:

a. *Entitlements to retiring leave, expressed in working days, are set out in G112-G117*;[3]

b. *Retiring leave is not to count as part of service, i.e., service for retiring leave purposes is to be reckoned up to and including the last day of the actual duty plus any annual or long service leave due*;[4]

c. *Anticipated retiring leave is not to be counted as part of service and the period taken is to be deducted from the period of retiring leave due on total service when the officer retires*;[5]

d. And when paying back antipcated leave which might later have to be done due to the fact leave taken exceeded the number of days due upon final cessation *The value is calculated at the gross salary rate applicable at the time the anticipate leave was taken.*[6]

[14] This last provision reflects a fact upon which the parties agree – namely that under the PSM retirement leave was paid at base salary either as a lump sum or as a continuing fortnightly salary payment (with the choice being largely attributable to tax implications and superannuation contributions). It is that approach MPI says should continue to be applied.

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[2] Section 6(1) of the State Services Conditions of Employment Act 1977
[3] PSM at G96
[4] PSM at G100(2)
[5] PSM at G100(3)
[6] PSM at G120(4)

[15] The issue here is that Mr Dean did not work a regular eight hour day which the salary would reflect. He worked a four day on / four day off roster and each rostered working day lasts 11 and a half hours.

[16] The roster mean Mr Dean's fortnightly hours varied and this has been addressed by the parties in various ways over the years though these arrangements have not been reflected in ancillary changes to grand-parented provisions such as retiring leave.

[17] Early last decade the parties agreed a system under which the additional daily hours when rostered on and applicable allowances were recognised in a single annualised allowance. These were known as site rates and meant staff were paid a regular *smoothed* amount each fortnight.

[18] The evidence is that since then that allowance has been included when calculating retiring leave payments[7] and it may be an arrangement that took account of these additional payments was already in existence given evidence such a change may have occurred at an unknown point between 1996 and 1999. That said the evidence also shows some inconsistency in that an e-mail sent to the PSA in February 2013 indicates the allowance is included when the leave is taken in advance but not when paid upon cessation. Further confusion emanates from the fact site rates were replaced with a *loading arrangement* in 2007.

[19] As outlined by Mr Scott-Howman there are four potential ways the phrase working day may be applied. They are:

a. 8 hours pay at base salary;

b. 8 hours pay at base salary plus what he described as an *uplift* (being the earlier site allowance or the current loading). For Mr Dean this would mean a payment approximately 30% greater than that he would have received under (a) above;

c. 11.5 hours at base salary (some 43% greater than (a)); or

d. 11.5 hours at base salary plus the uplift (approximately 190% of the amount payable under (a)).

[7] Innes brief at [31] and e-mail Steeneck (MPI) to Caldis (PSA) dated 18 Feb 2013

[20] MPI says 19(a) reflects the historical arrangement that was grand-parented and favours a finding that reflects it. That said it is conceded that at some time in the past calculation of the payments was changed to reflect 19(b).

[21] PSA seeks an order 19(d) is appropriate.

[22] Having considered the evidence and the submissions I conclude the answer is 19(c) – 11.5 hours at base salary. I do so for the following reasons.

[23] The parties agree this is a contractual interpretation issue and statute is irrelevant. That is because retirement leave is not being granted pursuant to any statutory provision. It is, as MPI argues, is an extra emolument payment - a gift MPI has agreed to make in certain circumstances.

[24] While there can be no doubt the originally grand-parented arrangement was as described under 19(a) I must conclude MPI is no longer capable of applying that interpretation. By its own evidence it waived that and agreed to include the loading. It then applied the amended approach for some years effectively changing the arrangement by conduct if not express agreement.

[25] Nor can I agree with the PSA's position that 19(d) be applied. The evidence is the uplift takes account of both penal payments and, more importantly, the fact that when an employee's hours are smoothed over a year the weekly average exceeds the contractual maximum of 40 ordinary hours a week. In other words there is, when the *uplift* is included, already recognition of the fact an employee in Mr Dean's position completes 11.5 hours on each of the days s/he is rostered to work.

[26] The PSA's position is therefore a double dip that would see the extra daily hours recognised twice. There is no evidence of anything express, implied or confirmed by custom that could lead to a conclusion that was intended or agreed.

[27] That leaves 19(b) or 19(c). To me the answer lies in the PSA's submission and the agreement.

[28] As Mr Cranney said the entitlement *is expressed as an entitlement to leave and not an entitlement to money*.[8]

[8] Closing submission at [15]

[29] The entitlement to leave is expressed as being granted in working days. The collective agreement defines day for leave purposes. It reads:

> *For Leave Purposes:*
> *Day:*
> *Means number of hours an employee normally works each day*[9]

[30] The number of hours an employee such as Mr Dean would normally complete on a day work is 11.5. That is his *working day* and means the appropriate daily payment is that in 19(c). It complies with the agreements definition. It also recognises the custom and practice adopted by MPI when it chose to include the then site allowance in the rate payable for retiring leave.

Conclusion and orders

[31] For the above reasons I conclude a working day for the purposes of paying retiring leave to Mr Dean is 11.5 hours at base salary.

[32] Costs are reserved

M B Loftus
Member of the Employment Relations Authority

[9] MPI PSA Collective Agreement 1 July 2013 at page 12