

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 138
3256460

BETWEEN

RACHELE MITCHELL
Applicant

AND

MENZIES AVIATION (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Luke Meys, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 5 December 2024 in Auckland

Submissions received: 5 December 2024 and 23 January 2025
from the Applicant

Date of determination: 6 March 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 30 October 2007 Rachele Mitchell began work at Menzies Aviation (New Zealand) limited (MAL) as a passenger service agent. Her employment ended by redundancy on 9 September 2020.

[2] On 10 October 2023 Ms Mitchell lodged a statement of problem with the Authority claiming that she was unjustifiably disadvantaged during her employment with MAL, because she was not properly paid in accordance with her collective

employment agreement (CA). She also sought payment of wage arrears, holiday pay and KiwiSaver from MAL for its failure to pay in accordance with the CA.

[3] Ms Mitchell's also claims that she was unjustifiably dismissed by MAL and seeks compensation and penalties.

The Authority's investigation

[4] Ms Mitchell's claims are now before the Authority for determination. During the course of investigating this employment relationship problem I received a written statement and supporting documents from Ms Mitchell. Ms Mitchell answered questions under affirmation from me and Ms Mitchell's representative. Ms Mitchell's representative also lodged written closing submissions with the Authority.

[5] MAL was served with the statement of problem on 7 November 2023. Although MAL sought and was granted an extension from the Authority to lodge its statement in reply, it never lodged a statement in reply and did not participate further in proceedings. I am satisfied that a copy of the notice of investigation meeting was properly served on MAL on 23 October 2024.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me.

Issues

[7] The issues identified for investigation and determination are set out in Ms Mitchell's statement of problem and are as follows:

Ms Mitchell's personal grievance claims

- (a) Was Ms Mitchell unjustifiably disadvantaged by MAL?
- (b) Was Ms Mitchell unjustifiably dismissed by MAL?
- (c) If MAL's actions were not justified, what remedies should be awarded, considering;
 - (i) Reimbursement of lost wages under s123(1)(b) of the Act-subject to evidence of reasonable endeavours to mitigate their loss; and

- (ii) Compensation under s123(1)(c)(i) of the Act.
- (d) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Mitchell which contributed to the circumstances which gave rise to his grievances?

Arrears of wages and holiday pay

- (e) Did MAL fail to pay Ms Mitchell wages due in accordance with the employment agreement?
- (f) If so, is Ms Mitchell entitled to payment of arrears for unpaid wages including payment of holiday pay, KiwiSaver and interest.

Wage, time and holiday records

- (g) Did MAL fail to keep and provide appropriate wage, time and holiday records to Ms Mitchell in accordance with the Act and the Holidays Act 2003?
- (h) If MAL is found to have failed in its obligations to provide wage, time and holiday records, should penalties be imposed against MAL?

Costs

- (i) What costs and disbursements should the successful party be awarded (if any)?

Background

[8] Ms Mitchell started work for MAL on 30 October 2007 as a passenger service agent pursuant to an individual employment agreement. Around 31 August 2008 she was promoted to the position of a senior passenger service agent.

[9] On 6 June 2010 Ms Mitchell was promoted to Level 4 passenger services ticketing agent (“PSTA”).

[10] On 10 February 2012 Ms Mitchell joined a union which covered her work for MAL. Accordingly she was then covered by the terms of the CA between the union and MAL.

Level 5 senior passenger services ticketing agent

[11] Ms Mitchell claimed that around 15 August 2012 she had met the requisite experience and qualifications required for her promotion to Level 5 senior passenger

services ticketing agent (SPSTA). She claimed that in accordance with the CA the promotion was an automatic qualification for her to move from the PSTA role to the SPSTA role.

[12] The relevant remuneration provisions of the CA explains the following.

SENIOR PASSENGER SERVICES TICKETING AGENT
LEVEL 5

An employee who is permanently appointed by the Company to perform IATA fares and ticketing duties at the Auckland International Service Desk and who has:

- relevant IATA fares and ticketing qualification, and
- a minimum of 2 years proven ticketing experience, and/or
- performed duties as a Senior Passenger Services Agent carrying out IATA fares and ticketing for a minimum of 2 years

[13] Ms Mitchell stated that during her career with MAL she transitioned through various positions on different pay bands. As she transitioned she would be automatically paid at the higher grade rate once she qualified for it on any given date. She did not have to take any active steps to apply or be approved for any move up a grade on the CA remuneration scale.

[14] In 2019 Ms Mitchell became a union delegate and was involved in the negotiations for an updated CA for all union members. It was during these negotiations that she discovered she was being paid at the incorrect pay rate. She should have been on a higher pay rate.

[15] In July 2019, Ms Mitchell approached her manager, Mathew Edwards, looking to set up a meeting to discuss her pay rate. Ms Mitchell and a colleague, Bindiya Patel, met with Mr Edwards.

[16] Ms Mitchell stated that during the meeting Mr Edwards accepted that she was on the incorrect pay rate. After reviewing the pay grade table in the CA he stated she should be on the higher pay grade and said he would contact human resources to implement the change.

[17] The following week, Ms Mitchell queried with Mr Edwards if he had heard anything back from human resources . He said that he had not yet received anything. Because she had heard nothing from MAL Ms Mitchell created a spreadsheet breaking down her payments into categories and forwarded it to Mr Edwards. She said Mr

Edwards confirmed that he had forwarded it to the human resources team on 3 December 2019.

[18] On 6 March 2020 Ms Mitchell complained to the human resources manager about the lack of progress with her back pay issue. The manager's response was that MAL was still considering her claims. MAL never provided a formal response to Ms Mitchell.

[19] On 25 March 2020 New Zealand went into the COVID-19 lockdown. Around this time Ms Mitchell received the COVID-19 wage subsidy and was still required to go into work for any rostered hours as there were some recovery flights departing and arriving.

[20] As a result of the lockdown Ms Mitchell's back pay discussions were on hold. On 28 August 2020 Ms Mitchell said the back pay discussions continued when she then attended a meeting via audio visual link with MAL management. She said the back pay matter was left unresolved.

[21] Due to COVID-19 restrictions MAL went through a business restructure. As a result Ms Mitchell was made redundant and her last day of employment was 9 September 2020.

[22] In January 2021 Ms Mitchell met with MAL management to try and resolve the backpay issue. Ms Mitchell said she was told by MAL that she was not qualified to be a Level 5 SPSTA under the CA.

[23] Between about May 2023 and July 2023 Ms Mitchell through her representative requested pay records from MAL. On 10 October 2023 Ms Mitchell lodged a statement of problem with the Authority.

Was Ms Mitchell unjustifiably disadvantaged?

Ms Mitchell's claim

[24] Section 103(1)(b) of the Act, states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[25] Ms Mitchell was promoted to Level 4 PTSA from her previous position as a Level 3 PSA on 6 June 2010. She was properly paid her wages up to and during this time.

[26] After joining the union and being covered by the CA in February 2012 Ms Mitchell claimed she should have been paid at the correct rate as set out under the CA from August 2012. The reason for this was because at this time she had the requisite experience and qualifications to have automatically qualified as a Level 5 SPSTA. MAL did not pay her this correct rate from August 2012 up until the end of her employment.

[27] Ms Mitchell claimed that MAL's failure to pay the pay rate stipulated in the CA placed her at a significant financial disadvantage and was contrary to the provisions of the CA. For this reason she also claimed that MAL's actions were unjustified.

Is Ms Mitchell's claim a dispute or a personal grievance under the Act?

[28] Ms Mitchell's unjustified disadvantage claim presents jurisdictional issues as to whether it should be treated as a grievance or whether it is a dispute about the interpretation of the relevant provisions of the CA. Section 103(3) of the Act sets out the following:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation of any provision of any employment agreement.

[29] In accordance with s129(1) of the Act a dispute of the interpretation of an employment agreement can be pursued through a process outside of the grievance process under the Act. If the Authority finds that Ms Mitchell's claims are a dispute for the purposes of s 129 of the Act, the Authority may have no jurisdiction to investigate her claims as a grievance claim under the Act.

[30] Ms Mitchell's claims to backpay were framed as both a disadvantage personal grievance claim and a dispute over interpretation of the CA. Based on the available evidence, Ms Mitchell's back pay claims are a dispute about the interpretation of the CA in accordance with s129 of the Act. As a result, her back pay claims are excluded from the definition of disadvantage grievances in s 103(1)(b).

Conclusion on unjustifiable disadvantage

[31] I find Ms Mitchell was not unjustifiably disadvantaged by MAL failing to pay her the contractual pay as specified in the employment agreement. Ms Mitchell does however have a dispute for wage arrears.¹

Was Ms Mitchell unjustifiably dismissed?

Whether Ms Menzies raised a personal grievance against MAL in accordance with s 114(2) of the Act?

[32] What is required in terms of the raising of a personal grievance is dealt with at s 114 of the Act, which provides that an employee who wishes to raise a personal grievance must raise the grievance with their employer within the applicable employee notification period unless the employer consents to the personal grievance being raised after the expiration of that period. The notification period is set out:

7(b) in respect of any other personal grievance, the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later.

[33] Although Ms Mitchell's employment ended by redundancy on 9 September 2020, she claimed she did not receive a notice confirming the end of her employment by redundancy. She had arrived at work in July 2020 and saw that everything had been moved, and when she asked why she was verbally told that her position had been disestablished. She stated she was upset by the lack of process.

[34] However, Ms Mitchell provided no definitive evidence at the investigation meeting that she had appropriately raised a personal grievance for unjustified dismissal with MAL prior to the lodging and service of her statement of problem in the Authority on 7 November 2023.

Conclusion on unjustifiable dismissal

[35] At best Ms Mitchell raised her personal grievance for unjustified dismissal on 7 November 2023 when her statement of problem was served on MAL. This was three years after her employment was terminated on 9 September 2020. Accordingly, she has not raised her personal grievance for unjustified dismissal within the 90-day statutory

¹ Employment Relations Act 2000, s 160.

time limit in accordance with s 114 of the Act.² MAL has not consented to the personal grievances being raised out of time and there are no exceptional circumstances that would require leave to be granted outside the statutory time limit.

[36] Ms Menzies' personal grievance claim for unjustified dismissal cannot proceed.

Dispute of contractual term

[37] In the January 2021 meeting MAL disputed whether it owed outstanding wages and holiday pay to Ms Mitchell. MAL argued Ms Mitchell was not qualified under the CA as a Level 5 SPSTA. Ms Mitchell had first raised the interpretation issue regarding her pay rate with MAL in July 2019 as a union delegate.

[38] Under the CA a PSTA becomes a Level 5 SPSTA when they meet the qualifications. The qualifications for an SPSTA are two years of proven ticketing experience, and a relevant IATA fares & ticketing qualification.

[39] From 15 August 2012 Ms Mitchell had the required two years ticketing experience and relevant qualifications to be a Level 5 SPSTA. Ms Mitchell gave evidence that she had previously always been automatically paid at the higher-grade rate once she qualified for it. In a meeting in July 2019 Ms Mitchell's manager agreed that she was qualified and should have moved up the remuneration scale on the CA. As MAL has failed to participate in the investigation meeting Ms Mitchell's evidence is uncontested.

[40] I find that from 15 August 2012 Ms Mitchell was entitled to be paid at the pay rate stipulated in the CA as a Level 5 SPSTA.³

Wage Arrears

[41] Ms Mitchell provided a detailed analysis for the calculation of the correct pay rates for a Level 5 SPSTA which I have adopted.

[42] From 30 May 2016 through to 30 May 2019 pay rates were governed by the CA 2016-2019

[43] The correct base payrate per hour for a Level 5 SPSTA.

² Employment Relations Act 2000, s 114(7).

³ Employment Relations Act 2000, s 160.

- (a) Across the period, these amounts were:
 - (i) \$23.07 after June 2016,
 - (ii) \$23.30 after January 2017,
 - (iii) \$23.60 after June 2017,
 - (iv) \$23.84 after January 2018,
 - (v) \$24.14 after June 2018, and
 - (vi) \$24.39 after January 2019.

[44] From 31 May 2019, the payrate was governed the by the CA 2019, and from October 2019 onwards, it was set at \$24.88 per hour.

Long service rate

[45] Under clause 1.3 of Part III of the CA (long service rate) Ms Mitchell was entitled to an additional 71 cents per hour on top of the SPSTA Rate, as she had been continuously employed by the company for more than five years.

[46] A specific example is the period from June 2018 until January 2019.

- (a) During this period, Ms Mitchell's pay rate on her payslip was \$23.5 per hour
- (b) This figure comes from the base rate of \$22.79 per hour for Level 4 PSTA plus the Service Rate of an additional 71 cents.
- (c) She should instead have received \$24.85 per hour, which would be \$23.84 per hour as a Level 5 SPSTA plus the Service Rate of an additional 71 cents.
- (d) This leads to a shortfall in pay of \$1.35 per hour.

[47] Using this method to calculate the shortfall per hour, the shortfall is multiplied by the number of hours paid to calculate the short payment amount for a period.

Holiday pay

[48] Because Ms Mitchell's hours of holiday pay should also have been paid out at a higher rate, holiday pay at the standard rate of 8% of Ms Mitchell's gross earnings is added to the short payment amount to find Ms Mitchell's wage shortfall.

KiwiSaver

[49] To account for MAL's KiwiSaver contribution (at a rate of 3%), 3% is added to the wage shortfall amount to find the wage arrears owing.

Wage arrears analysis

[50] Ms Mitchell's wage arrears calculations are set out below:

- (a) Level 4 PSTA Pay Rate + Service Rate = Actual Pay Rate.
- (b) Level 5 SPSTA Pay Rate + Service Rate = Corrected Pay Rate.
- (c) Corrected Pay Rate – Actual Pay Rate = Shortfall.
- (d) Shortfall x hours paid = Short Payment.
- (e) Short Payment x 1.08 (Holiday Pay at 8%) = Wage Shortfall.
- (f) Wage shortfall x 1.03 (KiwiSaver Contribution at 3%) = Wage Arrears owing.
- (g) Interest is calculated using the Ministry of Justice's interest calculator,⁴ with the Wage Arrears for each year deemed as owing since the last day of each relevant year.

[51] Ms Mitchell provided a spreadsheet and summary page showing her actual and corrected rates of pay, with KiwiSaver and holiday pay then added. Interest on the total arrears figure is calculated at the end of each year over the 6 years prior to the filing of the Statement of Problem.

⁴ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

Redundancy notice

[52] The CA provides that an employee is entitled to four weeks' notice of redundancy. Ms Mitchell's evidence was that she did not receive four weeks' notice of redundancy. Her final payslip shows she received only two weeks' pay.

[53] Accordingly, she is entitled to two weeks' pay at her correct pay grade & service rate of \$25.6, plus interest since 31 August 2020.

Conclusion

[54] The total wage arrears owing to Ms Menzies are:

- (1) Wage arrears (including KiwiSaver at 3% and holiday pay at 8 percent) of \$7,139.14; and
- (2) Interest calculated using the Ministry of Justice's website calculator pursuant to the Interest On Money Claims Act 2016, in the sum of \$1,446.85; and
- (3) Wages of \$1,689.60 being the remaining two weeks of the four week notice period which the MAL was required to give pursuant to the redundancy clauses of the CA; and
- (4) Interest calculated using the Ministry of Justice's website calculator pursuant to the Interest On Money Claims Act 2016, in the sum of \$268.48.

[55] The total of the amount of wage arrears owing is \$10,544.07.

Penalties

Penalty for failure to provide wage and time records upon request

[56] Through counsel, Ms Mitchell requested wage and time records from MAL. MAL was required to keep wage and time records under the Act and holiday records under the Holidays Act. It was also required to provide these records upon request by Ms Mitchell.

[57] Ms Mitchell claimed MAL only provided generic statements of her earnings, however, based on the records MAL provided to Ms Mitchell she was able to calculate

her wage arrears. In the circumstances I am not convinced MAL has failed to comply with s 130 of the Act and decline to award a penalty.

Summary of Orders

[58] Menzies Aviation Limited is ordered, within 28 days of the date of this determination, to make payment to Rachell Mitchell \$10,544.07 as wage arrears.

Costs

[59] Menzies Aviation Limited is ordered to pay Rachell Mitchell \$4,500 as a contribution to her costs in this matter and disbursements of \$71.55 for the lodging fee. This is to be paid within 28 days of this determination.

Andrew Gane
Member of the Employment Relations Authority