

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 691
3060193

BETWEEN	KEITH ADAIR Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
Kevin Thompson for Respondent

Investigation Meeting: On the papers before the Authority

Submissions Received: 10 October and 1 November 2019 from Applicant
31 October 2019 from Respondent

Determination: 4 December 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Adair's application is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Adair worked for Air New Zealand Limited (Air NZ) as a pilot until his retirement. He is a member of the Federation of Air New Zealand Pilots Inc (the Union) and was employed under the terms of a collective agreement between the union and Air NZ.

[2] The collective agreement sets out entitlements to leave including annual leave, sick leave and retirement leave. Mr Adair commenced a period of retirement leave on 18 July 2018. While he was on leave he was injured and he was medically certified as being incapacitated for work from 30 July 2018. The injury was covered by the Accident Compensation Act 2001 (the ACC Act) and in accordance with the ACC Act he received earnings related compensation after the first week of his injury.

[3] Mr Adair applied to Air NZ for payment of sick leave under the Holidays Act 2003 for the period 30 July to 5 August 2018 being the first week of his injury. Air NZ declined his application.

[4] Mr Adair challenges Air NZ's decision and says he is entitled to sick leave for the first week of his injury.

[5] With the consent of the parties this matter has been dealt with on the papers before the Authority.

Issues

[6] In order to resolve Mr Adair's application I must determine whether Air NZ was correct to decline his application for sick leave for the period 30 July to 5 August 2018.

[7] 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 as a result. While I have not referred to all the submissions received from the parties in this determination I have carefully considered everything I have received.

Retirement Leave

[8] The collective agreement provides for retirement leave for employees whose work is covered by the collective agreement and who were employed prior to 30 December 1999. Mr Adair was employed by Air NZ from 20 February 1980 and was entitled to the retirement leave provided for in the collective agreement.

[9] Clause 1.2 sets out a scale which records the number of consecutive days leave an employee will become entitled to on their retirement which is based on the length of

the employee's continuous service with Air NZ once they have achieved 15 years continuous service.

[10] The employee has the discretion to take the days as leave or receive a lump sum equivalent to the amount of salary for the leave period. Mr Adair elected to take the days as leave.

Sick Leave

[11] The collective agreement provides for sick leave for a pilot who is absent from duty by "reason of sickness". From the information before the Authority I have concluded Air NZ does not differentiate between an employee who is absent due to illness and those absent due to personal injury. Air NZ has published a policy document entitled "Group Standard" setting out its standards relating to leave. Through this document Air NZ recognises that sick leave may be taken for an employee's own illness or injury. Accordingly I have read "sickness" to include both illness and injury.

[12] The collective agreement differentiates between statutory sick leave, which is sick leave paid pursuant to the Holidays Act 2003, and additional sick leave provided through the collective agreement. The difference between the two is the method used for calculating payment for time taken off on sick leave.

[13] Payment for statutory sick leave is to be calculated in accordance with the Holidays Act which requires Air NZ to pay an amount equivalent to the greater of the employee's relevant daily pay or average daily pay for each day taken "that would otherwise be a working day" for the employee.¹

[14] In order to be successful in his claim Mr Adair must establish that Air NZ is required to pay him sick leave for the period 30 July to 5 August inclusive when he was unable to work as a result of his injury.

¹ Holidays Act 2003, s 71.

[15] The collective agreement allows payment of sick leave if a pilot is “absent from duty”. The Holidays Act requires payment when a day taken as sick leave would “otherwise be a working day” for Mr Adair.

[16] Section 12 of the Holidays Act sets out the factors to be taken into account if it is not clear whether a day would otherwise be a working day which includes the reasonable expectations of the employer that the employee would work on the day concerned and whether, but for the day the employee was on sick leave, the employee would have worked on the day concerned.²

[17] Section 36 of the Holidays Act provides an employer with the discretion to allow an employee who is taking annual holidays under the Holidays Act and who becomes injured to take the time as sick leave rather than as annual leave.

[18] Section 36 does not apply to Mr Adair because he was not taking annual holidays when he was injured. Further, in its Group Standard document Air NZ makes it clear that where an employee is injured during a period of annual leave or other holiday, the period of injury cannot be converted to sick leave, nor will the holiday period be extended to offset the whole or part of the injury period.

[19] At the time of his injury Mr Adair was on retirement leave. That was the reason he was absent from duty, not because of his injury. Neither he nor Air NZ had any expectation that he would have been working on the dates in question, but for the injury. Accordingly Mr Adair was not entitled to payment for sick leave the period 30 July to 5 August 2018 and his application is declined.

Costs

[20] Costs are reserved. The parties are invited to resolve the matter. Given the nature of the dispute I am of a mind to let costs lie where they fall. However, if the parties wish to have costs dealt with and they are unable resolve the matter between them Air NZ shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Adair shall have a further 14 days in which to

² Ibid at ss 12(3)(c)(iii) and 12(3)(d).

file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[21] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority