

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5137623
CA 70/09

BETWEEN JOHN CONRAD
 Applicant

AND REAL JOURNEYS LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Helen McAra, Advocate for the Applicant
 Janet Copeland, Counsel for the Respondent

Investigation Meeting: 2 April 2009 at Queenstown

Determination: 29 May 2009

DETERMINATION OF THE AUTHORITY

[1] John Conrad is employed as a launch master by Real Journeys Limited in its Milford Sound operation. He is a member of the Merchant Service Guild Incorporated and bound by the collective employment agreement between the Guild and Real Journeys. Mr Conrad says that Real Journeys breached the agreement by the way it rostered him to work in late September and early October 2007. To remedy this breach Mr Conrad seeks an order reinstating his rostered days off, damages for not applying the roster properly and damages for a breach of the implied obligation to provide him with a healthy and safe working environment.

[2] Real Journeys says that it complied with the terms of the agreement regarding rosters and did not breach any implied obligations.

[3] The problem is essentially about the interpretation, operation and application of the agreement. Before setting out the relevant provisions it is helpful to explain what happened with the roster.

What happened with the roster

[4] During the winter season Mr Conrad works a 10 days on, 4 days off roster. For the summer season he can elect a 7 days on, 7 days off roster or a 9 days on, 5 days off roster. The option arose from protracted bargaining to settle the collective agreement dated August 2007 applicable between 1 April 2007 and 30 June 2009.

[5] The summer season runs from October to April. Mr Conrad elected the 9 and 5 roster for the summer season commencing October 2007.

[6] The collective agreement requires a fortnightly roster of working hours to be issued one week in advance. Sunday is the start of the week and each roster period. The roster for the fortnight commencing 23 September 2007 had Mr Conrad off for the first three days, on for the next 10 days and off for the last day. The next fortnight (commencing 7 October 2007) had him rostered on for 6 days, off for 5 days then on for another 3 days. Another perspective emerges from this work pattern if we ignore the division of the fortnightly roster periods. Because the 10 and 4 roster pattern started with 3 days on and ended with 1 day off, Mr Conrad had 4 days off between each period of 10 days on. With the change to the 9 and 5 roster, Mr Conrad had only 1 day off after 10 days on before starting a further period of 6 days on.

[7] In fact Mr Conrad did not work all his rostered hours over these periods because of road closures and early finishes but that is irrelevant for present purposes.

Collective Agreement

[8] The agreement includes definitions of *Day*, *Week* and *Roster* to the effect described above.

[9] Clause 4.7 of the collective agreement is headed *MILFORD SCENIC CRUISE VESSELS*. Clause 4.7.1 sets out the *Summer Season Roster Basis* and provides launch masters with the option of a *nine (9) day on / five (5) day off roster* or a *seven (7) on / seven (7) day off roster*. The qualifications about this election and the remuneration consequences of the *7/7 roster* are not presently relevant. Clause 4.7.2 sets out the remuneration consequences of the *Nine (9) Day On / Five (5) Day Off Roster* and reserves the right for the employer to roster launch masters to work 10 days *whenever operationally necessary without any additional payment*. The remaining provisions of clause 4.7 provide more detail about the *Seven (7) Day On / Seven (7) Day Off Roster* and the *standard 10/4 roster*.

Mr Conrad's argument

[10] Mr Conrad says that days off must follow days on. That is implicit in the way clause 4.7 expresses the roster provisions: eg, *a nine (9) day on / five (5) day off roster*. If so, Mr Conrad was entitled to 4 days off after working 10 days in a row. When he changed to the 9 and 5 roster he was only given 1 day off after 10 days' work. He is therefore entitled to a further 3 days off. Since he worked on days off he is also entitled to the *callback* provision which turns the 3 days into 4½ days off. Mr Conrad concedes that he had some extra time off which should be brought to account.

[11] There is expert opinion evidence to support the contention that roster cycles commence with working days and that working then generates an entitlement to days off at the agreed ratio. There is also expert opinion evidence to the effect that working 10 consecutive days followed by only 1 day off is not a safe practice.

Interpreting the agreement

[12] Both parties referred me to *Association of Staff in Tertiary Education & Ors v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491. To summarise relevant principles: it is necessary to construe an agreement with reference to surrounding circumstances. The starting point is the natural and ordinary meaning of the words used. Agreements should not be narrowly or literally construed. It is always necessary to have regard to the purpose of the agreement, which can help overcome inept drafting. However, where the meaning is clear, it is not permissible to have regard to the surrounding circumstances in order to find a different meaning.

[13] The expert opinion evidence that roster cycles must commence with working days to be followed by days off does not assist with the task of construing the natural and ordinary meaning of the words used in the collective agreement.

[14] The collective agreement sets out several objectives which include providing terms of employment and ensuring the smooth operation of the employer's business. It defines a roster as a fortnightly roster of hours issued one week in advance by the employer with the roster commencing on Sunday. Everyone works in accordance with the same roster, but the individual working patterns over the roster period need not be identical. That follows from the individual choice of *summer season* rosters but it is also obvious from reflecting on the purpose of the collective agreement. It sets out terms of employment for those engaged in the respondent's business which

operates fourteen days each fortnight. If everyone's working days had to be at the start of the fortnightly roster there would be no-one to do any work during the last part of the roster period. Once it is understood that individuals' working patterns must vary during the roster period it goes without saying that some individuals may commence the roster period with days off. That leaves no room for inferring from the expression *days on / days off* that days off must follow days on. What is being stipulated by the words in the collective agreement about days on and days off is the total number of working days and the total number of days off over each roster period, not the order in which the days must occur.

[15] Given this interpretation of the roster provisions in the collective agreement, there was no breach of it by Real Journeys regarding Mr Conrad's roster. It provided him with the stipulated number of days off in each roster period.

[16] This conclusion arises from the ordinary and natural meaning of the roster provisions read in context against the purpose of the collective agreement. The conclusion is strengthened by reference to the previous collective agreements. The current collective agreement does not require days off to be given consecutively whereas previous agreements did (to some extent) require that.

Breach of implied terms

[17] There is an argument that a term is implied into the employment agreement that days off must follow days on. Such a term does not meet the test for the implication of terms. It is not necessary to give business efficacy to the contract. For the reason explained above, implying such a term would also be inconsistent with the express terms set out in the collective agreement.

[18] The second argument is that the roster arrangement breached implied duties concerning health and safety. To resolve this point something more must be said about what happened.

[19] It is common ground that Mr Conrad raised the possibility that he might suffer fatigue as a result of working 16 days in a row with only one day off. His evidence is that he was told in a blunt manner to manage his fatigue. Paul Norris is Real Journey's area manager. He received Mr Conrad's email query about the roster and possible fatigue and replied by email saying *You will need to manage this. Chances are John all three vessels won't be required each day, so I'm sure with good*

communication with Jason you'll get through the six days till your days off roll around. Please liaise closely with Jason. Jason Steele was Real Journey's branch manager at the time. Both he and Mr Norris say in their evidence that he was asked to monitor the situation and not allow Mr Conrad to sail if he was unable to work safely. There is no reason to doubt this evidence or the evidence that Mr Steele did monitor the situation. As mentioned above, Mr Conrad did not actually work all his rostered time and no issue about fatigue arose. The final point to mention is that the long sequence of working days with only one day off resulted from moving from one roster pattern to another so it was not an ongoing problem or risk.

[20] From these facts there can be no finding that Real Journeys breached its obligation to take all reasonable care to avoid exposing employees to unnecessary risk of injury: see *Attorney-General v Gilbert* [2002] 1 ERNZ 31. To the contrary, Real Journeys was alert to its responsibilities.

Summary

[21] Real Journeys did not breach the collective agreement or any implied duties owed to Mr Conrad.

[22] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority