

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 51
5397751

BETWEEN GABRIEL FLOARES
 Applicant

AND KIWI RAIL LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Gabriel Floares on his own behalf
 Andrea Pazin for the Respondent

Investigation: By way of submissions received

Submissions Received: By 26 April 2013

Determination: 13 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Floares seeks an order requiring the respondent, Kiwi Rail, to backdate employer contribution payments to the New Zealand Shipping Officers Superannuation Scheme for the period between 21 February 2008 when he commenced employment with Kiwi Rail on the Inter Island line, and 15 June 2011, when he properly joined the Scheme.

[2] Mr Floares commenced employment with Kiwi Rail's predecessor as an Engineer on board one of its ferries on 21 February 2008. He elected to join its employer subsidised superannuation scheme. Unknown to Mr Floares and Kiwi Rail, the scheme Mr Floares sought to join had temporarily closed to new members,

effectively from the previous year. The scheme had been temporarily closed to new membership pending an update to the scheme's documentation.

[3] However, despite filling in what was the wrong form, Mr Floares commenced making payments to the superannuation scheme, which were subsidised on a two-for-one basis by Kiwi Rail, which also sent its contributions to the scheme provider.

[4] It was later brought to Mr Floares' attention that he had not been properly enrolled in the scheme. He was therefore given the option to either withdraw the sums he had remitted to the provider, Tower, or fill in a new application for the scheme.

[5] At the time Mr Floares was in the process of buying a house and on 8 December 2008 he determined to get a refund of his putative contributions. He stated, amongst other things:

I do not wish to be part of NZ Ship Officers Superannuation Scheme at the moment and I wish to receive the full refund of my contribution. I will advise my employer to stop deducting this contribution from my salary.

[6] This did in fact occur and Mr Floares then received payment from Tower.

[7] Mr Floares later decided that he did wish to join the Scheme, albeit a replacement one, given the lapse of time. Thus in December 2009 he wished to not only rejoin the Scheme, but to make back payments for the period from the commencement of his employment, provided Kiwi Rail also backdated its contributions.

[8] Kiwi Rail decided at that point not to backdate its contributions, because it had no obligation to do so and there was no provision in the fund for back dating. This is despite the fact that in previous years Kiwi Rail had backdated such payments for at least three employees. There was also evidence that prior to 2007 other employees had also been given the benefit of backdating.

[9] Mr Floares did not pursue the matter at that time. However, on 10 May 2011 he reapplied to join the Scheme again, and completed a new application form. The following month his contributions, together with the employer's contributions, were forwarded to Tower, and both parties continued doing so regularly.

[10] In 2012 Mr Floares renewed his request for Kiwi Rail's contributions to be backdated to the commencement of his employment, as he had discovered that *Inter Islander* have done this type of arrangement with other former and current employees who have joined the Scheme at a later date.

[11] Mr Floares was advised that this practice had ceased by 2010 except for exceptional circumstances. In both cases where this benefit had since been provided, paperwork had gone missing through no fault of the employee concerned.

[12] Mr Floares continued to dispute Kiwi Rail's decision and raised an employment relationship problem and a personal grievance. Mediation was held on the matter, but it did not resolve the issue.

Determination

[13] This matter can be looked at as either a claim for monies due under an employment agreement or as a personal grievance. As a personal grievance what Mr Floares would have to show was that his employment, or one or more conditions of his employment, was affected to his disadvantage by some unjustifiable action by the employer. In both types of claim, Mr Floares has to establish that it was a term or condition of his employment that Kiwi Rail was for some reason obligated to backdate its contributions to the superannuation scheme.

[14] There is no evidence that backdating has ever been a term or condition of Mr Floares' employment with Kiwi Rail. There is nothing in any written employment agreement. No-one from Kiwi Rail has ever directly or indirectly promised or undertaken to him that he would receive backdated contributions from it. That is simply the end to the matter.

[15] Even if Mr Floares could found a claim to a legitimate expectation that Kiwi Rail would provide him with backdating on the basis of the other examples where Kiwi Rail has provided backdating, I conclude that there was no disparity of treatment in the sense that the term has to be interpreted in a legal setting. Disparity of treatment does not require an employer to extend generous treatment for ever more. In December 2009 Kiwi Rail changed its policy to backdating, as it was entitled to do. There is a sound business reason behind the policy because otherwise Kiwi rail would have to hold on its books, as a contingent liability, sufficient funds to cover backdating claims, for all its staff who had elected not to join the scheme. These

funds would have to cover the duration of such members of staff whole employment, in case any made a claim such as Mr Floares', even if on their last day of employment.

[16] Mr Floares' case is also quite different to the two cases whereby Kiwi Rail, in its own discretion, decided to grant an employee backdated contributions since 2009, because in both those cases the employee was not responsible in any way for the delay. However, in Mr Floares' case, he decided that he did not want to be in the Scheme at the time, because he preferred to have the moneys collected on his behalf by Tower for the superannuation Scheme to be refunded to him so that he could buy a house. That was his decision and his responsibility, not Kiwi Rail's. Kiwi Rail is entitled to not exercise its discretion in his favour in these circumstances.

[17] I therefore dismiss Mr Floares' claims.

Costs

[18] Costs are reserved.

G J Wood
Member of the Employment Relations Authority