

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 11
5314938

BETWEEN NIGEL McMILLAN & ORS
Applicants

A N D AIR NELSON LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Greg Lloyd, Counsel for Applicants
David France, Counsel for Respondent

Investigation Meeting 13 December 2011 at Nelson

Submissions Received: 13 December 2011 from Applicants
13 December 2011 from Respondent

Date of Determination: 17 January 2012

DETERMINATION OF THE AUTHORITY

- A. The claims by all applicants save Mr Grayer fail.**
- B. The claim by Mr Grayer succeeds and his right to a 30 minute paid meal break is to be restored by the respondent.**
- C. Sums due to Mr Grayer payable by the respondent fall to be assessed.**
- D. Costs are reserved.**

Withdrawal of two of the applicants

[1] The statement of problem was lodged on behalf of 10 applicants, Nigel McMillan, Tim Grayer, Boyd Grinstead, Hennie Steenkamp, Grant Newman, David Francey, Taniela Likiliki, Nic Buckendhal, Andrew Twose and Peter Miller.

[2] The claims for Andrew Twose and Peter Miller were subsequently withdrawn from the proceedings.

Statement of problem

[3] All of the applicants, save Mr Grayer, are employed by the respondent as Aircraft Tradesmen (Qualified). Mr Grayer is employed as a Licensed Aviation Maintenance Engineer.

[4] At all material times all the applicants were members of the NZ Amalgamated Engineering Printing & Manufacturing Union (“the EPMU”) and were, from the commencement of their employment with the respondent, employed pursuant to the terms of a collective agreement pertaining to ground employees.

[5] All of the applicants were formerly employed by Safe Air Limited in Blenheim (“Safe Air”). In May 2010, the applicants commenced employment with the respondent following an announcement by Safe Air that it was planning to make a significant number of employees redundant. The applicants were taken on by the respondent in order to assist in an ATR heavy maintenance programme, work recently won from Mt Cook Airlines.

[6] The employment relationship problem concerns the fact that, when the applicants commenced employment with the respondent, they were each told to record their daily eight ordinary hours of work on their timesheets in such a way that they would effectively receive a paid half hour meal break. They did in fact receive a paid half hour meal break for approximately three weeks. In around the middle of the fourth week of their employment (the applicants did not all start on the same day, so this summary is approximate purposely), the respondent asserts that it realised that it had not been its intention to employ the applicants with an entitlement to a paid half hour meal break and so advised them that, with effect from the following week, their eight ordinary hours of work would end a half hour later, effectively removing the paid half hour meal break. They all ceased receiving this paid half hour meal break with effect from Monday, 14 June 2010.

[7] The applicants complain that this change in the daily end time of their ordinary hours has had the following effects:

- (a) They have to work an extra half an hour per day to receive the same remuneration as before;

- (b) Their entitlement to ordinary overtime (at time and a half) is triggered half an hour later than previously;
- (c) Their entitlement to overtime at double time is also triggered half an hour later;
- (d) The applicants have to work an extra half an hour before becoming entitled to a further paid meal break (which is triggered after working two hours' overtime); and
- (e) They are now treated differently from other aircraft engineers who were already employed when the applicants joined Air Nelson and who receive a paid half hour meal break and become entitled to the overtime payments and additional paid meal break referred to above half an hour earlier.

[8] The applicants claim that they have suffered a disadvantage by way of the unilateral withdrawal of the right to a paid meal break and apply for the following:

- (a) The paid meal break to be reinstated for all applicants. The remedy of a compliance order, available under s 137 of the Employment Relations Act 2000 would bring that result;
- (b) All applicants to be paid a sum equal to the amount lost as a result of not receiving the paid meal break. A recovery action pursuant to s 131 of the Act would achieve that result; and
- (c) Costs.

[9] It is the respondent's case that the applicants were given the paid half hour meal break for the first three or four weeks of their employment solely due to an error and that the applicants have no contractual right to a paid meal break.

[10] Oral evidence was given at the Investigation Meeting by two of the applicants, Mr McMillan and Mr Grayer with sworn affidavits provided by Taniela Likiliki, David Francey, Hennie Steenkamp and Boyd Grinstead. Oral evidence on behalf of the applicants was also provided by George Hollinsworth, an organiser for the EPMU, and Aaron Peterson, an aircraft engineer. Oral evidence for the respondent was given by Roger Duncan (shift manager), Mark Butchart (former production manager) and

Robert Burdekin (manager, technical). No sworn evidence was presented by two of the applicants, Mr Newman or Mr Buckendhal.

The facts

[11] Relevant parts of the collective agreement are as follows:

Clause 6 Definitions

Rostered Employee: An employee, other than a day employee, whose ordinary time daily hours are within the hours 07.00 to 19.00 inclusive, on no more than any five days of the seven days of the week, Monday to Sunday inclusive.

Shift Employee: An employee who is regularly required to work outside the hours of 07.00 to 19.00 as part of his/her ordinary hours of work. Such an employee may be required to work on no more than any five days of the seven days of the week, Monday to Sunday inclusive.

Day Employee: An employee permanently working his/her ordinary hours between the hours of 07.00 and 19.00 inclusive, Monday to Friday inclusive.

Clause 7 (a) Ordinary Time

- (i) *in determining the ordinary hours of work for respective employees the following limits shall apply:*
 - *the ordinary hours shall not exceed eight on any day or shift or forty hours in a week;*
 - *as an alternative to the eight ordinary hour day, ten ordinary hours may be worked on any four days/shift in the week;*
 - *other hours/shift patterns may be agreed, provided that the ordinary hours still average out to 40 per week over an agreed period;*
- (ii) *Whenever possible two days rostered off in each week shall be consecutive.*
- (iii) *Shift and rostered employees shall be required to work no more than an average of four weekend days out of every six weekend days over the period of the roster.*

Clause 7 (b) Hours of Work

- (i) *Ordinary hours of work for day employees shall be between the hours of 07.00 and 19.00 Monday to Friday.*
- (ii) *The restrictions on the hours of work for day employees contained in clause 7(b)(i) above may be varied by agreement between the employer and the majority of affected employees. The variation shall be reduced to writing and be binding on all affected employees.*

Clause 7(c) Rules for Changing the Roster

- (i) *At commencement of this Collective Agreement rostered and shift employees shall be employed in accordance with the roster patterns in existence at that time.*
- (ii) *Subsequent changes to rostered start and finish times, days on/off and numbers of hours worked shall be made in accordance with the following consultation procedure:*
 - (a) *The Company shall enter into consultation with the effected (sic) employees and their Staff Delegate over the required roster.*
 - (b) *The consultation process above shall observe the following principles:*

There follows a detailed process for agreeing the change in the roster which it is not necessary to replicate here.

Clause 7(e) Flexible Hours Allowance:

- (i) *A flexible hours allowance of \$2.78 from 29 March 2010 (\$2.85 from 28 March 2011) per hour shall be paid to non salaried rostered or shift employees in recognition of the working ordinary time hours beyond those of a day employee and that the required daily hours of work may fluctuate between eight and ten.*

Clause 7(g) Meal breaks:

- (i)(a) *Unless otherwise agreed to between the employer and employee, each full time employee shall be entitled to an unpaid meal break of at least 30 minutes within 6 hours of commencing ordinary time work for the day.*
- (iii) *Shift employees who take meal breaks as provided for in this clause shall have those meal breaks treated as time worked.*

Clause 61 BASE MAINTENANCE ROSTERED WORK

- (a) *Rostered employees shall be required to work no more than six out of twelve consecutive weekend days.*
- (b) *Variations of subclause (a) above may be agreed with the employees concerned.*
- (c) *Base Maintenance Rostered Employees shall, whilst so employed, accrue an additional 20 hours Annual Leave per annum.*
- (d) *Notwithstanding the definition of a rostered employee in clause 4, the ordinary time daily hours of work for a rostered employee in Base Maintenance are within (sic) the hours of 06.00 to 19.00 inclusive, on no more than any five days of the seven days of the week, Monday to Sunday, inclusive.*

[12] Each applicant had received an offer letter from Air New Zealand Link (operated by Air Nelson) offering them employment with the respondent. As several parts of this offer letter are relevant to the employment relationship problem before the Authority, it is worth quoting the substantive part of this letter in its entirety. Each letter was identical in its terms, save in respect of the addressee, the actual position offered, deemed length of service and the commencement date. Below is a reproduction of the letter addressed to the first applicant, Mr McMillan.

Dear Nigel

OFFER OF EMPLOYMENT

I am pleased to offer you the position of Aircraft Tradesperson (Qualified) on a permanent basis with a commencement date of 17 May 2010 subject to the following conditions being fulfilled:

1. *You having signed the settlement agreement between you and Safe Air Limited in the form attached. Please ensure that you sign and return the settlement agreement to me by 12 noon 12 May 2010 otherwise this offer of employment is automatically withdrawn (without further notice) and cannot be accepted.*
2. *By accepting this offer you are also acknowledging that you have not received any conviction since 6 January 2003.*

The work that you will undertake in your role is covered by the coverage clause in the existing Air Nelson Limited Ground Staff Collective Agreement. You will be required to work shifts as per the roster that is in force at the time. This roster may be changed as per

the guidelines in the Air Nelson Collective Agreement. You may be required to work day or night shift.

For the first 30 days of employment, you will be employed on the Collective Employment Agreement. While you may choose to join the Union at any time, if you choose not to do so, or if you have not chosen to do so at the expiration of the 30 day period, your employment will continue on an Individual Employment Agreement the terms and conditions of which will be negotiated between you and Air Nelson.

You will be given a copy of the Collective Agreement for your reference on your first day of employment.

If you are interested in joining the Union, their contact information is as follows [contact details follow].

*I am able to hold this offer of employment open until 12 noon on 12 May 2010. To accept this conditional offer please sign your Individual Terms and Conditions (page 2). Please ensure you fax or email a **signed copy** back to me along with the signed settlement agreement by 12 noon on 12 May 2010.*

Please note, no employment relationship will be created (except as provided for by law) and your employment does not commence until all the conditions set out above are fulfilled.

Your Individual Terms and Conditions are:

<i>Position:</i>	<i>A/C Tradesman Qualified</i>
<i>Hours of work</i>	<i>Rostered and/or shift work (this includes roster and/or night shift work)</i>
<i>Wage:</i>	<i>\$20.96 per hour plus allowances and benefits according to the existing Air Nelson Limited Ground Staff Collective Agreement.</i>

For the purposes of redundancy entitlements and long service leave, your service commencement date is deemed to be 6 January 2003. Although it is not a contractual entitlement, your length of service for staff travel privileges (as determined by the company from time to time) shall also be that date.

Provided that you accept this offer of employment your first day of work will be 17 May 2010 unless other arrangements are made and agreed by Air Nelson. On your first day of work you will be required to start at 0800 and to report initially to the Technical Administrator. Under the Collective Agreement a tool allowance of 49.4 cents per hour exists plus a flexible hours allowance of \$2.78 that applies to rostered and shift employees.

[There follows details of information that the applicant was required to provide on his first day.]

If you have any questions regarding the position or any of the terms and conditions specified in either your Individual Terms and Conditions or in the Collective Agreement please feel free to contact me, Roger Duncan, [contact details follow].

*I look forward to having you as a member of the Technical team.
Welcome aboard!*

Yours sincerely,

Air Nelson Limited

[13] Each applicant signed their respective offer of employment. All of the applicants stated in evidence that they had been told at their induction meetings by their Production Manager, Mark Butchart, how to fill in their timesheets. The timesheets produced to the Authority showed that the applicants had written, for each day worked, their start time in the *On* column and their finish time in the *Off* column, recording eight hours ordinary time in the *Ord* column. Typically, for the first week when start and finish times were recorded, these would show 07.00 as the start time and 15.00 as the finish time. The applicants also say that Mr Butchart told them specifically and expressly that they would receive a paid meal break.

[14] Mr Butchart admits that he told some of the applicants to fill in their timesheets showing eight hours of ordinary time from 07.00 to 15.00 but that these applicants had then gone on to tell the others. Mr Butchart denies that he had made any mention of a paid meal break expressly. His evidence was that he had written 07.00 to 15.00 hours on someone's time sheet to show them how to fill it out, and that it had been a *mechanical error*. He said that the mistake had not been that he had believed that the applicants were on the same terms as other staff who did receive a paid meal break, although it appears that he had written 15.00 as the finish time (instead of 15.30) because 15.00 was the finish time of those staff, and he had done it out of habit. Mr Butchart also said that he had not mistakenly believed that these applicants were specifically entitled to a meal break.

[15] The effect of this instruction by Mr Butchart however was that by the applicants recording each day that they had worked eight ordinary hours between 07.00 and 15.00, they received a paid half hour meal break. When their hours changed, (so that, for example, some of them worked from 06.00 to 16.30) they recorded that as eight ordinary hours plus 2.5 hours overtime.

[16] Mr Butchart's evidence was quite detailed and credible, especially in respect of explaining the various arrangements that had been made with different existing ground staff which accounted for why they specifically received paid meal breaks. In light of his detailed knowledge about these specific arrangements, of which he had first hand knowledge, it is not credible that he would have mistakenly believed that

the applicants had been entitled to receive paid meal breaks. I therefore accept his evidence that he had made what he called a *mechanical error* in writing down 07.00 to 15.00 when he had been showing some of the applicants how to fill in their time sheets and that he had not made specific mention of paid meal breaks.

[17] Two of the applicants, Mr Grayer and Mr Newman, contended that they had also been told at their initial interviews, before signing their offers of employment, that they would receive a paid meal break. Mr Newman's evidence was not sworn and he was not present at the investigation meeting so was unable to be questioned on this. However, Mr Grayer was absolutely certain that the Shift Manager, Roger Duncan, had told him at interview that he would receive a paid meal break. He said he had remembered it particularly because he had been so *chuffed* to be receiving a paid meal break, something he had not received before in New Zealand. Mr Duncan denies saying to Mr Grayer (or any other applicant) that he would be in receipt of a paid meal break.

[18] On this point, I prefer Mr Grayer's evidence. Given its importance to him, it is far more likely that Mr Grayer accurately recalls the content of the interview than Mr Duncan, who had conducted several. The fact that Mr Grayer is the only applicant who maintains with certainty that Mr Duncan had made the statement does not necessarily lend weight to an argument that the statement had not been made, given that Mr Grayer is the only one of the applicants who held the position of Licensed Aviation Maintenance Engineer. I deal below with the effect on Mr Grayer of my finding.

[19] However, as Mr Newman had not been present to give evidence at the Investigation Meeting, nor had sworn an affidavit, I prefer the evidence of the respondent that nothing had been said to Mr Newman about a paid meal break at his interview, especially as Mr Newman's evidence in his written brief of evidence was very vague on the point, not knowing who had said it or exactly what had been said.

Findings

[20] Counsel for the applicants conceded that they were not seeking to argue that any of the applicants had been induced into entering into their employment with the respondent on the strength of a promise that they would receive paid meal breaks. Their arguments fall into two main categories:

- (a) That at the time the applicants accepted their offer of employment, they had not been made aware of what their hours of work would be. Full agreement had only been reached between the respondent and the applicants at the induction meetings with Mr Butchart when he had advised them that their hours would be from 07.00 to 1500, Monday to Friday, which constituted eight hours of ordinary time. Therefore, by reference to clause 7(g)(i)(a) of the collective agreement, the applicants fell into the category contemplated by the words *unless otherwise agreed to between the employer and employee*, that specific agreement having been reached at the induction meeting. Therefore, the respondent withdrawing that paid meal entitlement and requiring each employee to work an extra half an hour before the overtime rates became applicable, constituted a unilateral and unlawful variation of each applicant's terms and conditions of employment.
- (b) As an alternative, the applicants argue that they are actually shift workers and are entitled to a paid meal break by virtue of clause 7(g)(iii) of the collective agreement. This argument is based on the fact that, a few days after the applicants started work, their commencement time had been changed to 06.00 hours. The applicants rely on the definition of shift employee cited above which states that he or she is an employee who *is regularly required to work outside the hours of 07.00 to 19.00 as part of his/her ordinary hours of work*. Therefore, being a shift worker, they are entitled to a paid meal break.

[21] I shall call these arguments the induction agreement argument and the shift worker argument respectively.

[22] I shall deal with the shift worker argument first, as I believe it can be disposed of more easily. It was common ground that all of the applicants were base maintenance workers. The definition of base maintenance rostered work, cited above in clause 61(d) of the collective agreement, makes it clear that, notwithstanding the definition of a rostered employee in clause 4, the ordinary time daily hours of work for a rostered employee in base maintenance are within the hours of 06.00 to 19.00 inclusive. The reference to clause 4 in this definition is an error and, in my view should be a reference to clause 6. Therefore, clause 61(d) varies the definition of a

base maintenance rostered employee to someone who starts at 06.00, rather than 07.00.

[23] Counsel for the applicants pointed out that the offer letters for each applicant refer to their hours of work as *rostered and/or shift work (this includes roster and/or night shift work)*. He submitted that this definition of their hours of work is unclear. Counsel for the applicants argued that the respondents accepted that the employees were not day workers as defined and that that no roster had been in place or agreed when the applicants had commenced employment, and clause 7(c) had not been invoked, so they could not have been rostered employees when they commenced. That left only the category of shift worker, which is what the applicants must be. Therefore, taking all this into account, the applicants argue that they were entitled to paid meal breaks as stipulated in clause 7 (g)(iii).

[24] Counsel for the applicants submits that it is only a day or so before the investigation meeting that the applicants had ever been identified by the respondent as Rostered Base maintenance workers to whom clause 61 applied.

[25] Counsel for the respondent submits that the applicants had never argued that they were shift workers prior to two days before the investigation meeting, that they themselves habitually referred to themselves as *day workers* but that, despite this, there was no confusion as to what their true status was - they were clearly rostered workers as defined by clause 61(d). Shift workers worked in practice between 19.00 and 04.00 hours, and none of the applicants worked these hours, save Mr Newman who had become a night shift worker.

[26] Counsel for the respondent pointed out that evidence had been given by witnesses for the respondent that the hours of work section of the letters of offer of employment had been written in such a way as to enable the company to require employees to work night shifts if the need arose. This was because, in the past, the terms and conditions of aircraft engineers had been less flexible, which had caused problems when needing to provide aircraft engineers during night shifts. However, up to the date of the Investigation Meeting, only Mr Newman had become a night shift worker.

[27] Counsel for the respondent argued that it was ludicrous for the applicants to submit that no roster had been in place when they had commenced work. He

submitted that all the evidence suggested that the applicants (excepting Mr Newman, whose status had changed) had only ever been rostered to work Rostered Base Maintenance employee hours pursuant to clause 61 of the collective agreement.

[28] The timesheets shown to me certainly indicated that during the first four weeks of employment the applicants to whom they applied had worked the Rostered Base Maintenance employee hours (between 06.00 and 19.00) pursuant to clause 61 of the collective agreement. No applicant gave evidence that his hours of work had changed to hours falling outside of the period 06.00 to 19.00 after those first four weeks.

[29] My finding is that a roster did exist when the applicants first commenced employment (namely that of Rostered Base Maintenance Employees) and that the hours worked by the applicants fitted within that roster. Therefore, the applicants are not shift workers as defined by the collective employment agreement and clause 7(g)(iii) was clearly aimed at those workers who were genuine shift workers as defined in clause 6 of the collective agreement. Therefore, the applicants cannot succeed in their claim based on the shift worker argument.

[30] I now turn to the induction agreement argument. The crucial element of clause 7(g)(i)(a) is comprised by the words *Unless otherwise agreed to between the employer and employee...* ..Deferring consideration of Mr Grayer's situation until later, all other applicants rely upon what they say was said to them during the induction process, and by their receipt of paid meal breaks for the first three weeks of their employment, to show that it had *otherwise been agreed* with them that they would receive daily 30 minute paid meal breaks. The essence of the applicants' argument is that no agreement had been reached about their hours of work and the provision of a paid meal break until specific statements had been made to the applicants during induction, when binding agreements had been reached.

[31] The applicants have sought to argue that their receipt of a flexibility allowance was something they were not entitled to under the collective agreement and that it had been given to the applicants because it had also been given to the existing employees doing the same work. The applicants argued that the same principle applied to the paid meal break. I do not accept this. Clause 7(e)(i) of the Collective Agreement makes clear that the flexible hours allowance is an entitlement of non salaried rostered employees. As determined above, the applicants are Rostered Base Maintenance

Employees who are therefore entitled to receive a flexible hours allowance. This argument does not, therefore, assist them.

[32] The respondents' witnesses gave evidence that the existing non shift engineers who do receive a paid meal allowance had all reached specific agreements with the respondent in that respect. The applicants called Mr Peterson to refute this, but an examination of his time sheet showed that he had originally not been entitled to a paid meal break, and that from 24 January 2010 he had started to receive a paid meal break. Mr Peterson could not account for that change, but it almost certainly arose because of a specific agreement which had been reached with Mr Peterson when his work requirements had changed. I am therefore satisfied that the respondent's evidence in respect of existing non shift engineers who do receive paid meal breaks is correct and that comparing their situations to the applicants' does not assist the applicants.

[33] The starting point in the analysis of the issue is the wording of clause 7(g)(i)(a); *Unless otherwise agreed to between the employer and employee, each full time employee shall be entitled to an unpaid meal break of at least 30 minutes within 6 hours of commencing ordinary time work for the day.* In other words, the normal position is that full time employees get an unpaid 30 minute meal break, unless the parties agree otherwise.

[34] The necessary step to take in this analysis therefore is to ascertain whether a 30 minute paid meal break had been *otherwise agreed*. Putting aside Mr Grayer's situation for a moment, it is my view that merely telling the applicants in an induction meeting that their ordinary eight hours of work would be between 07.00 and 15.00 does not constitute an agreement pursuant to clause 7(g)(i)(a) that they were entitled to a daily 30 minute paid meal break. The effect of telling the applicants to record their time in that way, was that they had effectively received a paid half hour meal break. That consequential effect does not constitute an agreement either.

[35] I do not accept either the argument of the applicants' counsel that no agreement had been reached with the applicants about their hours of work and the provision of a paid meal break until specific statements had been made to the applicants during their induction when binding agreements had then been reached. I find that complete agreements between each applicant on the one hand and the respondent on the other had been reached at the point when each applicant had signed

his offer letter, before the induction meetings at which Mr Butchart had made the erroneous statement. That agreement contained the specific contractual term, plainly expressed in each offer letter, that each applicant would be employed to work either rostered or shift work, at the respondent's election. When the applicants commenced work, it was the respondent's election to treat them all as rostered workers (with hours as defined in clause 61 of the Collective Agreement).

[36] Therefore, the effect of the mistake that Mr Butchart had made when he had explained to the applicants (or to some of them, who then told the others – the exact mechanism is not material) how to fill in the time sheet was not to create a contractual right to a paid meal break, but to give the applicants an unintended, short term, non contractual and supplementary 30 minutes of paid time each day. This unintended effect was one that the respondent was entitled to rectify. Therefore, rather than the respondent taking away an entitlement, they were effecting a return to a situation which they had always intended, and which the applicants would have had no reason not to expect at the point when they each signed their offer letters.

Mr Grayer

[37] Turning to Mr Grayer, for the reason explained above I find, on balance, that Mr Duncan had told him that he would be in receipt of a half hour paid meal break. I do not believe that this statement specifically induced Mr Grayer to enter into the agreement, as he had been facing redundancy and the job offer from the respondent would have ensured his continued employment, so I am satisfied that he would have accepted the position without the statement having been made by Mr Duncan.

[38] However, Mr Duncan's oral statement had been made to Mr Grayer prior to him signing his written offer of employment dated 7 May 2010. Under these circumstances I believe that, by reference to clause 7(g)(i)(a), it had been *otherwise agreed* between Mr Duncan and Mr Grayer that he would receive a paid thirty minute meal break. Mr Duncan had signed the offer of employment, and so had had authority to bind the respondent, and the statement pertaining to a paid meal break had not been expressly withdrawn in the offer letter.

[39] The law of contract in New Zealand expressly recognises that parties to a written agreement may have agreed orally, or in other form, terms not included in the document:

*If the written document appears on its face to be a comprehensive record of an agreement, that in itself would be strong evidence that it was intended to be exhaustive. The more the suggested oral term is in disharmony with the wording of the written document, the more difficult it will be to persuade the Court that it was intended to survive the written document. But if, from whatever source, the Court is satisfied as to the parties' real agreement, it will give effect to that agreement regardless of the form in which it may have been expressed. (Fisher J at [81] in *Newmans Tour Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68).*

[40] Counsel for the respondent submits that a paid meal break was not referred to in the 7 May 2010 offer letter, unlike the flexibility and tool allowances. However, the fact that Mr Duncan did not include the term does not, of itself, demonstrate that Mr Duncan had not intended to offer Mr Grayer a daily paid 30 minute meal break when he had made the statement to him in interview. It is often the case that contractual offer letters do not contain all the terms of employment. In addition, clause 7(g)(i)(a) contemplates that a paid meal break could have been agreed with Mr Grayer.

[41] Counsel for the respondent refers me to *Krukziener v Hanover Finance* [2008] 19 PRINZ 162, in which the Court of Appeal stated, at paragraph 38:

However, the departure from a voluntary promise is not unconscionable in itself, even if detriment results. Rather, equity responds to the defendant creating or encouraging an assumption in the plaintiff, and its knowledge that the plaintiff will rely on the assumption to its detriment. The plaintiff must have been led to believe that the promise would affect or result in legal relations; thus a promise made in negotiations that are subject to contract will not lead to an estoppel..... Lastly, equity does not intervene to satisfy the promise, but to avoid the detriment.

Krukziener is a case relating to a personal guarantee given by the appellant in order to secure a loan made to two of his companies by the respondent. Mr Krukziener attempted to argue, inter alia, that the respondent was estopped from calling on the guarantee in reliance of a representation made in pre-contractual negotiations by the former Chief Executive of the respondent as to when the debt would fall due. He argued that, to Hanover's knowledge, he had acted to his detriment by entering into the contract on terms inconsistent with the representation. He relied on the negotiations to contradict the contract that followed the negotiations.

[42] I am satisfied that *Krukziener* can be distinguished from the current situation, in that the statement that I have found was made by Mr Duncan did not contradict the terms of the collective agreement, but was contemplated by it by the words of clause 7(g)(i)(a) *unless otherwise agreed...* In this case, I am satisfied that Mr Grayer had been led to believe that a promise had been made to him by Mr Duncan which would affect or result in legal relations. There is nothing inconsistent with what Mr Grayer was promised in either the offer letter or the collective agreement.

Determination

[43] The claims by the applicants Nigel McMillan, Boyd Grinstead, Hennie Steenkamp, Grant Newman, David Francey, Taniela Likiliki and Nic Buckendhal are dismissed.

[44] The claim by Mr Grayer succeeds. Mr Grayer is entitled to receive the benefit of a daily 30 minute paid meal break and his right to it is to be reinstated by the respondent.

[45] No data had been made available at the time of the investigation meeting to enable a calculation to be made as to the sums lost by Mr Grayer as a consequence of the respondent's withdrawal of the daily paid 30 minute meal break. The parties are encouraged to agree between themselves the arrears that should be paid to Mr Grayer.

[46] In the absence of such an agreement within 30 days of the date of this determination, Mr Grayer is entitled to make an application to the Authority for an assessment of those arrears.

Costs

[47] Costs are reserved.

David Appleton
Member of the Employment Relations Authority