

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 485/10  
5295023

BETWEEN                      AILSA MURRAY  
   Applicant

AND                              FULLERS BAY OF ISLANDS  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:              Clare Abaffy, counsel for Applicant  
   Elizabeth Coats, counsel for Respondent

Investigation Meeting:        28 October 2010

Determination:                17 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The problem was initially described as an unjustifiable dismissal personal grievance and a breach of good faith, arising from the employment of Mrs Ailsa Murray by the respondent Fullers Bay of Islands Ltd.

[2]     Before the investigation meeting began the parties accepted that a dispute about the interpretation, application or operation of the employment agreement lay at the core of the problem. Mrs Murray and Fullers have accepted that the Authority should give a declaration as to their rights and obligations under the agreement, before determining whether Mrs Murray has a personal grievance and whether Fullers failed to act in good faith, as alleged.

[3] Over about 30 years Mrs Murray has worked for Fullers or its predecessors and associated companies, as the launch master or skipper of boats that carry passengers on tours, cruises and scheduled ferry services in the Bay of Islands. On occasions Mrs Murray has been in command of launches undertaking the famous Hole in the Rock trip.

[4] For a few years before going overseas to live Mrs Murray worked for Fullers fulltime. From 1990 after her return she was rostered for work as and when required, in situations where a fulltime skipper was temporarily absent because of sickness, accident or other reason.

[5] From 1994 her employment fell under the coverage of the Fullers Cruises Northland Ltd Maritime Employees Collective Employment Contract (CEC). This had been negotiated with the National Distribution Union Inc. (NDU) to which Mrs Murray belonged and has remained a member of.

[6] The 1994 CEC referred to Mrs Murray by name as an original party to the agreement, the stated purpose of which was to regulate the contracts of employment and conditions of work of all original parties as well as new employees engaged after the agreement commenced.

[7] There is no dispute that Mrs Murray's employment in 1994 was covered by clause 18 of the CEC which was headed *Part-Time and Casual Employees*. It defined as a casual employee, *a person whose engagement is for a period of less than one week and is recorded as such in writing*. The same provision was put into the CEC negotiated in 1996, also at clause 18.

[8] In 1997 the heading of clause 18 changed to *Seasonal Employees* and in clause 18.1 casual employment was referred to as follows;

**18. SEASONAL EMPLOYEES**

*18.1 A seasonal employee is a launch master, deckhand, hostess or ticket collector employed for either a roster period(s) or on a casual basis to cover a permanent employee absent for the following reasons -*

[9] The CEC in 1997 no longer expressly defined a casual employee.

[10] The dispute that is central to Mrs Murray's employment relationship problem arose under the latest collective agreement, which came into force in July 2008. It is

the Fullers Bay of Islands Ltd & Intercity Group (NZ) Ltd Collective Employment Agreement (CEA), the term of which is expressed to be from July 2008 to July 2010. Clause 18 is the same as the 1997 document as reproduced in part above. As with the 1997 document, the 2008 CEA did not directly define casual employment.

[11] For Mrs Murray and the NDU it is contended that the work she had been doing as a launch master or skipper periodically over the years from 1990, fell within the coverage of the latest collective agreement. It is contended that the type of work she performed was provided for by clause 18, the heading of which since 1997 has been *Seasonal Employees*.

[12] For Fullers it is contended that Mrs Murray's employment was not covered by clause 18 of either the 1997 CEC or the 2008 CEA. The company's General Manager, Mr Charles Parker, said in evidence that although Mrs Murray had been employed under the CEA she was not a *Seasonal Employee* within the meaning of clause 18 of it.

[13] Mr Parker's evidence was that Mrs Murray had always (since 1990) been a casual employee and as such had no entitlement to work any particular hours for Fullers during any period of time. When on call it was her choice whether to accept or refuse any offer of work made by Fullers.

[14] Mr Parker's evidence was that the term *seasonal* is used to describe employees employed, full or part-time, to cover Fullers' high season which he said usually runs from 1 October until 30 April. That is the period over which the spring, summer and autumn seasons are regarded as falling. For Fullers it is contended the engagement of launch masters on a casual basis under Clause 18 of the agreement is confined to those particular months which are regarded in their business as the high season.

[15] Mrs Murray claims that Fuller's right to select who the company wanted to hire for any casual engagement was not unrestricted but was limited by particular provisions of clause 18. Materially they require, at clause 18.6, that as far as is practicable seasonal work is to be divided equitably among existing seasonal employees. They also require that wherever possible preference is to be given to long-serving employees. Mrs Murray claims that those rights to an equitable share of seasonal work and to preference, were retained by her between the engagements she was offered and accepted from time to time. Her claim is that a contractual

relationship requiring equitable sharing and preference subsisted even when she was not physically and mentally performing any employment duties on call as a seasonal casual employee.

[16] The only reference in the CEA to any of the four seasons of the year is at clause 10.3. It provides for recognition to be given by the parties to the desirability of having a *full time or seasonal employee* take lieu days during *the winter season*. This addresses the situation where work has been performed on a public holiday and a day off in lieu becomes part of a worker's entitlement under the Holidays Act 2003.

[17] There is no dispute that, as generally is the case in tourism, Fuller's business in the Bay of Islands is a seasonal one. I have approached the interpretation of the CEA on the basis that this was widely known, understood and accepted by both Fullers and the NDU at the time they negotiated the collective agreement. As a matter of general principle, as far as possible the construction of the agreement should take into account this circumstance of the workplace.

[18] Clause 18 appears to provide a definition of *seasonal employee* in the following words:

18.1 *A seasonal employee is a launch master, deck hand, cruise attendant or ticket collector employed for either a roster period(s) or on a casual basis to cover a permanent employee absent for the following reasons –*

18.1.1 *Sickness*

18.1.2 *Accident*

18.1.3 *Approved leave of absence*

18.1.4 *In the circumstances of seasonal demand and/or special circumstances to compliment the existing workforce.*

[19] For Fullers it was submitted that *seasonal employee* in clause 18.1 describes an employee who may be engaged on an ongoing and permanent basis to cover the company's high season. It is more accurate to say that there is no particular length of engagement required under clause 18.1; it could be for a day, a roster period or multiple and successive roster periods. Also, under clause 18.1 a seasonal employee may be employed expressly *on a casual basis*, a concept difficult to align with that of ongoing and permanent employment.

[20] It was also submitted for Fullers that the CEA provides for seasonal employees in a manner that is inconsistent with those employees also being

considered casual. However *casual* has been expressed to be a basis of employment under clause 18. The provision could not be clearer in that regard.

[21] I find that in ordinary usage ‘seasonal’ has a plain enough meaning. It can refer to a part of a year – summer, winter etc. – or to a proper or suitable time in comparison to other times. Fullers and the NDU in negotiating clause 18 of the collective document from 1997 onwards are presumed to have intended by the use of ‘seasonal’ that it would add something to the meaning of clause 18. It is I find reasonable to infer that they intended employment under clause 18 would be for a part of any year, not anytime at all during the year.

[22] The reference at clause 10.3 to the winter season and the obvious purpose of that provision strongly suggests that winter is the off-season or low season for Fullers. On that basis the ‘season’ is spring, summer and autumn, the months Mr Parker said are the high season. I accept the evidence of Mr Parker that those months are when the Fullers tourism business is at it busiest and potentially most profitable.

[23] I conclude that the term *seasonal employee* was intended by the parties to the CEA to define a part of a year or a suitable time during which a launch master and other workers may be employed for rostered periods or on a casual basis. Therefore the provisions of clause 18.6 in relation to equitable sharing of work and preference only applied to Mrs Murray when she was employed to work as a casual during the high season. Casual employment at other times, such as in winter, did not give her the benefits or protections under clause 18.6.

[24] I accept that on this construction there may appear to be surplusage in the words used by the parties. Why refer to *sickness, accident or approved leave*, if those occasions of absence are covered by the general words of clause 18.1.4, as circumstances of seasonal demand and/or special circumstances to compliment the existing workforce? I conclude that those last words are intended as a catch-all, in case the situations referred to in 1.1, 1.2 and 1.3 of clause 18 are too narrow to apply to the particular circumstances requiring cover for a permanent employee.

[25] I find that the parties negotiated to provide express terms and conditions of employment for ‘seasonal’ casual employees only and made no provision in the CEA for non-seasonal casual employees. The employment of non-seasonal casuals appears not to be inconsistent with the CEA however.

Clause 10.3 provides for the rostering of seasonal employees to work on statutory holidays. Under clause 18.1 a seasonal employee can be a launch master employed on a casual basis. If rostered to work on a statutory holiday, clause 10.3 provides for the desirability of lieu days being taken during the *winter season*, where possible *in conjunction with rostered days off*. This implies the rostering of seasonal employees to work in the winter season and therefore is contrary to the construction of clause 18 that seasonal employees work only in the high season. If seasonal casuals are only employed during the high season (or non-winter season) it is difficult to see how they will be able to take lieu days during the winter season if they are unable to be employed as a seasonal worker then.

### **Determination of Dispute**

[26] While clause 10.3 does not leave the proper construction of clause 18.1 entirely free from doubt, I consider it is reasonably clear from the use of 'seasonal' that the parties to the 1997 CEC and 2008 CEA intended to limit employment under clause 18 to part of the year or to a suitable time of the year, being the high season.

[27] I conclude that in clause 18.1 the circumstances that may provide a reason for employing a seasonal employee on a casual basis are not circumstances that arise at any or all times of the year, but only those occurring over spring, summer and autumn. I find it is reasonable to infer the parties intended seasonal to mean during the high season, or the months of spring, summer and winter.

[28] Accordingly, to resolve the dispute between the parties about the interpretation, application or operation of the 2008 CEA, the Authority gives a declaration that under clause 18.1 a seasonal employee is a person engaged to cover a permanent employee during Fullers' high season, being the period from the beginning of October through until the end of April, approximately.

### **Resolution of grievance and breach of good faith claims**

[29] The evidence is clear that Mrs Murray was employed in February and March 2008. Ms Anne Abraham was rostered to work for Fullers in November 2008. This was after she had left her previous employment with Fullers and had commenced with another Bay of Islands tour operator.

[30] Ms Murray's employment in February and March of 2008 was within the terms of clause 18 and she became then, if not before, a seasonal employee. I find that under clause 18.6 she had an ongoing expectation of equitable sharing and preference with regard to further seasonal work, if there was any. The provisions of clause 18.6 required Fullers, as far as practicable, to allocate Mrs Murray an equitable share of that work and, wherever possible, give her preference to the work as a long-serving employee. Subject to what was practicable and possible in the circumstances, Mrs Murray had priority to be rostered on for the work Ms Abraham was engaged to do in November, or at any other times during the high season.

[31] The investigation of her claims about those matters will continue to a determination, unless the parties are able to resolve the claims themselves. There are a number of reasons why this employment relationship problem should be resolved by Mrs Murray and Fullers. When the CEA is renegotiated there will be an opportunity to improve the drafting of it, so that the words as clearly as possible express the intention of the parties in relation to seasonal and non-seasonal casual employment, if there is intended to be any distinction.

[32] Also, there is a retrenchment situation that has developed within Fullers since the 2008 merger of the Kings' business. Opportunities for further casual work, seasonal and non-seasonal, have become limited as a result. While there is evidence that Fullers did not comply with clause 18.6, in purporting to terminate Mrs Fuller's employment the requirements of that provision are not absolute but must be considered against what was *practicable* and *possible* in the circumstances.

[33] Further, in January this year Fullers made an offer to reinstate Mrs Murray under the CEA. She declined that offer on the basis that she was already under the CEA. Arguably the offer of 6 January 2010 was misleading in that clause 18.6 of the CEA should have been referred to as conferring a qualified entitlement to further employment after each period of seasonal casual employment. Arguably also, Mrs Murray's contended grievance in relation to the January 2010 offer is about actions of the employer that were derived solely from the interpretation or disputed interpretation of the CEA. If so, s 103(3) of the Employment Relations Act 2000 excludes those actions from becoming the subject of a personal grievance.

[34] Parties to an employment relationship have a mutual obligation to be active and constructive in maintaining it productively. In doing so they are required to be

responsive and communicative. Mrs Murray could have done more to communicate to Fullers her continuing availability for casual work, and not waited until she heard anything from Fullers.

[35] Even if, as Mrs Murray argues, Fullers dismissed her, it is a factor in the employer's favour which must be taken into account when assessing remedies, that it sought to repair any harm caused to an employee by its actions. Any monetary remedies recoverable by Mrs Murray are likely to be limited because of the relatively few days she worked each year as a seasonal employee and also because of difficulties in establishing long after the event what was practicable and or possible in the circumstances, for the purposes of clause 18.6 of the CEA.

[36] There was also the genuine attempt made at a personal level by Mr Parker who held out an 'olive branch,' to address with Mrs Murray her feeling that she had been badly treated. The injury to her feelings and sense of injustice she has experienced living in a smaller community may by agreement be addressed in ways other than financial compensation.

[37] I ask counsel to confer with a view to reaching a resolution of the outstanding claims. If that is not possible Ms Abaffy should advise the Authority and I will proceed to issue a final determination.

A Dumbleton  
**Member of the Employment Relations Authority**