New Zealand Employment Relations Authority Decisions

Robinson v Transfield Services (NZ) Limited AA 312/10 (Auckland) [2010] NZERA 607 (2 July 2010)

Last Updated: 3 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 312/10 5166978

BETWEEN BADEN ROBINSON,

applicant

AND TRANSFIELD SERVICES

(NZ) LTD, respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

James Wilson

Lou Yukich for the applicant Gillian Service for the respondent

22 October 2009 in Rotorua

20 November and 8 December 2009 & 21 June 2010 from the applicant
1 December 2009 and 25 June 2010 from the respondent

Determination:

2 July 2010

DETERMINATION OF THE AUTHORITY

Mr Robinson's employment relationship problem

[1] Mr Robinson's original statement of problem was filed with the Authority on 29 June 2009. However on 1 October 2009 the parties helpfully filed an amended joint statement of problem. In the joint statement the parties say that the problem they wish the Authority to resolve is:

... a dispute relating to Mr Robinson's terms and conditions of employment. Specifically, an issue has arisen regarding Mr Robinson's hours of work. The parties have different views of the dispute, being:

> *(a) Mr Robinson's view of the dispute is that Transfield Services cannot require him to work alternative days of the week as part of his ordinary hours of work, i.e. days and or hours that he was not required to work when first employed by Areva in 2005 being Saturdays, Sundays and Public Holidays and normal hours outside the hours of work advised to him by his supervisor at his commencement of employment being Monday to Friday starting at 7:30 AM through to 4 PM (07.30 thru 1600) Monday thru Friday inclusive, and to require that Baden not attend work without pay on any or all of the days Monday to Friday inclusive within his span of normal or clock hours;*
> *(b) Transfield Services view is that it can require Mr Robinson to work the new roster that has been introduced.*

[2] In the joint statement of problem the parties asked the Authority to determine:

(a) Mr Robinson's terms and conditions of employment;
(b) whether Transfield Services is able to require Mr Robinson to work the hours of the alternative roster; and
(c) what Mr Robinson should be paid.

Background

[3] The following is a brief summary of Mr Robinson's employment history with Transfield Services (New Zealand) Ltd and its immediate predecessors, and the events leading to this dispute.

Mr Robinson's employment history
[4] Mr Robinson commenced employment with AREVA New Zealand Ltd. in February 2005. He was employed as a full time permanent employee under an individual employment agreement (IEA) comprising a standard IEA and a covering letter. Following an amalgamation AREVA changed its name, to Transfield Services

E. & T. (New Zealand) Ltd, in June 2005.

[5] On 10 July 2005 Mr Robinson joined the Engineering Printing and Manufacturing Union (EPMU).

[6] On30 June 2007 Transfield Services E&T (New Zealand) Ltd. was amalgamated into Transfield Services (New Zealand) Ltd. (Transfield)

[7] On 30 October 2008 Transfield and the EPMU signed a new collective agreement with a term of 1 July 2008 to 30 June 2009. The CEA replaced a CEA in which the relevant clauses were identical and which had expired on 30 June 2008. The coverage cause of this collective agreement covered Mr Robinson's role.

Hours of work changes proposed.
[8] On 30 January 2009 Transfield and EPMU reached agreement regarding a process to trial an alternative roster (the mediated settlement) and on 1 June 2009 the planned roster trial commenced.

[9] On 3 June 2009 Mr Robinson joined the Electrical Union (EU) and at the same time revoked his membership of the EPMU

[10] Prior to the events which led to this dispute Mr Robinson had never been required to work weekends or overtime and requests for him to do so had been declined on the basis of personal circumstances. These circumstances had been explained to Transfield and relate to the fact that Mr Robinson's family provided regular respite care to the families of autistic children on weekends. However in June 2009, on the basis of the trial agreement between Transfield and EPMU, Mr Robinson was issued with a new roster which involved weekend work and rostered days off during the week. Mr Robinson asked to be excused from weekend duties for personal reasons but this request was declined.

[11] On Saturday 25 July 2009 Mr Robinson failed to work in accordance with the new roster and Transfield commenced a disciplinary inquiry. However after some discussion with Mr Robinson's union. Transfield agreed to suspend the disciplinary process to allow time for the Authority to investigate the dispute.

Mr Robinson's conditions of employment

[12] There is no dispute that, immediately prior to 6 June 2009, when Mr Robinson revoked his membership of the EPMU, his employment conditions where those set out in the *EPMU/Transfield Services telecommunications services collective employment agreement 2008 - 2009.* (the applicable CEA)

[13] The applicable CEA provided that

2.3 Except for written terms and conditions personal to the employee, the terms and conditions contained herein override and supersede any terms and conditions of employment that may have applied prior to the date of the application of this agreement.

[14] The only *written terms and conditions personal to (Mr Robinson)* are those contained in his original letter of appointment dated 17 February 2005, which provided , among other things:

You will also be required to work on weekends and on a roster basis covering seven days of the week. The details of the roster and your work schedule may vary according to business needs and will be provided by your supervisor.

[15] Mr Robinson says that the terms of this letter of appointment are (in the words of section 61(1)(b) of the Employment Relations Act 2000 (the Act), *inconsistent with the terms and conditions* of the collective agreement to which he became a party in October 2008. I do not accept that submission. The CEA clearly envisaged, at clause 2.3 (paragraph [13] above) that written individual conditions in effect prior to the settlement of that CEA should continue to have effect. In fact the wording of Mr Robinson's letter of appointment is entirely consistent with the hours of work clause in the collective agreement.

[16] From the day he resigned his membership of the EPMU, Mr Robinson became *employed under an individual employment agreement based on the collective employment agreement and any additional terms and conditions agreed under sub-section(1).*

(refer section 61(2) of the Act).

[17] For all practical purposes, therefore, Mr Robinson's conditions of employment did not change when he resigned from the EPMU. This included the terms and conditions set out in his letter of employment of 17 February 2005.

[18] At the time the EPMU and Transfield agreed the "mediated settlement" (January 2009) Mr Robinson was covered by the applicable CEA. If the mediated settlement had amended the applicable collective agreement it would have amended Mr Robinson's (and all other members' of the Union) conditions of employment. Any such altered conditions would have continued to apply to Mr Robinson after he resigned from the EPMU. However the mediated settlement did not amended the collective or any individual employee's conditions of employment and neither party is arguing that it did.

Other relevant CEA provisions

[19] As set out above, prior to June 2009 Mr Robinson's conditions of employment were those set out in the applicable CEA plus the individual conditions sets out in his letter of appointment of February 2005. After he resigned from the EPMU in June 2009 Mr Robinson's conditions, while now an individual agreement as opposed to a collective continued to be *based on* the conditions set out in the collective and continued to include those set out in his letter of appointment.

[20] The applicable CEA provides under a general heading

Provisions Relating to Hours of Work:

Hours of Work

> *10.1 Forty (40) hours shall constitute an ordinary week's work of which not more than twelve (12) may be worked between the hours of 6.00 am and 7pm on each day from Monday to Friday inclusive. Variations to ordinary hours may be agreed between the company, individual employees and the union.* (my emphasis)
> *10.2 The parties to this Agreement agree that the Company can organize its business in order to provide twenty - four (24) hours per day, seven (7) days per week services.*

10.3 The Employee's normal start and finish times will be as recorded in their personal letter. Accept as otherwise provided, employees will be required to start and finish work at the normal start and finish times (my emphasis)

The company says that in Mr Robinson's case, in the absence of any other written agreement, his letter of appointment of February 2005 is his *personal letter* as envisaged by clause 10.3 of the CEA. The Company also says that the mediated settlement agreed with the EPMU in January 2009 was simply the Company and the Union invoking the provisions of clause 10.2 as a mechanism to ensure that the introduction of a new roster system was the subject proper consultation.

Discussion and determination

[21] Mr Robinson's fundamental argument is that his contractual hours of work were not those set out in his letter of appointment or the applicable collective agreement. Rather, he says, his hours of work were those agreed by his supervisor/manager and which he worked from the time he was appointed. He says that these hours were verbally agreed between himself and his then manager and that he was assured that, despite the letter of appointment he would not be required to work weekends.

[22] Transfield, on the other hand, say that Mr Robinson's hours of work are those provided for in his letter of appointment and the applicable CEA and include a requirement that he work weekends on a roster basis as and when required. They say that they do not accept that Mr Robinson was given any assurance that he would not at some point be required to work weekends and rosters and that even if such assurances were given they did not constitute an amendment to Mr Robinson's conditions of employment as they were not in writing. It is Transfield submission that they did not need to gain Mr Robinson's individual agreement to change his hours of work and that the consultation with the EPMU was simply an attempt to ensure that the introduction of a new roster system caused as little disruption as possible to the employees.

[23] After carefully considering all of the submissions from the parties and working methodically through the various documents, I have reached the following conclusions in respect to the questions posed by the parties.

1. As at the end of June 2009 (i.e. after his resignation from the EPMU) **Mr Robinson's terms and conditions were based on the applicable CEA and included the provision's set out and his letter of appointment of February 2005 regarding his hours of work.** In this respect I accept Transfield's argument that, as there is no written agreement to amend the conditions set out in the letter of employment, any verbal understanding Mr Robinson may have had did not constitute such an amendment.

2. There is a consistent provision running through all of the various employment agreements applicable to Mr Robinson throughout his employment, providing that individual employees could and did agree specific conditions of

employment and these were set out in a *personal letter*. In particular:

- Page 2 of Mr Robinson's original individual employment agreement says *your personal letter records your normal work schedule.*
- Mr Robinson's letter of appointment of 17 February 2005 says that the proposed terms of employment *comprise the AREVA (standard IEA) and the following additional terms....* That letter specified that Mr Robinson *will also be required to work on weekends and on a roster basis covering seven days a week.*
- Mr Robinson subsequently became a party to a series of collective agreements all of which include reference to *written terms and conditions personal to the employee.* In my finding this reference was intended to preserve those specific, individual, conditions previously agreed by individual employees and contained in such documents as their letters of appointment.

3. In accordance with clause 10.1 of the applicable CEA **Mr Robinson's contractual hours of work could not be changed without his individual agreement.** I do not accept Transfield submission that the union was authorized by its individual members to agree to vary their individual hours of work. Had the parties intended such an interpretation of clause 10.1 the wording would not have included the reference to *individual employees.* On the contrary the wording is consistent with previous agreements between the parties and the acceptance that individual employees have agreed personal arrangements as set out in their *personal letters.*

However:

4. Mr Robinson's hours of work, as set out in his letter of appointment, included a provision that he could *also be required to work on weekends and on a roster basis covering seven days of the week.* **Subject only to a reasonable consultation process, carried out in good faith, Transfield could require Mr Robinson to work weekends as part of a 7 day roster.**
5. As and when Mr Robinson was required to work weekends, as part of a roster, he would be entitled to be paid in accordance with the relevant clauses of the applicable CEA.

Costs

[24] Costs are reserved. Given the nature and outcome of this matter I am inclined to the preliminary view that costs should lie were they fall. However should Transfield wish to pursue the matter of costs they should first discuss the issue with Mr Yukich, on behalf of Mr Robinson. If they are unable to reach agreement then they may file and serve submissions in respect to costs within 28 days of the date of this determination. Mr Robinson will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority
