IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 98/09
5098366

	BETWEEN	PATI AH SUE & ORS Applicants
	AND	HMSC-AIAL LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Mike Treen, advocate for Applicants Rob Towner, counsel for Respondent
Investigation Meeting:	23 April, 19 August and 16 October 2008, 24 and 27 February 2009
Submissions Received	26 February 2009
Determination:	30 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated claims brought by several past and present employees of HMSC-AIAL Limited that on various occasions up to the end of April 2007 they did not receive in full their entitlement to a rest break as provided by their employment agreements.

[2] HMSC-AIAL Limited is a joint venture company that operates food and beverage outlets in the terminal building at Auckland International Airport.

[3] At material times the applicants were employed under individual employment agreements which, in relation to hours of work, contained or had incorporated into them by reference to a collective contract, the same provision for breaks as follows:

3.4 ***Breaks***

The following meal and rest breaks will be allowed:

- *A half hour unpaid meal break after not more than every five continuous hours of work; and*
- *A rest break or breaks from work not exceeding twenty minutes in total each full working period of not less than eight hours in any day without deduction of pay; or*
- *A rest break from work of ten minutes in a scheduled working period in excess of three hours but less than five hours*

Provided that the prescribed breaks may be delayed on any day to ensure continuity of food and beverage services or through the needs of the Company's business.

[4] Eight employees claimed the rest break entitlement when this application was brought to the Authority but since then more employees have been joined into it.

[5] To resolve their employment relationship problem the employees, who are represented by Unite their union, seek:

- A declaration that HMSC-AIAL Limited failed to provide a break of twenty minutes in each eight hour shift at material times and consequently breached the employment agreement; and

- An order for *"reasonable compensation"* for that breach, calculated at the applicable rate at the time of breach together with interest, or alternatively at the current (2009) rate of pay without interest.

[6] The parties have attempted to resolve the problem by use of mediation.

[7] To date the evidence of five witnesses presented by HMSC-AIAL Limited has been examined. Four of the claimants have given evidence, and also Mr Mike Treen and Mr John Minto of Unite in support of the claim. There are a number of employees who have yet to give evidence.

[8] The investigation is now adjourned to allow the parties a further opportunity of resolving the problem by agreement reached on their own terms.

[9] Mr Towner counsel for HMSC-AIAL Limited proposed, and I agreed, that final resolution might be assisted if before mediation was resumed the Authority determined the claims in relation to the four employees so far heard and examined.

[10] A determination was therefore given orally on 27 February 2009. It was against the four applicants, upholding the employer's position on the claims.

[11] The claims of the remaining employees may continue to be investigated, if required, especially in the event that mediation does not resolve them.

[12] This determination puts into writing the determination and reasons for it given orally to Mr Towner and Unite's advocate Mr Treen, after submissions in writing from them had been made.

Determination

[13] The claimants seek the remedies of a declaration as to their rights or entitlements under the employment agreement. They also seek payment of compensation for each rest break, or part of a rest break, allegedly untaken by them at material times when due.

[14] I find that there is no difficulty as a question of law with the interpretation of rest break provisions in the employment agreements, but as to the central factual issue the main finding of the Authority is that the evidence provides no basis, or no sufficient basis, upon which orders of any kind could or should be made by the Authority. This finding is confined to the four employees named.

[15] The only declaration the Authority makes is the obvious one, that clause 3.4 of the employment agreements in the case of each claimant required the employer to allow a rest break or breaks, without deduction of pay, not exceeding a total of twenty minutes in each full working period of not less than eight hours in any day. The employment agreement expressly and plainly provided for that.

[16] The contentious factual question is whether each claimant did not, even once, have the prescribed rest break when eligible at material times prior to the end of April 2007. In that regard I find the weight of evidence is against the applicants in their claims.

[17] The information supplied by the employer in its extensive Summary of the applicants' claims shows that there were about 76 employees at material times working as Associates, the same position the 14 applicants were employed in. The Summary shows there were some 13,000 occasions on which shifts of eight hours or longer were worked at those times by all Associates including the 14 applicants.

[18] For 12 of the 14 applicants there were about 4,100 such occasions. Two applicants, Carol Leota and Antony Ryan, are not included in the Summary information.

[19] The applicants in their written evidence each asserted that throughout their employment prior to the end of April 2007 they had received only a break of 10 minutes on any occasion they worked at least eight hours, and not once had they received a break of 20 minutes.

[20] It is of some relevance that only 18 of 76 workers have complained to the Authority that they were not afforded their full entitlement to rest breaks.

[21] A distinct disadvantage in resolving this case has been the lack of recording of the breaks to evidence with more certainty that they either had or had not been taken for 20 minutes in total when due. There is now only the recollection of the witnesses to go on.

[22] Because of the nature of HMSC–AIAL's undertaking in which the claimants are employed, there were some limitations on the ability of the employer to apply clause 3.4 with any great precision to the circumstances that might have arisen on any day, or to create a system that would ensure employees had the break available under the employment agreement. The *"needs of the Company's business"* could lead to variable work patterns, as is recognised by the inclusion of the proviso at the end of clause 3.4.

[23] It is also relevant that the employer endeavoured to run its enterprise by minimising wherever possible the number of occasions on which an employee worked for longer than about seven and a half hours. It was permitted to do that under the terms of employment but this inevitably must have created some uncertainty on a day to day basis about the length of a shift or the time at which an employee could expect to work until. Whether the 20 minute break would become an entitlement was therefore often unknown at the beginning of a working day.

[24] However fluctuations and uncertainties notwithstanding, this case would not have arisen in all likelihood if the employer had implemented at material times a practice of recording and signing-off the taking of breaks, or the making of that opportunity to have a break available to each employee. Unite's involvement in this matter on behalf of its members led to that practice being implemented from April 2007 and the applicant's claims go only up to then.

[25] I accept that the existence of the right to the rest break in accordance with clause 3.4 was not hidden from the employees. It was either fully stated in each individual employment agreement or incorporated by reference to the collective employment contract covering employees between 1999 and 2002. Most importantly, I find, the employer gave each new employee an induction at which the availability of breaks under clause 3.4 of the employment agreement was explained.

[26] The evidence of Ms Diane King in particular about his has persuaded the Authority to accept the employer's position. Ms King is now Purchasing Manager for the company but she started out fifteen years ago in the same role of Associate as the applicants. Twice a week currently she supervises shifts and in doing so has the responsibility for issuing rest breaks and managing staff.

[27] Ms King's evidence was that when she worked as an Associate she always had a second 10 minute break if she worked eight hours or more in a single shift. When she currently supervises shifts she gives associates the second 10 minute break, once it is known they will work eight hours. She acknowledged that the administration of the rest breaks before the end of April 2007 had been informal in the sense that there had been no recording of the breaks taken and that the flexibility required of work patterns prevented scheduling of the breaks.

[28] Unite built the applicants' case partly on a claim that the employer admitted to having had an incorrect understanding of the requirements of clause 3.4 as to the timing of rest breaks. Mr Minto a Unite Organiser said in evidence that when the issue was taken up with the company in April 2007 its General Manager, Ms Anne Singe, claimed that the entitlement to a 20 minute break only applied when a shift of 8 ½ hours was worked. He said that after discussion with its advisors the company had then agreed this was incorrect and had also agreed that it *"had not been meeting its contractual obligations."*

[29] Such admissions, if made, might easily inspire claims to enforce entitlements. However I find the admissions were not expressly made by the company. Mr Treen also a Unite official, who was present with Mr Minto during the discussions with Ms Singe and company advisors, said that only the body language of the company representatives had conveyed to him any acknowledgement that the rest break provisions had not been complied with. I consider that if dismay was shown by management such a reaction was equally attributable to a discovery by them that the absence of a system for signing–off on the second break had caused a potential problem requiring to be fixed.

[30] I agree with Mr Towner it is highly improbable that company management was unaware of the requirements of the rest break clause in the standard employment agreement signed up to by the company and each Associate. The agreement was obviously drafted by the company and its contents were also from time to time the subject of a formal induction carried out with each new employee.

[31] There were witnesses who said they had received the full break entitlement prior to April 2007. It is reasonable to assume that their supervisors had been aware of that at the time and are likely to have stopped the employees from having any break they were not entitled to, or to have challenged them as to their right, if this was regarded as a problem. There was no evidence that happened.

[32] I turn to the claims of each of the four applicants this determination is concerned with.

Kapeneta Malaeimi

[33] Ms Malaemi's employment contract records that she commenced with HMSC-AIAL on 22 May 2000. The Summary produced by the employer shows 846 occasions during the claim period on which she worked a shift of eight hours or longer. As ten minutes have been claimed for each occasion, she seeks to recover payment for 141 hours.

[34] As with the other three claimants whose evidence has been heard so far, Ms Malaeimi gave little detail about her claim. She asserted that during her relevant period of employment (spanning some six years) *"I was only ever given a ten minute break for the eight hour shifts I worked."* Her claim therefore is that over a period of

some six years, on 846 separate occasions not once did she ever receive the full 20 minute break required under clause 3.4.

[35] Ms Malaeimi also asserted that for the entire period of her claim she had been unaware that her employment agreement made provision for a 20 minute paid break whenever her shift was eight hours or more.

[36] The employer's evidence was that upon engagement each new employee was taken through an induction process, an event which as shown by the evidence was noted or recorded in writing. During that process the employees were instructed about the availability of rest breaks.

[37] I do not consider there was anything in the evidence of Ms Malaeimi, including her sweeping assertions, to seriously contradict the evidence of the company witnesses. I agree with counsel Mr Towner that it is reasonable to infer from the company's evidence that the rest break to be provided under clause 3.4 was fully available to the claimants during the period in question. The entitlement to the breaks had been clearly set out in the employment agreement of Ms Malaeimi, and those of the three other claimants whose evidence has been heard.

[38] Ms Maleaimi's claim is not established.

Carol Leota

[39] There was a significant inconsistency in Ms Leota's evidence which I find must reflect upon her reliability as a witness in this case. She gave exactly the same written evidence as Ms Malaeimi, as indeed did all four applicants, that throughout her employment with HMSC-AIAL she had been unaware of her right to 20 minutes of paid break during an eight hour shift.

[40] In oral evidence she conceded that her written declaration made at the time of entry into the employment agreement was a true declaration. According to it she had read and understood the terms of her employment which included, by reference to the collective contract, the rest break provisions of clause 3.4. She was therefore aware of her right in this regard, contrary to what she said in her written statement. In her oral evidence she conceded she had known of the rest break entitlement.

[41] This is confirmed by the account given by Ms Leota of the induction she received at commencement of her employment, and is further confirmed by the account given by company witnesses of the content of the induction usually given. I find that Ms Leota knew she was entitled to paid rest breaks to a total of 20 minutes when 8 hours was worked. Ms Leota did not claim that she had been actively prevented or dissuaded from taking the break by any of her supervisors. I find it unlikely that she was not offered the break or did not take that break on most, if not all, of the 239 occasions when her shift was 8 hours duration. Her claim is not established.

Alafou Leitu

[42] I find from her evidence and the company evidence of the formal induction process, that Ms Leitu knew she was entitled to the full 20 minute break in total during any shift of eight hours. There were only 11 of these in her case. She confirmed that she had not been stopped from taking that break. Her claim is not established.

Anthony Ryan

[43] Mr Ryan conceded he had understood the rest break provisions in his agreement. He acknowledged, contrary to his written evidence, that he had known of his entitlement to what he called a second paid break once eight hours had been worked. The Summary does not give the data but I estimate that there were approximately 100 occasions over the period in question when he worked for at least eight hours and therefore qualified for the total of 20 minutes paid break. Mr Ryan's claim is not established.

Appropriate remedy for any breach of clause 3.4

[44] Had I found that any of the four employees this determination is concerned with did not receive all the rest breaks he or she was entitled to under clause 3.4, a consideration of the remedy sought of *"reasonable compensation"* would have raised at least two problems. The first is ascertaining when the occasions were that the break was not provided, and how many times this occurred over periods of employment stretching to several years in some cases.

[45] A second problem is that if any employee did not have the break when required, wages for that time were paid regardless of what the employee did during it. In principle an employee may not recover payment a second time for the same period, or double-dip. The compensation sought is referable to wages payable for time worked rather than being compensatory damages assessed according to the intrinsic value of an opportunity to have a rest from work.

[46] No claim for a penalty for breach of an employment agreement has been sought, nor has compensation as a remedy available from a successful disadvantage personal grievance claim. Statutory limitation periods will have some influence on the ability of employees to seek either of those remedies now.

[47] I agree with Mr Towner that an appropriate remedy for the situation as alleged to have occurred up to April 2007 would have been compliance under s 137 of the Employment Relations Act 2000, to prevent any recurrence of a breach. As the applicants accept that after April 2007 they received all rest breaks due to them, any earlier breach has therefore been rectified and for that reason compliance is no longer available.

[48] It is possible there may have been occasions when for one reason or another an employee did not have a paid rest break, or did not have one to the full extent provided under clause 3.4, but there is no evidence that the employer deliberately or systematically deprived any employee of that opportunity. It is possible there were some occasions when employees elected not to rest during the period of break available to them, or before eight hours had been worked took a longer break in anticipation of qualifying for the full 20 minutes later on.

Continuation

[49] Following mediation Mr Treen is to advise the Authority if the matter has been resolved and, if it was not, whether any of the applicants require the investigation to be continued.

Costs

[50] Costs are reserved until all the claims of all employees have been resolved whether by mediation, determination or any other means.

A Dumbleton
Member of the Employment Relations Authority