

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 11
3073292

BETWEEN LOUISA SHANNON
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Davinnia Tan

Representatives: Emily Griffin, counsel for the Applicant
Kevin Thompson, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 1 March 2023, 7 August 2023, and 30 November 2023
from the Applicant
10 March 2023, 18 August 2023, and 27 November
2023 from the Respondent

Determination: 12 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Shannon was a 'flexi' part time flight attendant with Air New Zealand Limited (Air NZ). On 25 December 2017 she commenced work at 7:15 AM and finished at 4:34 PM, having worked a total of 9 hours and 19 minutes (9.32 hours). She was paid \$127.01 for that day.

[2] Ms Shannon claims that Air NZ has not paid her in accordance with s 50 of the Holidays Act 2003 (HA) by incorrectly calculating her 'relevant daily pay' (RDP) under s 9(1) of the HA as 1/365th of her salary. As she only works 130 days a year, the correct notional RDP should be her annual salary divided by 130, and not 365.

[3] As at 25 December 2017, Ms Shannon was a member of E tū and covered by the Collective Employment Agreement (CEA).

[4] Ms Shannon also claims that pursuant to s 6(3) of the HA, clause 11.5 of her CEA has no effect because it reduces her entitlements under the HA.

[5] Air NZ rejects Ms Shannon's position and considers that she has been paid in accordance with sections 9 and 50 of the HA and clause 11.5 of the CEA.

The Authority's investigation

[6] A statement of problem was first lodged with the Authority on 2 September 2019, following which the parties were directed to mediation. Having not heard back from the parties, on 27 November 2020 the Authority sought further information from the parties. No response was provided, and the application was subsequently closed.

[7] In August 2022, counsel for Ms Shannon re-activated the matter and the parties attended mediation on 31 October 2022. Mediation was unsuccessful.

[8] On 25 November 2022 the Authority received memorandum from Ms Shannon's counsel to continue proceedings with the Authority.

[9] A case management conference was held by Member Arthur with the parties' counsel on 19 December 2022. It was agreed that as Ms Shannon's claim regarding payment on 25 December 2017 was still within time under s 142 of the Act, the matter would be heard on the papers. A fresh statement of problem and statement in reply were subsequently lodged with the Authority.

[10] For the Authority's investigation a sworn affidavit, signed 9 February 2023 by Ms Shannon, was provided. A sworn affidavit signed 8 March 2023, by Mijo Katavic (Air NZ Auckland Senior Manager, Cabin Crew) was also provided.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[12] The issues requiring investigation and determination were:

- (a) What did the terms of the relevant collective agreement and the relevant statutory provisions require Air NZ to pay Ms Shannon for working on 25 December 2017?
- (b) If there was a shortfall in payment due to her, what should she be paid now?
- (c) Should either party contribute to costs of representation of the other party?

What did the terms of the relevant collective agreement and the relevant statutory provisions require Air NZ to pay Ms Shannon for working on 25 December 2017?

Clause 11.5 of the CEA

[13] Clause 11.5 of the CEA states:

As provided for in the Holidays Act 2003, if a Cabin Crew Member performs work on a public holiday by way of performing any rostered duties...the Cabin Crew Member shall receive time and a half in compliance with the Holidays Act 2003 for work performed on that day, calculated in accordance with section 9(1) and section 50 of the Holidays Act 2003. Recognising that Cabin Crew Members are paid an annual salary on a daily basis (7 days per week) it is agreed that a compliant calculation for the purposes of the Holidays Act 2003 will be to derive the daily rate (salary divided by 364), which amount is then multiplied by 150%, regardless of the duration of the work duties performed.

The Holidays Act 2003

[14] Section 50(1) requires an employer to pay an employee at least time and a half for working on a public holiday. It states:

If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of –

- (a) The portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
- (b) The portion of the employee's relevant daily pay that relates to the time actually worked on the day.

[15] Section 9(1) defines 'relevant daily rate' as meaning the amount that the employee would have received had the employee worked on the day concerned.

[16] Section 6(3) sets out that an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act has no effect to the extent that it does so.

Ms Shannon's submissions

[17] Counsel for Ms Shannon submitted that a main issue that the decision of *New Zealand Airline Pilots' Association Inc and Ritchie v Mt Cook Airlines Limited (Mount Cook)*¹ does not address is the effect of s 6 of the HA. It is therefore submitted that the Authority is not bound by *Mount Cook* and that clause 115 of the CEA has no effect because it "excludes, restricts, or reduces" Ms Shannon's entitlements under the HA.

[18] Relying on *FENZ*,² counsel also submitted that if the net effect of an agreement results in the reduction of the minimum entitlement, the result is 'impermissible'.

[19] In Ms Shannon's affidavit she stated that the fulltime salary of an inflight service manager is \$49,565. The flexi part-time is pro-rated to 54% of the fulltime salary which is \$26,765.10. Ms Shannon confirmed this was her salary in 2017. Being salaried meant that her pay was spread out evenly over 26 fortnights in the year. She stated in the pay period where she worked 25 December 2017, she had only worked one day that period, but would have made up for the other 9 days of work over the rest of the 28-day roster.

[20] Ms Shannon stated that her hours of work fluctuate from roster to roster. There are 13 rosters per year and each roster is for 28 days. As part-timer, she would work the equivalent of 130.4 days a year and get paid fortnightly.

[21] Counsel submitted that what Ms Shannon was paid for on 25 December 2017 (\$127.01) is less than the hourly minimum wage at \$13.09 per hour.

[22] Ms Shannon believes that the correct method to calculate her pay for the hours worked on 25 December 2017 ought to be based on a divisor of 130.4 as that is the number of actual days she was rostered to work per annum (the number of days a part

¹ *New Zealand Airline Pilots' Association Inc and Ritchie v Mt Cook Airlines Limited* [2012] NZEmpC 218 (*Mount Cook*).

² *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union* [2023] NZEmpC 90 (*FENZ*) at para [50].

time worker is required to work). Ms Shannon stated that this would have meant that her RDP would be calculated as follows:

| | | |
|---------------------------|---|------------------|
| \$26,765.10/130.4 days | = | \$205.25 per day |
| Short haul allowance | | \$8.6296 per day |
| FA1 recognition allowance | | \$2.51 |
| RDP | = | \$216.39 |

[23] The total of \$216.39 multiplied by 50% would amount to \$108.20. Therefore, when added with the RDP, Ms Shannon says she ought to have been paid \$324.59, and not \$127.01 for working on 25 December 2017.

Air NZ's submissions

[24] Counsel for Air NZ submitted that to calculate the amount Ms Shannon would have received for the day in question (her RDP), Air NZ used the divisor of 364 of the salary and applied the 50% loading. Air NZ's case is that this is not only the correct amount under s 9(1) and s 50(1) of the HA, but is the required payment under clause 11.5 of the CEA.

[25] In response to the question posed on what amount Ms Shannon would have received had she worked on 25 December 2017 but for public holiday, Counsel for Air NZ submitted that she "receives her salary each day in daily increments of salary divided by 364. RDP was \$84.68, arrived at by dividing the salary and taxable allowances by 364."

[26] The portion of that RDP that relates to the time worked on 25 December 2017 plus half that amount again is RDP x 150% which is \$127.01.

[27] Air NZ stated that even though Ms Shannon was a part-time flight attendant, and that part-time flight attendants work a fewer number of days each roster, they still receive an entitlement for all 11 public holidays (regardless of whether the public holiday was a working day or not). Then for a public holiday worked, clause 11.5 applies.

[28] Air NZ disagrees that clause 11.5 is affected by s6(3) of the HA because it does not exclude, restrict, or reduce any entitlements under the HA.

[29] Air NZ stated that the remuneration arrangements for flight attendants require an annual salary to be paid which is paid by way of fortnightly payments with each day paid, and regardless of whether any work is provided. Air NZ noted that the number of days and hours worked in each roster period vary. For example, Ms Shannon's pay slip for the period 25 December 2017 to 7 January 2018 shows that there are 14 pay events representing each of the 14 days in the fortnight, even though Ms Shannon only worked for one day in that fortnight.

[30] Air NZ submitted that this pay structure and the CEA gives rise to the 365/364-day model which means the salary is divided by 364 and each day is paid. Air NZ said that it is common ground that for these reasons flight attendants are not paid by the hour, or weekly, and are therefore fortnightly paid employees.

[31] The pay slip set out the following to calculate the public holiday worked:

| | |
|---|-----------------|
| Salary amount - \$26,765.10/364 | \$73.53 |
| Short haul allowance for part-time - \$3,141.18/364 | \$8.63 |
| FA 1 allowance ³ - \$915.86/364 | \$2.51 |
| Total | \$84.68 |
| Public holiday loading of 50% | \$42.34 |
| Total | \$127.01 |

[32] Mr Katavic's affidavit stated that a week under the CEA is a period of 7 days and not 5 (as might be the case for a Monday to Friday worker) and each of those 7 days is paid. The construct of the CEA requires that payments to flight attendants and the payroll to be structured this way as there is no ability to predictably separate the working days from the non-working days in any roster period. If it was not structured this way then flight attendants would need to be paid daily which would result in extreme pay variability.

[33] Mr Katavic also stated that based on Ms Shannon's calculation, she would have been paid \$324.59 for 25 December 2017, but she was actually paid \$1,326.69 for one day worked in that fortnight. As such, in order to be paid with reference to actual days or hours worked, Air NZ would require a very different contract and pay structure altogether, including a very different way to deliver leave and other entitlements.

[34] In response to the minimum wage issue that Counsel for Ms Shannon raised, Air NZ submitted that there is no minimum wage issue. This is because the minimum

³ Air NZ noted that it received advice from Payroll that the FA1 allowance should also have been prorated under the CEA but has not been which resulted in a slight overpayment. This allowance no longer exists.

wage assessment for Ms Shannon must be done with reference to what she is paid per fortnight. Ms Shannon was paid \$1,326.69 for the fortnight and therefore is in line with s 4(d) of the Minimum Wage Order 2017.⁴

Analysis

[35] Having reviewed the evidence and parties' submissions on this issue, I find that Air NZ has correctly calculated Ms Shannon's RDP and applied the provisions of the HA correctly in paying her \$127.01 for working 25 December 2017. My reasons follow.

[36] Firstly, determining what an employee's RDP in any work context, is a fact specific inquiry.⁵ In declining leave because it did not consider the question of what "received" means of requisite general or public importance, the Court of Appeal in *New Zealand Airline Pilots' Association Inc and Ritchie v Mount Cook Airlines Limited*⁶, noted that the decision is "fact intensive":

We doubt that the answer to the question of the meaning of "received" in s 9(1) would necessarily provide useful guidance in cases of other salaried workers. The employment arrangement of such employees is likely to involve a wide range of collective employment agreements involving different industry or business contexts with highly varying work conditions and a range of payment mechanisms. Each case is likely to turn very much on its own facts.

[37] Turning to the specific facts here, it is relevant that Ms Shannon was paid fortnightly regardless of the hours or days she worked in that fortnight. This meant that when she worked on 25 December 2017 as the only day during the fortnight of 25 December 2017 to 7 January 2018, she was paid for each of the 14 days in that fortnight. This mirrors the facts in *Mount Cook*⁷ where the pilots were paid an annual salary each year and payments were made by regular fortnightly payments for each of the 14 days in a fortnightly period notwithstanding that their work hours would vary on any given day.

⁴ S 4(d) of the Minimum Wage Order 2017 specifies that the minimum rate of wages payable to an adult worker is \$1,260 per fortnight.

⁵ *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union* [2023] NZEmpC 90 (FENZ); *New Zealand Airline Pilots' Association Inc and Ritchie v Mount Cook Airlines Limited* [2013] NZCA 174 at paras [14] and [15].

⁶ *New Zealand Airline Pilots' Association Inc and Ritchie v Mount Cook Airlines Limited* [2013] NZCA 174 at paras [14] and [15].

⁷ *New Zealand Airline Pilots' Association Inc and Ritchie v Mt Cook Airlines Limited* [2012] NZEmpC 218 (*Mount Cook*).

[38] Subsequently, the Court of Appeal⁸ commented on the rationale of the Employment Court's finding that the appropriate divisor for calculating RDP in those circumstances was '365':

A pilot's salary, by definition payable for a year's service, was payable no matter how many rostered days were worked. The payment of a daily amount was the only practical way the payroll could work with the contracted rostering system. This method had been accepted by the parties from the beginning and was consistent with the terms of the agreement.

[39] On the facts, I am unable to find any differences that would distinguish Ms Shannon's circumstances from those in *Mount Cook*⁹.

[40] In reaching this view, I have taken into account *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union (FENZ)*.¹⁰

[41] I consider *FENZ* distinguishable on its facts because the parties in those circumstances had agreed to express contractual terms for firefighters working overtime to be paid time and a half, whether that work was performed on a public holiday or not (making 1.5 the relevant daily rate), and *FENZ* claimed therefore the rate already included the time and a half requirements in s 50 of the HA. The Employment Court disagreed with *FENZ*, and agreed with the Authority that the correct rate was 2.25 following the application of s 9 and s 50(1) of the HA. Noting that what an employee receives on "the day" is intensely fact specific, Judge Corkill stated:

If overtime is worked on a public holiday, s 9 requires the starting point to be the applicable overtime rate. Under s 50, a multiplier of 1.5 must then be applied.¹¹

[42] Secondly, I agree with counsel for Air NZ that there is no minimum wage issue in Ms Shannon's circumstances. Section 4(d) of the Minimum Wage Order 2017 provides for a minimum of \$1,260 per fortnight to be paid to an adult worker. As it has been established that Ms Shannon was paid \$1,326.69 for the fortnight 25 December

⁸ *New Zealand Airline Pilots' Association Inc and Ritchie v Mount Cook Airlines Limited* [2013] NZCA 174 at para [19].

⁹ *New Zealand Airline Pilots' Association Inc and Ritchie v Mt Cook Airlines Limited* [2012] NZEmpC 218 (*Mount Cook*).

¹⁰ *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union* [2023] NZEmpC 90 (*FENZ*).

¹¹ *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union* [2023] NZEmpC 90 (*FENZ*) at para [48].

2017 to 7 January 2018 and that she is paid fortnightly, not hourly and not weekly, there is no issue of non-compliance here.

[43] Finally, I have also considered whether s 9A(2) is applicable in these circumstances and sought supplementary submissions from both parties on this. Both parties agree there is no dispute on the “ordinary” time part of Ms Shannon’s public holiday and that they disagree on how RDP should be calculated.

[44] Counsel for Ms Shannon submitted that the correct methodology is to divide Ms Shannon’s annual salary by 130 whether s 9(1) or s 9A is applied, and the result would be the same because the two sections are designed to ensure compliance with s 50(1) of the HA.

[45] Air NZ submitted that s 9A is a permissive approach and that neither party has indicated that it is not possible or practicable to determine RDP, or that Ms Shannon’s daily pay varies within the pay period when the holiday fell. As such s 9A is not applicable nor relevant.

[46] Air NZ however stated that even if s 9A was to be considered, the ‘b’ denominator would be ‘364’ and not ‘130’ because there are no “other days” to exclude because every day has been paid.

[47] Having reviewed parties’ further submissions on this matter, I have reached the methodology to calculate average daily pay under s 9A is not applicable. This is because I do not consider the qualifying criteria in s 9A(1) to have been met.

[48] I accept that it is a permissive provision and not mandatory, but it must first be established that it is “not possible or practicable” to determine Ms Shannon’s relevant daily pay under s 9(1). Submissions were not advanced on this point for Ms Shannon although I acknowledge it would have been met with some difficulty in light of the evidence on hand that for each fortnightly pay slip, there are 14 daily pay events representing each of the 14 days in the fortnight, even where not all 14 days were actually worked. This was precisely what happened when Ms Shannon only worked 25 December 2017 for the pay period of 25 December 2017 to 7 January 2018. This meant that it was not only possible to determine her relevant daily pay, her daily pay also does not vary within the pay period 25 December 2017 to 7 January 2018. Therefore, the qualifying criteria in s 9A(1) were not met to trigger the provisions of s 9A(2).

If there was a shortfall in payment due to her, what should she be paid now?

[49] As I have found that Ms Shannon has been paid accordingly to the terms of her employment and the HA, it follows that there is no shortfall in payment due to her.

Outcome

[50] I find that Ms Shannon's case is not made out.

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[52] If they are not able to do so and an Authority determination on costs is needed Air NZ may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Shannon would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Davinnia Tan
Member of the Employment Relations Authority

¹² See www.era.govt.nz/determinations/awarding-costs-remedies.