IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 7
ARC 101/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AIR NEW ZEALAND LIMITED Plaintiff
AND	RANDALL WULFF Defendant

Hearing: on the papers - memoranda received 30 March, 23 April and 11 May 2012

Appearances: G L Norton, counsel for the plaintiff
P F Wicks, counsel for the defendant

Judgment: 1 February 2013

SUPPLEMENTARY JUDGMENT OF JUDGE A A COUCH

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[1] On 6 December 2010, I gave my substantive judgment in this matter.[1] The remedies granted to Mr Wulff included reinstatement and I reserved leave to apply for directions if there were any issues about implementing reinstatement. Counsel for Mr Wulff has now sought directions regarding the manner in which Air New Zealand has calculated his entitlement to sick leave following reinstatement.

[2] I have been asked to give directions in relation to two issues:

(a) The amount of accrued sick leave to which Mr Wulff was entitled on reinstatement; and

(b) Whether that entitlement should be reduced to reflect "notional usage" during the period Mr Wulff was not working.

[1] [2010] NZEmpC 158.

Sick leave entitlement on reinstatement

[3] Mr Wulff was dismissed on 7 November 2008. His personal grievance was determined by the Authority on 4 December 2009.[2] Regarding remedies, the Authority said:

> [91] I therefore make the following orders:
>
> i. the respondent is to reinstate Mr Wulff to his former role on a date to be agreed between the parties, and
>
> ii. the respondent is to pay to Mr Wulff lost earnings from the date of this determination to the date of reinstatement.

[4] In my decision, given on 6 December 2010, I concluded:

> [158] In summary, my judgment is:
>
> a) Mr Wulff was unjustifiably dismissed.
>
> b) The order for reinstatement made by the Authority is confirmed. If any issues arise about implementing reinstatement, leave is reserved to apply to the Court on notice for directions.
>
> c) The Authority's order that Mr Wulff be reimbursed for remuneration lost between 4 December 2009 and the date of his reinstatement is confirmed.
>
> d) Mr Wulff contributed to the situation giving rise to his personal grievance to an extent which requires that he be awarded no remedies under s 123 of the Employment Relations Act 2000 other than those confirmed above.
>
> e) The challenge is unsuccessful.

[5] When an employee has been dismissed and away from the workplace for some time prior to reinstatement, it may not be practicable or sensible for reinstatement to be implemented immediately. That is especially so in cases such as this one. Commercial flying is a heavily regulated industry in which safety and other requirements change. Flight crew must be up to date with all current requirements. They are also rostered well in advance. For these and other reasons, it can reasonably be expected to take time to reintroduce a staff member back onto the job. On the other hand, an employee who is to be reinstated should not be deprived of income and the other benefits of employment while the employer makes the necessary arrangements for that to happen. The answer, as in this case, is to provide

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[2] AA 433/09.

for the employee to be paid from the time the order for reinstatement is made but delay resumption of work to enable the employee to be effectively reintegrated into the workforce. Sometimes that is done by specifying a future date on which the employee is to be actually back on the job. In other cases, particularly where the reintegration process is likely to be complex or aspects of it are unknown, it is achieved by leaving it to the parties to manage in good faith.

[6] In either case, the assumption is that the employment relationship is resumed immediately and it is only the provision and performance of work which is delayed. That is consistent with the leading authority[3] on the test for reinstatement which is in terms of “reimposition of the employment relationship”.

[7] On close analysis, the words used by the Authority to express its order for reinstatement are equivocal but my understanding of it, which I reflected in my decision to sustain the order, was that the employment relationship was to resume immediately the determination was given. The intended effect of my decision, therefore, was that the parties’ employment relationship should be regarded as having resumed on 4 December 2009 and to have been continuous since that date.

[8] Mr Wulff’s employment by Air New Zealand has been covered by a series of collective agreements. At the time of his dismissal on 7 November 2008, the applicable agreement did not quantify the amount of paid sick leave to which employees were entitled. Rather, the entitlement was open ended with employees relied on to use it responsibly.

[9] During the time between Mr Wulff’s dismissal and his reinstatement on 4 December 2009, a revised collective agreement came into effect which quantified employees’ entitlement to paid sick leave. It also contained a transition clause which deemed current employees to have accrued certain amounts of sick leave entitlement according to their length of service. The relevant provisions of the collective agreement were:

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[3] *Lewis v Howick College Board of Trustees* [2010] NZCA 320.

> "10.6 On 6 July 2009 each full time Flight Attendant shall be deemed to have a sick leave balance based on years of completed current continuous service with Air New Zealand as follows:
>
> (i) Less than 10 completed years of service - 27 Duty Days
>
> (ii) 10 or more but less than 20 completed years of service - 36 Duty Days
>
> (iii) 20 or more completed years of service - 54 Duty Days
>
> In addition, each Flight Attendant shall be granted on 6 July 2009 a further balance of sick leave determined in accordance with the following formula:
>
> Additional balance = 14 Duty Days x (no. of months until next anniversary/12)

[10] The difficulty in applying this provision to Mr Wulff is that he was not a "full time Flight Attendant" on 6 July 2009 and the collective agreement makes no provision for an employee in his very unusual position. That is not surprising. While this gap might be filled by construing this clause of the collective agreement to apply to Mr Wulff notwithstanding the language used[4], it is probably best done by giving additional directions as part of my judgment.

[11] In deciding what directions are appropriate, I am guided by the full description of the remedy of reinstatement in s 123(1)(a) the Employment Relations Act 2000 which is "…reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee."

[12] This requires that, as far as possible, Mr Wulff's entitlement to sick leave on reinstatement be consistent with what he would have had if he had not been dismissed but taking account of the fact that he was not employed after his dismissal and prior to his reinstatement. I achieve that by directing that Mr Wulff's initial sick leave entitlement should be calculated by applying the formula in clause 10.6 of the collective agreement as at the date of his reinstatement but on the basis of his continuous service prior to his dismissal.

[13] In taking this approach, I reject Mr Wicks' submission that Mr Wulff should be regarded as having accrued further sick leave entitlement during the period

[4] Applying the principles enunciated by the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10.

between his dismissal and his reinstatement. The Authority did not purport to backdate Mr Wulff's reinstatement and, reflecting his substantial contribution to the situation which gave rise to his dismissal, specifically declined to award any other remedies in relation to that period. I reached a similar conclusion following the de novo hearing in the Court. The effect of my judgment was that the employment relationship between the parties which ended on dismissal was not resumed until 4 December 2009. It follows that Mr Wulff has no entitlement to any remuneration or service related benefits for that period.

[14] When he was dismissed on 7 November 2008, , Mr Wulff had more than 10 but less than 20 years of service. The starting point is therefore an entitlement to 36 duty days of paid sick leave. As the anniversary of Mr Wulff's original employment is in September, there must be added to that figure an additional 10½ days being 14 x 9 ÷12. That makes a total of 46½ duty days to which Mr Wulff was entitled as at 4 December 2009. Clause 10.7 of the collective agreement provided that 14 duty days must be added to that balance on each anniversary of Mr Wulff's employment. That should be done from September 2010 onwards.

"Notional usage"

[15] I am informed by counsel that Mr Wulff did not resume actual work until 12 September 2011. This delay was at the request of Air New Zealand and with the agreement or acquiescence of Mr Wulff.

[16] Air New Zealand accepts that Mr Wulff should have accrued sick leave entitlement during the period after his reinstatement when he was employed but not working. The company has purported, however, to deduct from his sick leave balance a notional amount of 11 days per year to reflect the sick leave the company says Mr Wulff would probably have used had he been working. Mr Wulff objects to this deduction and seeks a declaration that it is invalid.

[17] It is apparent from Mr Norton's submissions that Air New Zealand has taken this approach in the belief that the employment relationship between the parties did not resume until Mr Wulff recommenced actual work. The rationale set out in his

submissions was that "… in an effort to facilitate a smooth transition back to work, [Air New Zealand] was prepared to allow for a further notional accrual of sick leave but only on the basis that there was a notional deduction for usage."

[18] The clarification provided in this judgment that the employment relationship resumed on 4 December 2009 should resolve this issue as I expect Air New Zealand will accept that its position has been based on a misunderstanding. In case that may not be so, however, I make it clear that there is to be no deduction from Mr Wulff's entitlement to sick leave based on notional usage without his agreement.

Conclusions

[19] I give the following further directions regarding implementation of the order for reinstatement made in my substantive judgment:

(a) The employment relationship between the parties is to be regarded for all purposes as having resumed on 4 December 2009.

(b) As at 4 December 2009, Mr Wulff was entitled to 46½ duty days of paid sick leave.

(c) On each anniversary of his original employment since 4 December 2009, Mr Wulff has become entitled to an addition to his sick leave entitlement in accordance with the applicable employment agreement. The first such increase was of 14 days in September 2010.

(d) Air New Zealand is not entitled to make any deduction from Mr Wulff's sick leave entitlement on account of "notional usage" without his agreement.

(e) These directions are subject to any agreement reached between the parties or any collective agreement binding on them.

Costs

[20] Both parties sought costs on the application dealt with in this judgment. I expect that the further directions I have given will be of equal value to both parties and, on that basis, my initial inclination is to allow costs to lie where they have

fallen, If either party wishes to seek an order for costs, however, I will certainly entertain it. In that event, a memorandum should be filed within 15 working days after the date of this judgment and the other party will then have 15 working days in which to respond.

A A Couch
Judge

Signed at 12.30 pm on 1 February 2013