Determination Number: CA 62/05
File Number: CEA 155/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	David Adams (First Applicant) **AND** Juliane Bound (Second Applicant) **AND** Nigel Bullock (Third Applicant) **AND** Michael Lulham (Fourth Applicant) **AND** Linda Mott (Fifth Applicant) **AND** New Zealand Public Service Association (Sixth Applicant)
AND	Aviation Security Service (Respondent)
REPRESENTATIVES	Phillip Allan, Counsel for the First to Fifth Applicants Andrew Dallas, Counsel for the Sixth Applicant Joanna Holden, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	8 March 2005
DATE OF DETERMINATION	3 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute concerning the interpretation of Section V of the Individual employment agreement that applies to the applicants.

[2] The essence of the dispute is that the applicants' claim that the respondent Aviation Security Service ("AvSec") has misdirected itself in respect to a discretion which resides with AvSec and allows AvSec to recognise previous service with other state sector organisations for the purposes of leave.

[3] The Authority is asked to investigate AvSec's actions, determine whether the employment agreements of the applicants have been breached and if they have issue a compliance order to remedy that and/or issue any other order that the Authority thinks appropriate.

[4] By reason of the interpretative nature of the dispute between the parties and the issues of principle which both parties considered were raised, the employment relationship problem did not go first to mediation and while I considered the prospect of requiring the parties to attend mediation, I reached the conclusion that it would not be helpful to require the parties to attend mediation given the nature of the issues between them.

[5] The investigation meeting was conducted in a positive spirit and both parties were respectful of the others position. Helpful and constructive oral and written submissions were made available

to me by not only the representatives of the parties but also by unions who sought to be heard in these proceedings or joined by virtue of the fact that they represented other workers employed by AvSec. Pursuant to s129 (2) of the Act, the New Zealand Public Service Association and the New Zealand Engineering Printing and Manufacturing Union were advised of these proceedings. As a party to the base document in contention, the PSA has been joined as a party and the EPMU has sought to be heard on the matter.

[6] I record that I have derived great assistance from all the submissions made available to me and I commend all of the representatives for their efforts in that regard.

The facts

[7] All of the applicants are employed by AvSec as Aviation Security Officers. Their circumstances are all slightly different but the common denominator in each case is that each of the applicants had previous service with a Crown entity before entering the employment of AvSec.

[8] That previous service was in a variety of different Crown agencies, two in the New Zealand Army, two in the New Zealand Customs Services, one in the RNZAF and a short period in the New Zealand Police for one of the applicants who also had Crown service with the New Zealand Customs Service.

[9] The extent of that previous service in terms of years ranged from three staff who had in excess of 20 years service with a previous Crown employer to one applicant whose service with other Crown agencies was for some seven years.

[10] All of the applicants had applied to AvSec for their previous service in the State sector to be recognised for leave purposes and all had been turned down.

The contractual provision

[11] The relevant provision is contained in the Aviation Security Service Collective Agreement current from 1 April 2001 to 30 June 2003 (the expired Collective) a copy of which has been provided to me.

[12] There are two relevant provisions. The first is a definition of State Sector in Section I clause 6 which is as follows:

> *"State Sector" all instruments of the Crown in respect of the Government of New Zealand, whether Departments, Corporations, agencies or State Owned Enterprises, and including the Education and Health services.*

[13] The second relevant provision is a preamble to Section V of the Agreement. It reads as follows:

> *Section 5: Provisions Relating to Leave*
> *For the purposes of leave the General Manager may, as appropriate, recognise previous service with other organisations of the State Sector. Service will not be credited for leave purposes if it ended with the employee accepting severance of enhanced early retirement under any restructuring/surplus staffing provisions of any departments or organisations of the State sector.*

[14] It will be noted that this preamble contains two provisions the first of which gives the General Manager of AvSec a discretion to recognise previous service in the State sector and the second of which creates a class of relevant service which will not be credited for leave purposes where the employee is paid severance or enhanced early retirement.

[15] In my opinion, the words in the preamble ought to be given there natural and ordinary meaning.

[16] A "reasonable person" would say that this preamble means that an employee of AvSec who has previously been employed by a Government agency may have that previous service recognised unless they have accepted severance or enhanced early retirement in their previous role: *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74 applied.

[17] There are of course no detailed rules in the preamble about how that discretion is to be exercised but in my opinion it is axiomatic that AvSec must consider each application from an employee on its own merits and with an open mind.

[18] It follows that a consideration by AvSec of an application from an individual employee cannot meet this test if it is required to be evaluated against a blanket policy.

[19] I refer to this issue of "a blanket policy" because of the strong evidence presented to me at the investigation meeting that AvSec had in fact adopted "a blanket policy" in relation to the applications of the applicants.

[20] In the statement in reply the following two paragraphs are to be found:

> *1.4 the discretion is exercised on a case by case basis taking into account relevant matters… and*
>
> *1.8 there is no blanket policy that the respondent will refuse to recognise previous service for the purposes of the leave provisions in Section V of the Collective Agreement.*

[21] However, those two statements must be compared with the following quotation from an email sent by Mr Mark Williamson the Manager Corporate Services of AvSec dated 6 August 2002 as follows:

> *AvSec stopped recognising previous service with other agencies more than two years ago.*

[22] At the investigation meeting, Mr Williamson was very quick to acknowledge that the terms of his email (just quoted) was inconsistent with the statements also quoted above from AvSec's statement in reply. Mr Williamson also very properly accepted that the applicants in this matter got a less than adequate response from their employer. I was impressed with Mr Williamson's candour and his evident willingness to accept that he had done a less satisfactory job in dealing with this matter than either he would have liked or than the applicants were entitled to. His honesty in these regards is to be commended and was certainly not lost on the applicants or their representatives.

Determination

[23] I am invited to find that the respondent has breached the applicants' employment agreements and to issue a compliance order requiring the respondent to adhere to relevant clauses in the employment agreement. I accept that the applicants' have made out their claim that in apparently

considering these applications against what I have referred to as “a blanket policy”, AvSec has failed in its duty.

[24] Ms Holden who appeared for AvSec indicated to me at the end of the investigation meeting that AvSec would gladly look at the applicants’ applications again if there was further information that the applicants’ were able to advance in support of their applications.

[25] I consider that having been through the investigation meeting and heard for the first time what matters were of concern to the employer in respect of consideration these applications, the applicants might well now be in possession of more information than they were in at the time they made their initial applications.

[26] I find that AvSec has breached the applicants’ employment agreements and a compliance order requiring AvSec to adhere to the applicable clauses in the employment agreement will issue. AvSec have one calendar month to apply the relevant provisions to the applicants’ circumstances.

[27] I leave open the possibility that any of the parties heard by me in the original investigation meeting can come back to me for further directions in relation to the resolution of this dispute.

[28] I thank the parties for the positive way in which they dealt with their differences and for the respect which they showed to each other.

[29] Costs are reserved.

James Crichton
Member of Employment Relations Authority