IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 11
5341478

	BETWEEN	ERENA FUIMAONO Applicant
	AND	NEW ZEALAND RACING BOARD Respondent

Member of Authority:	G J Wood
Representatives:	Tim Oldfield for the Applicant Megan Richards, for the Respondent
Investigation Meeting:	10 and 11 August 2011 at Wellington
Submissions Received:	11 August 2011
Determination:	31 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Erena Fuimaono, is currently employed by the respondent (the Racing Board), in what it considers is a Phonebet operator position, in its Wellington premises. However Ms Fuimaono claims that since 2004 she has been employed in the position of "*night management support*" and as a result claims grievances for unilateral re-classification of her job, the reduction in wages that occurred from 1 December 2008 and a unilateral alteration to her 4 day 10 hour per day roster. She also claims back pay for failure to pay the after midnight allowance before November 2008. In the alternative, Ms Fuimaono claims that if her position as night management support and the wage payment thereof is inconsistent with the collective agreement then it was misleading of the Racing Board to offer those terms and conditions and she seeks damages accordingly. Ms Fuimaono also claims that she is entitled to remain on a four day 10 hour roster because she has an existing

contractual entitlement to it under the savings clause to changes to the rostering arrangements under the collective.

[2] The Racing Board denies Ms Fuimaono's claims. In its view, she accepted the reclassification of her job as night management support back to a Phonebet operator in 2007, in order to benefit by coverage of the collective agreement. The Racing Board denies that it has misled Ms Fuimaono over these matters. It considers that this also means that she can not claim a four day 10 hour roster, because she has been covered by the collective.

Factual discussion

[3] The Racing Board has expressly foregone any claims it may have that any or all of Ms Fuimaono's personal grievance claims are out of time.

[4] The applicant, Ms Fuimaono, has been employed by the Racing Board since February 1981 in its Phonebet operations. She has been a member of the Service & Food Workers' Union throughout. The union has had a number of collective contracts and collective employment agreements with the Racing Board throughout the term of Ms Fuimaono's employment. Ms Fuimaono started off as a casual employee but has been a full time employee for many, many years.

[5] In 2003, Ms Fuimaono was offered and accepted a position as *night administration support*. This role involved assisting management with the effective coordination of the Wellington Phonebet centre operation. It was agreed by the Phonebet manager at the time that Ms Fuimaono would work a 40 hour week over 10 hour days, with Wednesdays, Thursdays, Fridays and Sundays as her normal working days. She would be informed that she would continue to receive Saturdays off unless there was an urgent requirement to cover for another manager, due to annual leave or sickness etc. She would not be required to work statutory holidays except under similar conditions. These working conditions were unusual, because Saturdays and public holidays are the busiest racing days. The offer was made as a three month trial but her employment in that position continued well beyond that period.

[6] At the time the agreement was entered into, no thought was given to whether or not the position was covered within the coverage clause of the collective employment agreement, and if so what the implications for the parties would be.

[7] Although the level of pay agreed to was $2 an hour higher than the rate Ms Fuimaono had been receiving as a Phonebet operator under the collective employment agreement, there was no reference to the collective employment agreement, or the payment being $2 per hour more than that of a Phonebet operator, in the individual agreement entered into. It simply specified an hourly rate. The signed individual employment agreement however was said to supersede all previous agreements, contracts, representations, commitments and communications either written or oral between the parties. It also stated that the hours of work would be any day of the week, Monday to Sunday inclusive, as determined by her manager, and that it could be set by roster.

[8] Claims by the Racing Board that the position of night management support officer never existed simply can not stand in the light of the documentary evidence below and the individual employment agreement. For example, the Racing Board's own organisational chart for Phonebet (as at 30 July 2007) describes Ms Fuimaono as an *assistant manager (waged).* A job description was also produced for her in the position of Phonebet management support.

[9] The relevant part of the collective agreement's coverage clause provides:

> *This agreement covers Phonebet employees, employed on an hourly basis to work in Phonebet offices in connection with racing and sports betting operations … Salaried and managerial staff and other New Zealand Racing Board staff who are not employed in the Phonebet operation are not covered by this agreement.*

[10] A Phonebet employee is defined in clause 6 as:

> *An employee employed in any Phonebet office by New Zealand Racing Board on an hourly basis in connection with racing and sports betting operations and other duties as required by the employer.*

[11] Clause 8 in the latest collective provides for wages and allowances, and appears, for the purposes of analysis, basically consistent (other than the actual rates of pay) over all the relevant collectives. It states:

> *8.1 The rates of wages paid to Phonebet employees shall be:*
>
> - *Trainees (first six weeks only) $14.44 per hour.*
> - *Operators $16.89 per hour.*
> - *Certified operators $17.43 per hour.*

A certified operator is an operator who holds the National Certificate in Contact Centre Operations (level 3). …

8.2 The above flat rate of wages shall be paid for all hours worked in lieu of all overtime and penal time and in full recognition of all aspects of the work to be undertaken including the requirement for work to be done on Saturdays and Sundays. …

*8.7 Those employees who are required to work hours between 12 midnight and 6am [*previously 7am*] shall be paid at one and a half time the employee's applicable hourly rate for the hours worked between that span of hours.*

8.8 Where an employee is required to fulfil a team leader's job for one day, part thereof or more they will be paid an additional $4.07 an hour for all hours worked in that position as sole charge.

[12] During meetings in August 2007, over neither remuneration nor shift issues, I accept, despite the evidence of Ms Fuimaono's union representative to the contrary, that it was agreed that to avoid any doubt Ms Fuimaono would be employed under the collective employment agreement. As a result of that, she would be entitled to certain allowances, which had previously not been paid, that were later back paid to her. However, she continued to be paid $2 an hour higher than the collective agreement. Indeed she had continued to get wage rises at the level of $2 per hour above Phonebet operators' pay since 2004. Although the $2 an hour issue was not addressed, it was agreed that Ms Fuimaono would be a Phonebet operator who acted up as and when required, covered by the collective employment agreement. The fact was that Ms Fuimaono at that time acted up most of the time, or at least very regularly. However, the after midnight allowance in the collective was not paid to her until 5 November 2008.

[13] It has been difficult to assess matters that took place many years ago. However the Authority is required to determine what happened on the balance of probabilities, i.e. what is more likely than not to have occurred. In doing so, documentary evidence at or close to the time can be helpful. In these circumstances, I note that the pay claim was not pursued vigorously for quite a long time. It seems instead that the matter became vital in respect of the hours of work claim, when Ms Fuimaono was required to establish a contractual right to hours, in order to be covered by the savings clause. In these circumstances and in the absence of better evidence, this is a factor which strengthens the Racing Board's claims that Ms Fuimaono agreed to be covered by the collective agreement in 2007 and forewent

her opportunities to have an individual employment agreement, at least insofar as it was inconsistent with the collective. Thus I accept that position as the best description of what occurred, albeit that neither party fully considered the legal implications of Ms Fuimaono rejoining the collective until much later.

[14] When there was a pay rise due to Phonebet operators in December 2008 and Ms Fuimaono did not receive it, there was then a discussion, which has led to these proceedings, as to why Ms Fuimaono did not receive it. The answer given by the Racing Board was because she was covered by the collective and was not entitled to be paid $2 above it, as it was a fixed rate document. As well as the issue of consistency with the collective, another major reason for this conclusion was that Ms Fuimaono had already received payments for the allowances under the collective, but she would not have been entitled to them under her written individual employment agreement.

[15] In recent times, the amount of work Ms Fuimaono has been provided with as a fill-in team leader's position has decreased and thus her income has been negatively impacted. Despite the odd hiccough, the parties have operated together successfully on this basis, albeit that Ms Fuimaono claims that she should still be paid $2 an hour above the Phonebet operator hourly rate, plus receive all the allowances under the collective. This is to both parties' credit.

[16] In 2009, the Racing Board wanted to change the hours of work arrangements for Phonebet operators. Eventually the matter was resolved by the parties in their 2010-2011 collective employment agreement. In essence, the hours of work clause in the agreement makes it clear that there is need for cover 24 hours a day seven days of the week. Clause 7.2 states:

> *Each Phonebet employee will have an agreed individual work schedule which sets out the minimum weekly hours of work, agreed days of work, and early start times. The agreed individual work schedule cannot be altered without the express agreement of both the employee and the New Zealand Racing Board, best endeavours will be made to accommodate the parties' needs. The hours of an employee's individual work schedule shall not exceed eight hours per day, 40 hours per week, must include Saturdays, and will be on no more than six of the seven days per week, unless agreed between the employee and the New Zealand Racing Board.*

[17] Clause 7.3 provided *"the hours of week will be set by a roster to be determined by the manager … The hours of work may vary from week to week as*

necessary to suit the exigencies of the racing industry". This was not affected by the allocation of hours by the manager for employees, which would have included Ms Fuimaono.

[18] The hours of work clause in the new collective contained a savings provision. It stated:

> *Should an employee present a contractual entitlement to particular rostered times or days of work that applied immediately prior to this agreement coming into force, nothing in this agreement shall operate as to reduce that entitlement in such a way as to disadvantage the employee…*

[19] Ms Fuimaono claims that her entitlement was as set out above, namely four days per week on Wednesday, Thursday, Friday, and Sunday with 10 hour shifts. This matter went to mediation. As part of the mediation, the parties entered the following memorandum of understanding:

> *The parties are in dispute over the interpretation of the savings clause in the CA.*
> *Among the affected workers is Erena Fuimaono.*
> *Pending a determination in this matter and without prejudice to the respective parties' positions it is agreed that Ms Fuimaono will work 8 hours on M, W, T, F plus Sunday starting as early as possible on Mon plus as late as possible on Wednesday, Thurs, Fri plus Su with any back pay owing up to 40 hours per week since 10 May 2010.*
> *The parties will review the allocation of Monday shifts before 8 September 2010.*

[20] This review did not occur, but the memorandum explains why Ms Fuimaono has been working five shifts per week since then. Ms Fuimaono remains the only employee in the Phonebet operation not to have agreed an individual work schedule.

[21] The parties have been unable to resolve their differences and it therefore falls to the Authority to make a determination.

The law

[22] An employee and an employer can agree to additional terms and conditions even though they are bound by a collective agreement, provided they are not inconsistent with the terms and conditions in the collective agreement (s.61).

[23] The long held definition of the term "*inconsistency"* was set out by the Court of Appeal in *NZ Meat Processors etc IUOW v. Alliance Freezing Company*

(Southland) Ltd [1990] 2 NZILR 1071. At 1077, the Court of Appeal held:

> *The question of inconsistency between the award and the terms of the agreement must be resolved objectively… Whether a contractual provision is inconsistent with an award provision involves comparing the two. The Oxford English Dictionary (2nd ed) definition of "inconsistent" is: "not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous". In short, it is whether the 2 provisions can live together as terms of the contract of employment.*
> …
> *However, some texts are drawn from dicta in earlier cases the proposition that, if the contractual term is more favourable to the worker than the award provision, s.174 does not apply …*
>
> *The relevant awards in Strong, as in Baillie v. Reese, specified minimum rates of wages. In such cases there is no inconsistency with the award if employer and employee agree on higher rates. It is readily understandable why in such cases Courts have observed that the section does not apply if the contractual provision is more favourable. In many other cases the award may be silent on a matter provided for in the contract. There, too, no question of inconsistency arises. But where there is a true inconsistency, where the contractual provision and the award cannot stand together, the award must prevail whether the result is perceived as favourable or unfavourable to the particular worker.*

Determination

[24] The parties must be deemed to have known, when they used the term *"flat rate of wages"* that they had agreed to what is known as a paid rates rather than minimum rates collective agreement. In the light of *Alliance*, the parties have thus effectively agreed that any payment above or below that rate is inconsistent with the collective and therefore can not be enforced. This must therefore apply to Ms Fuimaono, if classified as a Phonebet operator, as she had agreed from 2007 onwards to be covered by the collective.

[25] The sole issue for determination in this regard therefore, is whether Ms Fuimaono could be seen as being employed in a position that was not covered by the wages clause. However, I conclude that Ms Fuimaono's position was that of Phonebet operator as set out in the definitions section. She was employed in the Phonebet office. She was employed on an hourly basis and she was employed in connection with racing and sports betting operations. The sort of work that she did in terms of acting up was also provided for under clause 8.8, and she was paid for several years according to that formula.

[26] Furthermore, even if Ms Fuimaono was right that her position's pay as *"night management support"* was not covered in the collective, she has still not established any term of her employment that entitled her to $2 an hour more. The individual employment agreement never so provided, and no such linkage can be established by custom and practice or legitimate expectation, given the short length of time the difference existed. I therefore dismiss Ms Fuimaono's claim that she was unjustifiably reclassified from her position of night management support and her claim that she was entitled to be paid $2 per hour above the collective rate in the collective agreement.

[27] It follows from the above that given that Ms Fuimaono was employed under the collective and that she agreed to her reclassification there can be no disadvantage for the loss of any supervisory functions that went with that reclassification.

[28] However, it also follows that Ms Fuimaono was entitled to be paid the late night allowance when applicable, once she was reclassified under the collective. The parties are to agree on the payments due under the night allowance between 1 September 2007 and 5 November 2008, plus interest at the rate of 5% per annum, calculated on a simple rather than accrued basis. Leave is reserved to return to the Authority should the parties be unable to agree on this amount.

[29] I dismiss the claim under the Fair Trading Act because there was no deliberate misleading of Ms Fuimaono by the Racing Board when it continued her pay at $2 over the Phonebet operator's hourly rate. It did so by mistake and such mistake was remedied when it was brought to its attention.

[30] The 2007-2008 collective agreement provides in hours of work that an employee's ordinary hours shall not exceed eight per day 40 per week or be worked on more than six of the seven days of the week. This is the justification for the Racing Board's insistence that Ms Fuimaono work an eight hour day rather than 10 hours that had previously agreed.

[31] It follows from Ms Fuimaono's acceptance that her position was covered by the collective, that she has not established a contractual entitlement to particular rostered times or days of work applying immediately prior to the 2010-2011 collective agreement coming into force. Rather she was employed on the same terms and conditions as other Phonebet operators under the collective, the provisions of which

are not covered by the savings clause. Furthermore, as noted above, when rejoining the collective she lost her individual terms over rostering, even if they had given her an entitlement to the 4 x 10 working arrangement, which is doubtful in any event, given that her hours could be set by roster over any days of the week.

[32] It therefore follows that all Ms Fuimaono's claims except any claim for payment for overnight work, are dismissed.

[33] Finally I would like to congratulate the parties and their representatives on the professional manner in which they have conducted themselves during the course of this protracted series of disputes. It reflects particularly well on them as it is clear they are all trying to maintain the success of this employment relationship.

Costs

[34] Costs are reserved.

G J Wood
Member of the Employment Relations Authority