IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] ERA Christchurch 76
5335047

	BETWEEN	MICHAEL JUKES Applicant
	A N D	SEALORD GROUP LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Stephen Thomas, Advocate for Applicant Peter Kiely and Mere King, Counsel for Respondent
Investigation meeting:	14 February 2013 at Nelson
Submissions Received:	At the investigation
Date of Determination:	2 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Michael Jukes, is questioning the manner in which he is reimbursed for annual leave and whether he is being paid appropriately by the respondent, Sealord Group Limited (Sealord).

[2] Sealord's position is its approach is legitimate and nothing owes.

Background

[3] The claim is not quantified but had its genesis in amendments to the Holidays Act 2003 which saw the minimum leave entitlement increase from three weeks to four with effect 1 April 2007. Mr Jukes did not see an increase and started questioning his entitlement and pay.

[4] Mr Jukes has been employed by Sealord as a crew member on fishing vessels since 1989.

[5] His remuneration comprises a regular fortnightly retainer plus an additional sum representing a share of the value of the catch. This later sum is calculated and paid after the completion of a voyage and therefore lacks regularity in respect to either the value or timing of the payment.

[6] Mr Jukes terms and conditions of employment are specified within a written employment agreement. Contained therein is an annual leave provision which reads:

> *Scheduled trips off (which may vary from vessel to vessel) are deemed to include twenty (20) days annual leave per annum.*

[7] Also contained therein is a public holidays provision which gives an indication as to how this works. Contained therein is the following:

> *Due to the trip on trip off rostering system the parties have accepted that taking alternative days are not practical as normal working days are seagoing voyages. To comply with the provisions of the Holidays Act, Sealord and the NZFIG (New Zealand Fishing Industry Guild Incorporated) have agreed that the trip off periods provide appropriate time for the observance of public holidays as outlined in the Holidays Act.*

[8] The reference to trip on trip off reflects the fact the normal rostering system sees a crew member aboard his or her vessel on alternate trips. There is a facility under which employees can change their trips though Mr Jukes has rarely exercised this option and never undertaken more than two consecutive trips.

[9] When ashore Mr Jukes is generally free to do as he wishes though there are a couple of restraints on this. He is required to undergo a couple of days training per annum and the actual date of departure is flexible. It depends on the vessels return from its previous trip which is, in turn, dependent to some degree on the voyages success. This means Mr Jukes must, for the last couple of days prior to an indicative date of departure, be in reasonable proximity to Nelson and available for an early departure if it eventuates. This, to some extent, limits his freedom on those days.

Determination

[10] To determine whether or not Mr Jukes has a claim Mr Thomas submits I must answer two questions. The first is whether or not the Act allows the respondent to include Mr Jukes annual leave within the scheduled stays ashore and the second is

whether or not his leave was properly paid. This later question really relates to the catch bouns and the flexibility regarding its payments.

[11] I agree with Mr Thomas' approach.

[12] Having considered the evidence and detailed submission from both parties, I reach the following conclusions.

[13] The answer to the first question is yes, the agreement allows Mr Jukes holidays to be included in his rostered time off.

[14] Although in a slightly different context (payment for public holidays as opposed to annual leave) the Court of Appeal found rostered time off could include days identified as recognition for holidays granted under the Act (see *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356 (CA). There is no reason why this principle can not extend to annual holidays provided the arrangement is (a) agreed and (b) ensures the employee can enjoy at least the minimum entitlement of four weeks annual holiday.

[15] In this case the arrangement has been agreed and that is reflected in Mr Jukes employment agreement (see 6 above). There can also be no doubt Mr Jukes time off is greater than required by law. A weekly Monday to Friday worker gets 104 weekend days plus 20 days of annual leave and 11 public holidays. The total is 135 days off per annum. Mr Jukes arrangement would normally see him getting approximately 182 days off per annum which is considerably greater than the norm.

[16] The requirement he be available a day or two prior to scheduled departure does not impinge on this for two reasons. First Mr Jukes is not normally required to work those days and while there may be some restriction on his ability to travel far from Nelson he is still largely free to do as he wishes. It is no different from being on call, which is not normally considered work (except for the purpose of acquiring an entitlement to an alternate public holiday). Secondly Mr Jukes evidence is the vessel he is on normally takes voyages of about four and a half weeks duration. That means he would not normally expect to do more than six voyages a year. Even if the couple of days prior could not be considered a proper break, there are not enough of them (approximately 12 a year) to see the total time Mr Jukes has off reduce below the minima expected by law.

[17] Here, and as an aside, I note there was a discussion about the way in which Mr Jukes leave was originally recorded. This appears to have been an administrative exercise which bore no resemblance to reality. Whilst confusing, it does not affect the above conclusion.

[18] Turning to the issue of payment and its adequacy. There has been no suggestion Mr Jukes has not continued to receive his fortnightly retainer or that he has not received the correct catch bonus. The only possible question can be whether or not payment was made at the point in time it should have been.

[19] Section 27 of the Holidays Act requires payment for a holiday be made before the holiday is taken unless the parties agree to continue regular pays and payment will therefore occur in the pay that relates to the period in which the holiday is actually taken (s.27(1)(a)).

[20] The confusion appears to arise as a result of the catch bonus which, as said earlier, lacks regularity in respect to either the value or timing. Clause 6.4 of the current fishers agreement (a collective agreement applying to Mr Jukes) states:

> *The frequency of Catch Bonus payments is dependent on when the catch is landed and evaluated… Where a vessel berths more than 7 days before the end of a pay period the catch bonus will usually be paid in the next pay following the landing and evaluation of the catch, but where a vessel berths 7 or fewer days before the end of a pay period the bonus will usually be paid in the following pay.*

[21] Putting aside the fact the arrangement the parties have means there has been difficulty in identifying specific day as a holiday and confusion could therefore arise, I conclude the agreement accepts the concept of regular pay periods and this is confirmed by the parties conduct over numerous years. The agreement also deals specifically with the uncertainty regarding catch bonuses and specifies when payment is to be made.

[22] In other words there is an there is an agreement as envisaged by s.27(1)(a) which both addresses and nullifies the requirement leave be paid before commencement.

Conclusion

[23] Having answered both questions in Sealords favour it follows I conclude there is no impropriety and dismiss Mr Jukes claim.

[24] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority