IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 49
5422341

	BETWEEN	NEIL JAMES MOORE Applicant
	AND	AIRWORK HOLDINGS LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Richard McCabe for the Applicant Gretchen Stone for the Respondent
Investigation Meeting:	4 February 2014 at Wellington
Further Submissions and Information received by:	15 April 2014
Determination:	19 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Neil Moore, worked for the respondent, Airwork Holdings Limited (Airwork) as a Wellington-based pilot until he was declared redundant on 30 December 2012. After that he was rostered for duties under what the parties titled a casual employment agreement as a pilot based out of Auckland, although he continued to live in Wellington. He claims that his dismissal for redundancy was not genuine and that his position still exists, and that from 31 December 2012, when he signed a casual employment agreement, he was in fact a permanent employee. He further claims that he was subsequently unjustifiably dismissed when he was not rostered any work from July 2013.

[2] Mr Moore claims reinstatement, loss of remuneration, compensation and costs. He also claims that he was under-paid during the course of his casual employment agreement because he was not fully paid when required to passenger (known as *paxing*) to Auckland or Dunedin both before and after his rostered days of work, so that he could carry out his flying duties for Airwork. Airwork, a public company with airline operations both within New Zealand and overseas, deny all of Mr Moore's claims.

Factual discussion

[3] Mr Moore started work for Airwork in Wellington as a pilot in 1991. He continued working as a pilot for Airwork in Wellington right through until December 2012. He flew Metro-liners as a captain but was also rated as a training captain and first officer. Schedule 1 to the employment agreement provided for his location and stated:

> *Subject always to clause 6 of the agreement, the employee's place of work is Wellington. The employee accepts that he or she may be required to travel from time to time.*

[4] This reference to clause 6 should perhaps have been to clause 5, entitled *Location and Relocation.* It states:

> *5.1* *The employee's usual place of work is described in Schedule 1. However, the employee acknowledges that due to the employer's operational requirements, the employee may be required to relocate to another location at any time. The employer will consult with the employee about any proposal to relocate the employee and will take into account the employee's personal circumstances before making the final decision in regard to relocation.*
>
> ...
>
> *5.3* *Where the employee is required to relocate permanently (i.e. for a period of more than 6 months), unless agreed otherwise, the employer will give the employee at least 30 days' notice.*
>
> ...
>
> *5.5* *Where the employee is permanently relocated and is required to sell their residence, the employer will also reimburse legal fees and agent fees associated with the sale of that residence….*
>
> *5.6* *The employer will also provide assistance towards the cost of temporary accommodation required as a result of relocation, the quantum to be agreed from time-to-time…*

[5] The employment agreement also provides for a redundancy in clause 21:

> *21. Should the employer determine that a redundancy exists, the employer shall be entitled to the notice period set out in Schedule One* [one month in this case]*, or payment in lieu. The employee shall also be entitled to redundancy compensation of one month's base salary.*

[6] Mr Moore's flying duties involved him working a contract with the Life Flight Trust, together with charter work. However, in December 2011 Airwork had to inform its pilots that it was losing the Life Flight Trust contract in March 2012. Airwork staff, including Mr Moore and Mr Chris Hart, Airwork's Chief Operating Officer, made extensive efforts to try and retain a base in Wellington, its other New Zealand operations being at Auckland, Blenheim and Dunedin. It was suggested that the terms and conditions for employees would have to alter in order for such an operation to be viable. No agreement was ever reached on that point, nor sufficient work generated to justify the retention of the Wellington operation.

[7] Another option available to staff was relocation to other of Airwork's operation centres. Mr Moore was adamant that he was not able to relocate for personal reasons. One option that Mr Moore put forward was whether or not there would be the opportunity to commute between Wellington and Auckland at his own expense. In an email of 15 December 2011 he stated:

> *If so, would the company entertain this as well as a roster that allowed predictability to plan ahead for airfares etc. i.e. roster a block of duties to achieve maximum productivity plus maximising days off at home.*

[8] It was clear on the evidence that no guarantees had ever been made to Mr Moore of appointment to any particular position, let alone the right to commute, even at his own expense, to take up a position outside of Wellington.

[9] Airwork's first response to the loss of the Life Flight contract was to retain Mr Moore as a Metro captain based in Wellington, while it sought to find new contracts for its Wellington operation. During this period Mr Moore did a lot of flying out of Wellington and Dunedin. However, as noted above, no sustainable work through a Wellington operation could be obtained. Therefore, it was formally proposed to Mr Moore on 12 October 2012 that

Airwork close the Wellington base, which could lead to his position becoming redundant.

[10] Through the consultation period of over a month there were discussions with Mr Moore and his union, NZALPA. The fundamental reason for the company's proposal was that the contract with Life Flight had been terminated over six months ago and insufficient work had subsequently been found. Mr Moore and another pilot were told:

> *Our commercial analysis based on expected utilisation, demonstrates that such an operation would not be commercially viable. In addition, subsequent events in respect of the structure of the ECL Metro fleet has created an opportunity to utilise this aircraft in Auckland as an operational back-up to Life Flight and ECL.*
>
> *These changes to our business mean we may no longer have a requirement for Metro pilots in Wellington and it is possible that as a result of these changes your positions may be made redundant.*

[11] A redundancy meeting was held on 1 November 2012. At the meeting Mr Moore again noted that relocation was not an option for personal reasons, but that he was willing to commute. Casual employment was suggested to Mr Moore as an option. ALPA's rep asked whether, if full time positions became available, Mr Moore and one of his co-workers would be given first opportunity to be appointed. Airwork's then General Manager of Flight Operations, Mr Brian Freeman, stated that he would guarantee that, if their licences were current and they would relocate or commute at their own expense.

[12] On 23 November 2012 Airwork informed Mr Moore that because there were no viable options to retain the Metro operations in Wellington, his position was being dis-established and that as there were no current redeployment options he would be made redundant.

[13] Airwork also made Mr Moore an offer of a casual flying role in that letter. However, in contrast to his statement at the redundancy meeting Mr Freeman also stated: *Should you apply for any role with Airwork in the future I can confirm that we will consider you for any role for which you are appropriately skilled and qualified.* Thus his earlier statement was not repeated.

[14] The casual employment agreement, which was signed on 17 December 2012, and came into effect on 31 December 2012, was in writing. Clause 1 dealt with the nature of the agreement. It stated:

> *Casual employment is on an "as and when" required basis at all times. The company is entitled to offer you casual employment at any time to meet its operational requirements. The company is not obliged to offer you work at any time and does not guarantee any minimum hours of work. Similarly, you are entitled to accept or reject any offer of work at any time.*
>
> *Each period of casual employment is a separate engagement. Where more than one period of casual employment is undertaken, the employment ceases at the end of each period. The service is not continuous.*
>
> *Nothing in this agreement provides any entitlement to further employment beyond each period of casual employment. You should not have any expectation of further offers of casual employment.*

[15] Schedule One also set out many terms. Significant were that the employee's place of work is Auckland and that the wages were $500 per day. Holiday pay was added to the hourly rate. Hours of work were said to be not specific because of the casual nature of the employment, and that Mr Moore was to be informed of the days and hours that he would be required to work and of any applicable breaks for meals and refreshments, when each offer of casual employment was made.

[16] It is clear from Mr Moore's income between January and June 2013 that he was engaged to fly between three and eight and a half days per month, substantially less than his flying hours while engaged full time as a captain by Airwork. In addition, he declared himself unavailable for work for 24 days over that six month period, in order to suit his own requirements.

[17] I accept that while Mr Moore applied for a number of positions, he was unsuccessful both before and after his permanent employment agreement. He was principally unsuccessful because Airwork did not want to run the risk of him being unavailable to commence his flying duties because he intended to commute to those positions. In other words Mr Moore was to make his way to Dunedin or Auckland at his own expense from Wellington, and Airwork was not satisfied that this would be a viable arrangement long term, given the vagaries of commuter transport, of which it is well aware. While a fair and

reasonable employer might consider such an approach appropriate, given Mr Moore's excellent flying record and long history with the company, it was also open to a fair and reasonable employer to take a different view, which I accept Airwork did.

[18] I accept that under the employment agreement Mr Moore could have been compulsorily transferred to Auckland. However there are two significant issues with that assertion. First, Mr Moore had made it very clear that he was not able to relocate to Auckland. Second, there were no permanent positions in Auckland at the time of his redundancy. It was therefore open to Airwork to conclude that its Wellington-based pilots were those to be made redundant as from the closure of the Wellington operation, even although either or both could have been transferred. I do not accept that there was sufficient work that only one redundancy was required, given the lack of work carried out by Mr Moore in the subsequent six months.

[19] On 26 March 2013 Mr Moore raised a personal grievance over his treatment. I do not accept that this was a factor in his failure to be rostered for flying duties under his casual employment agreement. Instead, I accept Airwork's witnesses' evidence that there was excess crew capacity in Auckland and preference was given to permanent Auckland-based pilots to Mr Moore. On the basis of this however, there were occasions when those Auckland-based pilots were offered the prospect of shifts in excess of their normal working hours by way of availability for call-ins outside of the roster. This is on the basis that call-ins do not indicate short staffing and there were reductions in the Auckland-based work. In particular, the Metro liner pilot staffing levels between December 2011 and December 2013 have reduced from 25 to 19. Given Airwork's responsibilities to give *permanent* staff work over casual staff, this was an option open to a fair and reasonable employer.

The law

[20] In *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEMPC 39, it was noted that in redundancy cases, following *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, it is not for the Authority to substitute or impose its business judgement for that of the employer taken at the time. However, the Authority is required to inquire into a decision to declare an employee's position

redundant and then to either affect the holder of that position to his or her disadvantage, or to dismiss that employee, and thus it must assess what a fair and reasonable employer could have done, and how. It was therefore concluded at para.[54]:

> *It will be insufficient under s.103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*

[21] Issues relating to whether employment agreements are casual or not and what the ramifications of this are, were dealt with in *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at para.[40] ff.

> *[40] Against this background, it is also important to understand what is meant by the terms "casual" and "ongoing" or "permanent". Whatever the nature of the employment relationship, the parties will have mutual obligations during periods of actual work or engagement. The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment-related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.*
> *[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and confirm work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact....*
> *[52] The common theme of these cases is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.*

[22] The existence of rosters is seen to support ongoing employment.

Determination

[23] It is clear on the facts that Airwork made a genuine decision to close its Wellington operations. For good reasons of a personal nature, Mr Moore was unable to relocate to Auckland. The redundancy situation arose in effect

because of Mr Moore's inability to relocate, as he had made clear to Airwork throughout. It would therefore have been artificial in the extreme for Airwork to have purported to require Mr Moore to relocate to Auckland as it could do under the terms of the employment agreement (because he had already made it clear that he would not accept such a transfer) and in the event he was better placed by receiving redundancy compensation and obtaining casual employment.

[24] Airwork has demonstrated that there was not a full time position in Auckland which could have been offered to Mr Moore and in any event, for the reasons given above, his commuting option did not have to be accepted by Airwork. However, given the closure of the Wellington base for genuine commercial reasons, Mr Moore's position was genuinely made redundant.

[25] Mr Moore did not have any entitlement while under notice or while under the casual employment agreement to be appointed to any particular position, and it was open to Airwork, for reasons given above, to not do so simply on the basis that it did not trust the arrangements he wanted to put in place to commute from Wellington as being sufficiently reliable.

[26] I have closely scrutinised whether Mr Moore was fairly treated during the course of his casual employment, particularly after he raised a personal grievance. However, while this could not be said to be a true casual relationship because of the nature of the rostering arrangements, I accept that Mr Moore was treated fairly under the rostering arrangements. It was clearly open to Airwork to favour *permanent* staff pilots on the rosters and given the demonstrated reduction in work, I accept that there was no work for Mr Moore since July 2013.

[27] Under the casual employment agreement Mr Moore's location in a place of work was stated to be at Auckland. His wages were to be $500 per day plus holiday pay. He was to be paid for his travel and accommodation costs when on duty. In actual fact Mr Moore was paid $500 per duty, i.e. shift, as a pilot. Under the employment agreement he was required to be paid instead per day of work. Mr Moore was also told that he would be informed *of the days and hours that you will be required to work and any applicable breaks for meals*

and refreshments when each offer of casual employment is made. This was done via the roster.

[28] The rosters note the days that Mr Moore travelled (known as *paxing*) from Wellington to the place of work, which could be in more than one location in New Zealand, normally the day before and the day after he did shifts as a pilot. Sometimes the work would be for one day; sometimes this would be for several days. The *paxing* was done in order to allow Mr Moore, who remained based in Wellington, to travel to Auckland, or wherever he was flying.

[29] It is my assessment that Mr Moore is not entitled to travel time when he is flying out of Auckland. That was done at his convenience and it was clearly not within the contemplation of the parties that he be paid for that, as Schedule One makes clear. His place of work was Auckland, even although he did not live there. On the other hand, if Mr Moore has worked shifts from other locations, such as Dunedin, he is entitled to be paid for *paxing*. This is because this travel was at Airwork's choice. Under the parties' fiction that he was based in Auckland, then being based in Auckland Mr Moore would have been required to *pax* to Dunedin or elsewhere in the country from Auckland, in order to get there to take up his flying duties. He was therefore entitled to be paid for such travelling time.

[30] Leave is reserved to the parties to revert to the Authority should they be unable to agree on what sums, if any, are owed to Mr Moore for such work. All other claims are dismissed.

Costs

[31] Costs are reserved.

G J Wood
Member of the Employment Relations Authority