

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5102038
AA 397/07

BETWEEN UNITE UNION
 INCORPORATED
 Applicant

AND ILA South Pacific Limited t/a
 Kaplan Aspect
 Respondent

Member of Authority: Marija Urlich

Representatives: Helen White, Counsel for Applicant
 Linda Penno, Counsel for Respondent

Investigation Meeting: 30 November and 4 December 2007

Submissions and further 7 and 11 December 2007
information received

Determination: 17 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Unite Union has members employed as teachers at Kaplan Aspect's English language schools located in Auckland and Christchurch.

[2] In September 2007 the teachers were advised of changes in the curriculum for the 2008 academic year which would impact on the way they worked. The changes are to be implemented by 7 January 2008.

[3] The teacher's say it is a term of their employment that once their contact teaching hours are complete they are free to remain on site to complete non-contact duties or perform those duties off-site.

[4] Kaplan Aspect says there is no individual term collateral to the CEA, that the CEA enables it to direct teachers to work an on-site 37.5 hour week as well as directing contact and non-contact teaching duties.

[5] The investigation meeting was held over two half days. By agreement of the parties the first part of the investigation was convened at the respondent's Auckland campus and the second part was facilitated by the telephone attendance of some participants. I wish to thank counsel for their assistance and cooperation with this process.

[6] I record that that the parties have attended mediation in an attempt to resolve this employment relationship problem themselves.

The CEA

[7] The parties' have a collective employment agreement¹. For the purposes of this determination the relevant clauses are:

1.2 Coverage

This agreement shall cover all academic staff who are members of the union and who are employed, as EFL teachers, by the employer at Auckland and Christchurch

...

1.9 Previous more favourable conditions protected

No employee whose conditions of employment are more favourable than those provided by this agreement shall have those conditions adversely affected solely by the implementation of this agreement.

...

2 Definitions

2.9 **"permanent full-time staff"** means people who are employed on a continuing basis and who are salaried. These people are employed to work 22.5 hours per week contact teaching time. These people may teach further hours by mutual agreement with the employer.

...

5 WORKLOAD

Workload

The maximum contact teaching hours employees can be required to work are set in clause 7.1. Additional contact teaching hours may only be allocated by mutual agreement.

¹ ILA South Pacific Limited t/a Aspect and Unite Incorporated 1 October 2006 – 31 December 2007

The Employee's duties include:

...

...

7 HOURS OF WORK

Duration

Contact teaching hours are 22.5 hours per week between the hours of 8.30am and 6.30pm Monday to Friday. These times may be changed at the discretion of the employer in order to meet the operational needs of the business, or the study preferences of the students, provided it has consulted with the affected employee and has endeavoured to seek agreement.

...

8. PLACE OF WORK

The places of work are at 10 Titoki Street, Parnell, Auckland and the adjacent buildings which constitute the employer's Auckland campus and 116 Worcester Street, Christchurch, which is the employer's Christchurch campus. Staff may be required to work at other premises to meet the operational needs of the employer.

Issues

[8] The issues for the Authority to determine are:

- (i) Can Kaplan Aspect require staff to be on site for 37.5 hours per week?
and
- (ii) Can Kaplan Aspect implement the proposed changes for 2008?

37.5 hours per week

[9] Kaplan Aspect wants staff to be on-site for a 37.5 hour working week. It says teaching staff who are permanent full time staff (clause 2.2 CEA) are employed to work full time hours and it is reasonable for it to require them to work those hours on site.

[10] Staff say the CEA does not enable a 37.5 hour working week and the proposal is a significant change for them because throughout their employment with Kaplan Aspect they have had the flexibility to complete their contact teaching and leave the premises and complete non-contact teaching duties off site, for example marking and class preparation, if they wish.

[11] There is no dispute that duties such as class preparation and marking are not site specific whereas contact teaching and some non-contact teaching duties (clause 5.2 CEA) such as attendance at weekly student graduation, are site specific.

[12] I do not understand from the evidence that Kaplan Aspect does not wish staff to undertake marking and class preparation off site. This is beneficial to Kaplan Aspect because staff are able to conduct detailed marking in a quiet environment which cannot be provided at the campus and are able to use their own teaching and technological resources for class preparation.

[13] The CEA provides for 22.5 contact teaching hours per week to be rostered from 8.30am to 6.30pm Monday to Friday. The CEA is silent as to how non-contact teaching duties are to be rostered. The CEA does not provide for usual working hours (outside contact teaching hours) or define a usual working week.

[14] Teachers cannot be rostered duties where there is no agreed rostering mechanism. Usual working hours cannot be set where there is no agreement as to what those usual working hours will be. A 37.5 hour week is beyond the scope of the CEA. It will have to be negotiated and agreed with staff.

Requirement to be on site 37.5 hours per week

[15] Having resolved the first question in favour of the applicant Union it is not necessary to resolve the on site issue; if Kaplan Aspect cannot roster a 37.5 hour week it cannot roster staff to be on site for 37.5 hours per week.

[16] Ms White made submissions as to the application of the judgment of the Court of Appeal in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v The Christchurch Press* [2005] ERNZ 543. She submits the teachers' situation is similar to that of night shift workers at The Christchurch Press whose job and finish arrangement was found to be a feature of their individual employment agreements and consistent with the requirements of section 61(1) of the Employment Relations Act 2000.

[17] Ms Penno submits that the asserted individual term is uncertain. I accept that certainty of terms is a key element of a binding contractual term.

[18] There is no dispute that staff have not been required to be on site to perform non-teaching duties which do not require them to be on site. These duties are typically marking and class preparation. This situation exists, again not disputed, because Kaplan Aspect cannot provide a quiet space necessary to carry out detailed marking, there is a premium on space and resources (such as computers and multi media equipment) for teacher only use, thorough steps have been taken to address these issues.

[19] The evidence received by the Authority was that the teachers valued the flexibility outside non-contact teaching duties because they could manage their work as they saw fit. This is entirely consistent with the structure of the CEA which rosters contact teaching hours and provides no mechanism for rostering non-contact teaching duties or sets hours for a usual working week. Given this I am of the view that there is no need to consider whether an individual term exists collateral to the CEA.

The proposed changes

(i) Consultation

[20] Section 4(4) of the Employment Relations Act 2000 provides that the duty of good faith applies to the following matters relevant to this employment relationship problem:

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees collective employment interests, including the effect on employees of changes to the employer's business:

(d) a proposal by an employer that might impact on the employer's employees,...

[21] In *Auckland CC v NZ Public Service Assn Inc* [2003] 2 ERNZ 386; [2004] 2 NZLR 10 (CA) the Court of Appeal stated at para 24:

“There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when they still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplace must be kept in mind.”

[22] In his witness statement Andrew Shaw, Kaplan Aspect’s Regional Academic Director for the Pacific², said he flew to New Zealand to meet with teaching staff on 6 and 7 September 2007 to present the changes which would come into effect in 2008. He said the changes flowed from the restructuring consequent to the merging of Kaplan and Aspect (creating Kaplan Aspect), that these changes were to be implemented globally and that elements of the changes were not negotiable. Mr Shaw went on to say he was aware the changes would not be popular with staff but that Kaplan Aspect wanted to work with staff to bring about the changes and address their concerns.

[23] The changes Mr Shaw outlined were:

- (i) reduction of contact teaching time from 22.5 to 21 hours per week;
- (ii) supervision in study centres of up to three hours per week;
- (iii) up to two hours per week performing other duties.

[24] Presenting staff with a fait accompli is not consultation. There was no possibility for staff to influence the outcome. The discussion with staff was about implementation of that outcome.

[25] Changes to contractual entitlements are not matters for consultation. Such changes must be agreed between parties who have entered binding agreements. I make this comment in relation to the proposed changes to clause 7 of the CEA.

[26] In regard to the two hours of other duties. Kaplan Aspect is able to require teachers to perform duties which are related to teaching duties. Contentious duties have not been specified.

² With responsibility for the coordination and development of academic programmes across Australia and New Zealand

[27] Kaplan Aspect has failed to consult with staff about significant changes to their employment as it is obliged to under section 4(4)(c) and (d) of the Employment Relations Act 2000.

(ii) The study centre

[28] The 2008 changes include the introduction of a study centre to be supervised by teaching staff for 3 hours each per week. The study centre is described in the 2008 prospectus as (page 9):

English Language Courses

...

Supplementary Structured Study

Your supplementary structured study lessons give you access to learning materials such as online books and interactive computer programmes, allowing you to focus on the language discipline of your choice.

[29] The evidence of behalf of the respondent was that, based on the Australian experience, supervision of the study centre is not teaching and is an administrative task that should be paid as such. Evidence on behalf of the applicant is that this is contact teaching and should be paid as such.

[30] The only factual evidence of how Kaplan Aspect envisages the study centres in New Zealand to operate is the description in the 2008 prospectus. All the other evidence I received was opinion, which is understandable given the study centres are not yet operating in New Zealand. In the 2008 prospectus the study centre is described as a lesson and as one of the categories of English language courses, the others being general English classes and elective classes.

[31] It is reasonable to conclude that, based on Kaplan Aspect's 2008 prospectus the study centre is contact teaching.

(iii) Senior teacher

[32] I accept Ms Penno's submission that this is a dispute about nomenclature.

[33] A Senior Teacher is a category of role provided for and defined by the CEA. If the new role is not the same then Kaplan Aspect should make that clear.

Costs

[34] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then the parties have leave to request that a timetable is set for the filing of costs memoranda.

Marija Urlich

Member of the Employment Relations Authority