IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

Determination Number: WA 106/07
File Number: 5088917

	BETWEEN	DR SHIE SATO Applicant
	AND	VICE-CHANCELLOR OF MASSEY UNIVERSITY Respondent

Member of Authority:	Vicki Campbell
Representatives:	Allan Millar for Applicant Hamish Kynaston for Respondent
Investigation Meeting:	16 July 2007 at Palmerston North
Submissions Received:	17,21 and 29 June 2007 from Applicant 16 July from Respondent
Determination:	30 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Sato is a member of the Association of University Employees NZ Inc., ("AUS) and is therefore bound by the Massey University Collective Employment Agreement. This determination deals with a dispute which has arisen about the interpretation, application, or operation of the collective agreement relating to Dr Sato's hours of work.

[2] Dr Sato seeks a declaration that her contracted quantum of weekly hours is a maximum of 37.5 hours. Alternatively the Authority has been invited to find that Dr Sato's hours of work are 40 per week in the terms of section 11B of the Minimum Wage Act 1983.

[3] In response, the Vice-Chancellor Massey University ("Massey University") says there is no express term limiting Dr Sato's hours to a specific amount and that she is required to work what ever hours are necessary to complete her duties.

[4] Dr Sato currently has, in addition to this dispute, two personal grievance claims and one compliance order currently before the Authority but awaiting an investigation. By consent the Authority is dealing with this dispute first and will then give some consideration as to how the additional three claims will be dealt with. With that in mind I have limited the factual evidence set out in this determination only to those facts relating to the dispute.

Interpretation of employment agreements

[5] The principles that apply to the interpretation of employment agreements are well established. These principles have been summarised in *ASTE v Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at pages 480 to 500. I have set out below the relevant principles, as usefully provided in Mr Kynaston's submissions:

> Agreements should be interpreted with reference to their factual matrix or surrounding circumstances, including such matters as the background to the transaction and the practice of the industry or sector in question. There is a two step approach:
>
> (i) First, consider the words the parties used, and ascertain their natural and ordinary meaning in the context of the document as a whole.
>
> (ii) Second, consider the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.
>
> Take an objective approach to interpretation. What matters is not what the parties say they intended or understood the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean.
>
> Evidence is not admissible of what one party thought the words meant or of the negotiations or earlier drafts.
>
> The final written agreement supersedes the negotiations. Positions may heave changed during negotiations: the final document is the agreed version which might involve a compromise of the respective parties' positions.
>
> …
>
> The interpretation of an agreement should not be narrowly literal but should be in accordance with business common sense. The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Nevertheless, if the words are clear and can only have one possible meaning, that should generally determine the matter.

Parol Evidence Rule

[6] Before moving to the factual findings, it is necessary to deal with Mr Millar's submission that the parol evidence rule applies.

[7] Simply put, "parol evidence" means extrinsic evidence. The rule applies to contracts generally and renders extrinsic evidence inadmissible where it would add to, vary or contradict the terms of a contract. Generally speaking, a contract is to be taken as an accurate record of everything that was agreed.

[8] Exceptions to the parole evidence rule include situations where the implied terms of a contract are subject to some custom and practice or where the written document was not intended to be the entire agreement.

(Burrows, Finn & Todd "The Law of Contract in New Zealand (3ed, 2007); D L Mathieson "Cross on Evidence" (6ed 1997); *Dwyer v Air NZ Ltd*, [1996[2 ERNZ 146)

[9] The starting point for the Authority is the Employment Relations Act 2000 which provides at section 160(2) that the Authority may:

> [T]ake into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[10] I do not accept Mr Millar's submission that the parol evidence rule applies in this case. Massey University is contending that the written material does not contain all the terms of employment applicable to Dr Sato and extrinsic evidence has been necessary to resolve this employment relationship problem.

Relevant terms and conditions of employment

[11] The collective agreement applies to Academic and General employees employed by Massey University. Clauses are structured to indicate whether each clause applies to Academic or General employees or both. This is set out in a note on the front page of the agreement which states:

> The provisions in this Agreement apply to employees covered by this Agreement as follows:
>
> (Aca&Gen) = all employees
> (Aca) = academic employees only
> (Gen) = general employees only

[12] In contrast to General employees, the hours of work for Academic employees is not defined in the collective agreement. Clauses indicating that they have application only to General employees include comprehensive clauses setting out the hours of work, and fixes, as the ordinary hours to be worked each week, at 37.5. General employees are also paid overtime for time worked in excess of 37.5. There is no comparable provision in the collective agreement for Academic employees.

[13] There are two references to hours of work for Academic employees. The first is a provision at clause 2.4 that all Academic employees are to devote their full "... contracted hours ..." to University duties. The term "Contracted hours" has not been defined in the collective agreement.

[14] The second is a reference to Graduate Assistants which states:

> The hours and days to be worked each week by a Graduate Assistant shall be as directed by their Manager, or nominee, in consultation with the employee, provided that the hours worked per calendar year shall not exceed 360 (three hundred and sixty) hours.

[15] Clause 1.6(i) of the collective agreement defines "hourly rate of pay" in the following terms:

> A salaried employee's hourly rate of pay shall be the employee's annual salary divided by 1950, except in the case of employees working 40 hours a week in which case the divisor shall be 2080.

Hours of work

[16] Dr Sato is a Lecturer in Japanese. Pursuant to the collective agreement, and it is not disputed, Dr Sato is classified as an Academic employees member.

[17] To support her contention that she should only work 37.5 or 40 hours per week Dr Sato relies on her payslip which indicates she is being paid 75 hours per fortnight; the hourly rate provision in the collective agreement (set out earlier in this determination); and section 11B of the Minimum Wage Act.

Payslip

[18] Dr Sato relies on a reference in her payslip to "75 units" to support of her application for a declaration that she is required to work a maximum of 37.5 hours per week.

[19] Ms June Dallinger, the Director of Human Resources for Massey University, told me that the payslips are generated automatically by the University's payroll system and that the number of units referred to on the payslip are simply administrative and do not fix the number of hours to be worked.

[20] I am satisfied that Dr Sato was not required to complete timesheets or any other documentation which would demonstrate that she was paid only for hours worked. I find therefore, that the references to units and hourly rates on Dr Sato's payslip are for administrative convenience only and not for the purposes of calculating Dr Sato's fortnightly salary payments.

Collective agreement clause dealing with the hourly rate

[21] Dr Sato relies on clause 1.6 of the collective agreement which deals with hourly rates, to support of her application for a declaration that she is required to work a maximum of 37.5 or 40 hours per week. Dr Sato relies on the divisors provided for in clause 1.6(i) being 37.5 and 40 hours per week.

[22] I agree with the submissions made on behalf of Massey University that Dr Sato's interpretation of this clause to define her contracted hours, stretches the natural meaning of the clause.

[23] I find that the purpose of clause 1.6(i) is to set out the calculation of an hourly rate where it would be necessary to apply such a rate. I am satisfied that, in the case of Academic employees, the circumstances in which such an application would be needed would be very limited, as highlighted by Mr Martin Braithwaite, the Industrial and Communications Officer for AUS, and may only apply to situations, such as calculating the payment for work undertaken on public holidays or providing a basis for deductions in the event of industrial action.

Section 11B Minimum Wage Act

[24] As an alternative Dr Sato submits that section 11B of the Minimum Wage Act fixes as 40, her maximum number of hours to be worked each week.

[25] Section 11B(1) requires every employment agreement to fix as 40, the maximum number of hours to be worked in any week. Section 11B(2) allows a number in excess of 40 to be fixed if the parties to an employment agreement agree.

[26] At the investigation meeting Dr Sato told me that when she was employed in 2003 she was told by Professor Ono that her maximum hours would be 37.5 hours per week. She also told me that Professor Ono he told her to be careful as he knew she tended to overwork. Further Dr Sato says, Professor Ono told her it was not forbidden to work long hours, and if she was willing to put in more hours she could, but she should be careful not to overwork. At the investigation meeting Dr Sato told me that the number of hours she would work in any one week was sometimes less than 40 or sometimes more.

[27] Ms Dallinger told me, and Dr Sato agreed with her, that a draft Academic Employees Availability Policy was implemented in 2005 as a result of strong feelings being expressed about academic hours of work and self-management of time. The stated purpose of the policy is to:

> …provide guidance on the expectations of the University community in regard to the availability of academic employees to ensure accessibility to students, academic colleagues and managers.

[28] The policy sets out the University's expectations including an expectation that Academic employees are expected to be available on the campus for most of their contracted hours of work.

[29] In addition, and pursuant to clause 1.8.3 of the collective agreement, Massey University developed Workload Policies in consultation with the unions to provide for the setting of workloads to ensure they are transparent, equitable, and flexible.

[30] The Workload Policy document for the School of Languages, which is where Dr Sato was engaged, sets out guidelines for each workload component each individual should normally fall within, to provide an ideal balance. The document states:

> While the workload calculations are based on a notional 37.5 hour working week, it is recognised that during peak periods of the year, many employees work longer hours than this. However, it is also true that, once development activities associated with new papers and programmes have been completed, substantial periods of time are available for research during the summer break and at other off-peak periods throughout the year. [my emphasis]

[31] Kevin Searle, Human Resources Director at the University of Otago gave evidence, with which Dr Sato agreed, that a requirement for Academic employees to work 9.00am – 5.00pm is at odds with how the sector operates and would be at odds with how Academics work. Mr Searle told me that the focus is on outputs Academics must achieve and Academic employees by and large have the freedom to determine when and how many hours they work.

[32] Further, Mr Searle told me that Academics in the University sector are paid for their creativity, original thinking and research and that this type of work is not carried out between certain hours or on certain days. He says that often Academics will work all the hours under the sun to complete a particular project, and then may work reduced hours for a period to reflect that. Dr Sato also agreed with Mr Searle on this point.

[33] Mr Braithwaite told me that hours of work at various universities is an ongoing issue for AUS and its members. He says the matter has been discussed frequently with a view to ensuring Academic employees are not required to work excessive or unfair hours and that there are structures and processes in place to guarantee that. Further, the possibility of introducing fixed hours of work for Academic employees has been raised in the past but has been resisted by the employees themselves who prefer a degree of flexibility to enable them to undertake research and related tasks outside normal hours when it suits them.

[34] I am satisfied that the collective agreement, together with the Workload Policies contemplate that an Academic employee may work more or less than a fictional (I have read "notional" as meaning hypothetical, imaginery as per The New Zealand Oxford Dictionary, (2005)) 37.5 hour week and that the hours worked will be dictated by the peaks and troughs of the Academic work to be undertaken. This constitutes an agreement pursuant to section 11B(2) of the Minimum Wage Act.

For the reasons set out above I find Dr Sato's hours of work are not fixed at either 37.4 or 40 hours per week. A finding that Dr Sato's employment agreement was for a maximum number of hours per week would be inconsistent the weight of the evidence.

Mediation

[35] As indicated at the investigation meeting, to assist the parties to reach a resolution on the three outstanding applications before the Authority, a direction to mediation will be made.

Costs

[36] Costs are reserved. The parties are encouraged to resolve the question of costs relating to this application between them. If the parties fail to reach agreement, given that I already have comprehensive submissions from Massey University, Mr Millar may file and serve memorandum in reply within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority