

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 397/09
5285514

BETWEEN SERVICE & FOOD
 WORKERS UNION NGA
 RINGA TOTA
 Applicant

AND OCS LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Mitchell for Applicant
 Paul McBride for Respondent

Investigation Meeting: 10 November 2009

Determination: 11 November 2009

DETERMINATION OF THE AUTHORITY

[1] The Service & Food Workers Union (“SFWU”) and OCS Limited (“OCS”) are parties to a collective employment agreement which expired on 30 June 2009 but continues in force by virtue of s 53 of the Employment Relations Act 2000. Some members of SFWU who are employees of OCS under the terms of the collective agreement are currently being paid weekly. However, OCS has advised its employees and SFWU that it proposes to commence paying all of its employees fortnightly and has commenced a consultation process with that end in mind.

[2] The SFWU has sought assistance from the Authority seeking a declaration that the collective agreement provides for either fortnightly or weekly payment, and that employees are entitled to payment on the basis agreed at the commencement of their employment.

[3] The position of OCS is that whether an employee is paid weekly or fortnightly is a matter for the employer and that after consultation and reasonable notice, but not necessarily with agreement, OCS is able to change the frequency of the pay period.

[4] The issue for this determination is whether OCS can change the regularity of the payment of wages from weekly to fortnightly without the agreement of the SFWU and its members covered by the collective agreement.

Background

[5] OCS and its related companies employ a total of about 4,100 employees throughout New Zealand. The vast majority of those (over 3500) are employed in the commercial cleaning and health services field.

[6] OCS says that over the years OCS has paid its employees either weekly or fortnightly depending on the payroll system in place and that changes have been made from time to time. This evidence was confirmed by Ms Emma Samuels who told me that when she was first employed by OCS (under the name of QSE) she was paid fortnightly but in 2002 that changed and she began to be paid weekly.

[7] OCS says that it has reviewed all its expenses and processes seeking to make efficiencies. As a result of the review OCS determined that it could create efficiencies by paying staff fortnightly rather than weekly. OCS says it has invested in a computerised payroll system which is able to accommodate the efficiencies sought, and has become operational during 2009.

[8] Consultation with the SFWU over the proposed change to weekly pay periods was commenced in September 2009. The information was channelled through Mr Peter Shannon, a union organiser, who distributed the information to other union organisers responsible for OCS employees. During September questions were raised about the change to fortnightly pays, which were answered and/or addressed by OCS.

[9] Concurrently with the consultation process over the change to fortnightly pay periods, the union and OCS were in a bargaining process with regard to a second collective agreement for employees based at Auckland Hospital. The Union advised OCS that the change of pay period was hugely contentious and sought to have the change deferred. It was at this time that the current dispute arose as to whether OCS could change the frequency of the pay periods without the agreement of SFWU and its members.

The relevant terms of the collective agreement

[10] There are two clauses relevant to this dispute. Clause 27.1 of the agreement provides:

Employees shall be paid fortnightly or weekly in arrears by direct credit no later than Thursday. Where errors have occurred as a result of employer action or inaction, corrective payment must be made within two working days of the error being brought to the employer's attention. Each employee shall be supplied with written details showing how his/her wages are made up.

and clause 36.1.1. which states:

The parties to this collective agreement accept that change in the health service is necessary in order to ensure the efficient and effective delivery of health services. They recognise a mutual interest in ensuring that health services are provided efficiently and effectively, and that each has a contribution to make in this regard.

Determination

[11] In coming to my conclusions in this matter I have taken into account the very thorough and helpful submissions of the parties.

[12] The principles of interpretation of employment agreements are well settled. The plain meaning of the words in clause 27.1 are clear and unambiguous. The clause allows employees to be paid either weekly or fortnightly. However, as already stated the question is whether after employment, OCS can change the frequency of the pay period.

[13] SFWU contends that the collective agreement allows OCS the ability to determine the frequency of the pay periods at engagement only and that once employed the agreement on frequency then becomes part of the terms and conditions of employment.

[14] In support of its approach SFWU submitted that sections 5 and 61(1) of the Employment Relations Act 2000 requires mutuality of agreement in order for conditions of employment to be contractual terms and for those terms not to be inconsistent with the collective agreement.

[15] This approach was confirmed in *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Christchurch Press*¹ where the Court held that a job and finish arrangement which had been in place for over 30 years was an individual term

¹ [2005] ERNZ 288.

which co-existed with the collective agreement. The Court found that the job and finish arrangements were discussed at the time of employees entering into employment with the *Press* and formed part of the contractual arrangements for those individual employees.

[16] OCS accepts that the approach of SWFU is correct but submits the *Press* case can be distinguished on the basis that when employees are engaged by OCS there is no “agreement” as to which option will apply to them with respect to the regularity of their pay periods. Rather, all employees are simply told the pay period will be either weekly or fortnightly, depending on what is in place at their particular work site.

[17] I find clause 27.1 of the collective agreement allows the employer the discretion to pay employees either weekly or fortnightly. I also find that whether the payment of wages is made weekly or fortnightly is a practice which can be changed during the employment relationship. I can think of no other reason why the parties would have agreed to the wording they have, if that was not what was intended.

[18] There are no provisions in the collective agreement to restrict the employer’s discretion to change the frequency of the payment of wages.

[19] In *Wholesale Distributors Ltd v Gibbon Holdings Ltd*² a majority of the Supreme Court accepted that subsequent actions of parties can be taken into account in the interpretation of a disputed contractual provision.

[20] Taking that approach my conclusions on the interpretation of clause 27.1 is reinforced when considering the conduct of the SFWU in relation to a clause identical to 27.1 which has been incorporated into a MECA to which both SFWU and OCS are parties and of which both parties are aware.

[21] Other employer parties to the MECA include Spotless Services and ISS. These employer parties to the MECA are not only in competition with each other, but from time to time, pick up contracts which had previously been performed by each other. In these situations the provisions of Part 6A of the Act apply.

[22] Mr Clive Menkin, General Manager Human Resources for OCS, provided uncontested evidence as to the way clause 27.1 has been operated by the parties to the MECA, including SFWU.

² [2007] NZLR 277; [2007] NZSC 37; (2007) 8 NZCPR 374.

[23] Mr Menkin told the Authority that Spotless picked up a contract with Wellington Hospital which had previously been undertaken by OCS. While employed by OCS the employees were paid weekly. After being transferred to Spotless Services and while still subject to the MECA the pay period was changed to fortnightly following consultation with SFWU. There was no evidence that agreement for the change had been sought or required.

[24] Finally, clause 36.1 recognises that change in the Health sector may be necessary to ensure efficiencies. The clause demonstrates that the parties, when they have negotiated this collective agreement, were cognisant of the shifting tides with regard to the health sector and the need to maintain an efficient and effective service. This is consistent with the lack of any provisions preventing OCS from altering the regularity of pay periods for its employees.

[25] I find clause 27.1 allows OCS the discretion to pay its employees either weekly or fortnightly. OCS must be mindful of its obligations under the Act and must proceed in accordance with its good faith obligations under the Act.

Costs

[26] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. Given the nature of the dispute I am inclined to let costs lie where they fall. However, if the parties fail to reach agreement on the matter of costs, OCS Limited may file and serve a memorandum as to costs within 28 days of the date of this determination with a right of reply by SWFU within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority