

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 177/09
5138603

BETWEEN ASSOCIATION OF STAFF IN
 TERTIARY EDUCATION
 AND GORDON ROBERT
 HALSEY
 Applicants

AND THE CHIEF EXECUTIVE OF
 THE OPEN POLYTECHNIC
 OF NEW ZEALND
 Respondent

Member of Authority: P R Stapp

Representatives: Peter Cranney for Applicants
 Bernard Banks for Respondent

Investigation Meeting: 7 July 2009 in Wellington

Submissions received by : 18 September 2009

Conference call on
submissions: 19 October 2009

Determination: 4 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an issue of interpretation. The applicant says that clause 12.14.1 of the Academic Staff Collective Agreement September 2007-September 2009 extinguishes previously agreed terms and conditions between the respondent and employees unless such terms and conditions are subsequently agreed in writing and signed by the employees and the respondent. The problem is about whether or not employees, covered by the collective agreement and who currently work a 36 hour roster should be working a 34 hour duty week if they have not given written consent.

[2] The respondent says that clause 12.14.1 should be interpreted according to its plain meaning: that mutually agreed terms and conditions put in writing at the time of an employee's appointment continue to apply after the employee joins the union. Clause 5.1.1 expressly permits and incorporates any previously agreed term at the time of an appointment that specifies an employee may be on duty for more than 34 hours in any one week.

[3] The collective employment agreement expired on 5 September, but remains in force by virtue of the bargaining arrangements between the parties to the collective employment agreement.

The Applicant's standing in the employment relationship problem

[4] The Association of Staff in Tertiary Education has ceased to exist. It has been replaced by the Tertiary Education Union. At the time of the Authority's investigation meeting the latter had not been registered under the Employment Relations Act by the Register of Unions. The former union was dissolved as an incorporated society. As such it did not meet the requirements for registration under the Employment Relations Act, but remained at the time of the Authority's investigation meeting a registered union for the time being. By consent the parties agreed at the time of the Authority's investigation meeting that neither ASTE nor the TEU were parties with standing for the purposes of the employment relationship problem filed in the Authority. Mr Gordon Robert Halsey came forward to be joined to the employment relationship problem. Mr Halsey did not appear at the Authority's investigation meeting but swore an affidavit that:

- He is employed by the Open Polytechnic of New Zealand.
- He joined the respondent in late May 2007 and signed its standard terms of employment. This required him to work a standard 36 hour week.
- He became a member of the Association of Staff in Tertiary Education about one month after being employed and remained a member. He says he is now a member of the Tertiary Education Union.
- He consented to being named as an employee party in the employment relationship problem filed in the Authority.

[5] I agreed to join Mr Halsey to the proceedings under s 221 of the Act.

[6] Since the Authority's investigation meeting the name of The New Zealand Tertiary Education Union has appeared on the Registrar's list of registered unions.

Issues

[7] To provide an interpretation of clauses 5.1.1 and 12.14.1 in dispute.

The facts

[8] I accept that Mr Halsey's affidavit indicates that he signed the standard terms and conditions when he became employed. Mr Halsey is required to work a 36 hour week.

[9] The relevant clauses in dispute are located in the Academic Staff Collective Agreement September 2007-September 2009 as follows:

5.1 Weekly Duty Hours

5.1.1 No employee shall undertake more than thirty six (36) hours of duty in any one week: and unless the employee consents or any conditions of employment agreed to at the time of their appointment otherwise specify, the employee shall not be required to be on duty for more than thirty four (34) hours in any one week. (Emphasis added)

12.13 Additional Terms and Conditions

12.13.1 Before any employee covered by this Collective Agreement becomes bound by any additional terms and conditions of employment pursuant to Section 61 of the Employment Relations Act 2000, the parties agree that any mutual agreement to such additional terms and conditions of employment shall be recorded in writing and signed by the employee and the Chief Executive of The Open Polytechnic of New Zealand.

12.14 Complete Agreement

12.14.1 The terms and conditions of employment of an employee who becomes bound by this Collective Agreement shall not include any

*individual terms and conditions of employment previously agreed with the employer without the written agreement of the employer and employee. **Any** previously agreed terms and conditions of employment cease to apply on the day on which the employee becomes bound by this Agreement. (Emphasis added).*

This shall not prevent additional terms and conditions being agreed pursuant to clause 12.13 after the employee becomes bound by this agreement.

[10] The respondent's standard offer of employment to employees contains the following relevant provisions:

Hours of Duty

This offer is conditional upon you agreeing to a full-time 36 duty hour working week.

[IF APPLICABLE]

(a) *As a part-time employee, your weekly duty hours will be [NUMBER] hours per week being 0.x of the full-time duty hours specified above.*

Other Terms and Conditions of Employment

The above position is covered by an applicable collective agreement, namely the "Academic Staff Collective Employment Agreement" ...

If you are already a member of ASTE, you will be bound by the above collective agreement from the date on which you commence your employment with the Polytechnic.

The Employment Relations Act 2000 provides that if you are not a member of ASTE then for the first thirty (30) days of your employment, you will be covered by an individual employment agreement comprising the terms and conditions of the above collective agreement and any additional terms and conditions mutually agreed to by you and the employer that are not inconsistent with the terms and conditions in the collective agreement.

You can if you wish join the Union by contacting ASTE direct ... Once you join the Union you will be bound by the collective agreement from the date of joining.

[...]

Please note that no variation or addition to your terms and conditions of employment shall have any legal effect unless agreed in writing and such written variation or addition is signed by both yourself and Chief Executive (or his representative).

Acceptance Clause

I hereby accept your offer of employment on the terms and conditions described above including full-time duty week of 36 hours, or the proportion specified above if the position is part-time ...

[11] Section 61 (1) and s62 of the Employment Relations Act 2000 are relevant and they read as follows:

61 *Employee bound by applicable collective agreement may agree to additional terms and conditions of employment*

(1) *The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are –*

- (a) *Mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and*
- (b) *Not inconsistent with the terms and conditions in the collective agreement.*

62 *Employer's obligation in respect of new employee who is not member of union*

(1) *This section-*

(a) *applies to a new employee who-*

- (i) *is not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and*
- (ii) *enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee; but*

(b) *does not apply to an employee who-*

- (i) *resigns as a member of a union and enters into an individual employment agreement with the same employer; or*
- (ii) *enters into a new individual employment agreement with the same employer.*

(1A) *For the purposes of subsection (1), a collective agreement that includes a coverage clause referring to named employees, or the work done by the named employees, to whom the collective applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).*

(2) *At the time when the employee enters into the individual employment agreement with an employer, the employer must-*

(a) *inform the employee-*

- (i) *that the collective agreement exists and covers work to be done by the employee; and*
- (ii) *that the employee may join the union that is a party to the collective agreement; and*
- (iii) *about how to contact the union; and*

- (iv) *that, if the employee joins the union, the employee will be bound by the collective agreement; and*
- (v) *that, during the first 30 days of the employee's employment, the employee's terms and conditions of employment comprise-*
 - (A) *the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union; and*
 - (B) *any additional terms and conditions mutually agreed to by the employee and employer that are not inconsistent with the terms and conditions in the collective agreement; and*
- (b) *give the employee a copy of the collective agreement; and*
- (c) *if the employee agrees, inform the union as soon as practicable that the employee has entered into the individual employment agreement with the employer...*

The applicant's case

[12] In essence the applicant's case is that previously agreed terms and conditions relating to duty hours cease to apply on the day that the employee becomes bound by the collective employment agreement.

[13] The applicant has relied upon clause 12.14.1 and the meaning of that clause being plainly clear in respect of the word "any" meaning "every" or "all". In this regard it was submitted that the maximum hours is 36 and the default number of hours is 34. The default can be changed by either the employee's consent or by specification in conditions of employment agreed to at the time of appointment (clause 5.1.1). The employee's consent relates to an employee bound by the collective employment agreement and agreeing to 36 hours. However, the nub of this employment relationship problem relates to the scenario where an employee agreed to 36 hours before becoming bound by the collective employment agreement. To become bound by the collective employment agreement an employee is required to join the union.

[14] Upon joining the union and becoming bound by the collective employment agreement the applicant says that does not include any individual terms previously agreed in regard to duty hours, and the clause 5.1.1 default applies whereby an employee must be allowed to work 34 hours unless there is written consent to work more than 34 hours. Thus, in conclusion it was submitted, that the collective employment agreement contemplates a 34 hour week with exceptions and that that is protected by clause 12.14.

The respondent's position

[15] The respondent rejected the applicant's claim because if the applicant's argument is accepted, clause 5.1.1 would be deprived of its "*full force and effect*" and preventing parties from agreeing that an employee may work 34 hours or more. Also it was submitted that clause 12.14.1 nullifies extraneous terms covering matters not specifically dealt with in the collective employment agreement, and that individual terms agreed at the time of appointment are authorised by s 61 of the Act.

[16] Further the respondent has relied upon the history of the clauses that apply including earlier documents where the wording was similar if not the same. Another point put forward has been the practice that the hours worked have been agreed by the employee upon being appointed. Also, it was submitted that ASTE has made claims for a 34 hour week unsuccessfully in previous negotiations.

Determination

[17] To have full affect Clause 5.1.1 provides for either 36 or 34 hours in terms of the offer of employment. When the worker becomes bound by the collective employment agreement any individual terms and conditions previously agreed cease until there is written consent and in the meantime the hours of work must be 34 hours because clause 12.14.1 provides for (1) any individual terms to cease including any written consent to work 36 hours, and (2) written consent must be obtained to work more than 34 hours. Indeed the words "*or any conditions of employment agreed at the time of their appointment otherwise specify*" relates to the consistent application of the default provision, meaning that it would cover any employee who agreed to work 34 hours.

[18] This approach does not deprive clause 5.1.1 of its full effect because clauses 5.1.1 and 12.14 must be considered together for them to make sense. I agree with Mr Cranney that clause 5.1.1 is not nullified of its full effect because there are two scenarios that can apply. First, new employees prior to becoming bound by the collective employment agreement and before joining the union sign up to work 36 hours under the offer of employment. Second, there must be consent to work more than 34 hours when their individual terms and conditions under the offer of employment cease to apply under clause 12.14.1. Of course neither scenario would apply if the employee was already bound by the collective employment agreement as a member of the union in terms of the offer that refers to:

If you are already a member of ASTE, you will be bound by the above collective agreement from the date on which you commence your employment with the Polytechnic.

[19] Also, the 30 day requirement would not apply in that instance because it is agreed that that only applies where the employee is not a member of the union and not covered by the collective employment agreement. Moreover, the employer's offer recognises that the terms and conditions while based on the collective employment agreement form an "*individual employment agreement*".

[20] Clause 12.14.1 is clear and unambiguous in that previously agreed terms and conditions (made upon the offer of employment) cease to apply on the day the employee becomes bound by the collective employment agreement. As such the terms of the collective employment agreement become an enhancement to the individual terms and conditions applying under the offer of employment that purports to be an individual employment agreement for the employees not covered by the collective and who have not joined the union. Since the clause is clear and unambiguous I am not required to draw assistance from the history of the clause, the custom and practice and prior claims in the collective bargaining, as submitted by the respondent.

[21] If a new employee has consented in writing under the offer of employment to work 36 hours that continues until the employee becomes bound by the collective

employment agreement. Then it ceases to have effect and can only be continued by agreement.

[22] The question needing an answer is whether an agreement to work 36 hours (and not 34) made prior to the employee becoming bound by the collective employment agreement is an “individual term and condition of employment”? This must include any individual terms and conditions previously agreed (the offer) and they cease to apply on the day on which the employee becomes bound by the collective employment agreement. I agree with Mr Cranney that the answer must be yes, within the meaning of clause 12.14.1. I am also supported in this conclusion by the offer of employment purporting to be an individual employment agreement. I also agree that an agreement to work 36 hours would be a precondition of employment at the time of engagement under the offer of employment. That would cease under clause 5.1.1 unless the employee was already a member of the union and becoming covered by the collective employment agreement on the day they start work.

[23] Clause 5.1.1 has to be read in light of s 62 of the Employment Relations Act that would apply to new employees who are not members of the union and the offer of employment to work 36 hours would cease once the employee becomes bound by the collective employment agreement. Then it is up to the employee to consider consenting in writing to work more than 34 hours. In support of my conclusion there is nothing to suggest why 34 hours would otherwise have been included in the agreement. The reference to 34 hours or more in that clause would be otherwise rendered meaningless. Thus, the employer is obliged to get written consent from the employee to work more than 34 hours after they become bound by the collective employment agreement.

[24] The respondent has also relied upon other implications in relation to other clauses, but the applicant countered with the position that clause 5.1.1 only relates to duty hours. I accept that.

[25] The respondent has submitted that the Authority would be going beyond its jurisdiction under s 163 of the Act that places a restriction on the Authority’s power in relation to collective agreements. This is an interpretation issue and does not entail

cancelling or varying the agreement or any terms of the agreement. Thus I can not accept the respondent's argument on that point.

[26] It is my conclusion that any terms and conditions mutually agreed as individual terms and conditions based on the collective employment agreement prior to an employee joining the union and becoming bound by the collective employment agreement cease to apply unless there is an agreement in writing to consent to work more than 34 hours upon the employee becoming bound by the collective employment agreement.

[27] Thus, I agree that when an employee becomes bound by the collective employment agreement whatever was agreed to prior to that point means there is a default position until written consent is obtained to work more than 34 hours.

[28] Costs are reserved.

P R Stapp
Member of the Authority