

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 238/10
5145518**

BETWEEN SERVICE AND FOOD WORKERS
UNION INCORPORATED AND
OTHERS
Applicant

AND TOURISM HOLDINGS LIMITED
Respondent

Member of Authority: Leon Robinson

Representatives: Tim Oldfield, Counsel for Applicant
Stephen Langton, Counsel for Respondent

Investigation Meeting: 29 April 2009
6 May 2009

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicants seek a compliance order with the terms of a collective employment agreement. The non-union applicants seek wage arrears. The parties were unable to resolve the differences between them by mediation.

The facts

[2] The parties were parties to a collective employment agreement operative from 1 July 2007 to 30 June 2009 (“the 2007 Collective”).

[3] The 2007 Collective contains these terms:-

2.2 Coverage

This agreement covers all employees of the Employer, who are employed as guides; ticket/reservation assistants; maintenance assistants for the Waitomo Glow Worm Caves who are members of the Service and Food Workers Union.

7.2 *Employment Classification and Wages*

Employees shall be classified and paid in accordance with the following schedule of minimum hourly rates.

This is a minimum document; the grades and steps set out below are a guide for the employment classification of employees. The commencement classification of an employee is at the discretion of the employer.

The progression through the grades and steps is outlined.

7.3 *Employee Rates of Pay*

All paid wages will be increased by 3.5% effective 1 July 2007; 3.0% effective 1 July 2008.

<i>Date</i>	<i>Increase</i>	<i>Step One</i>	<i>Step Two</i>	<i>Step Three</i>	<i>Step Four</i>	<i>Step Five</i>
<i>1 July 2007</i>	<i>3.5%</i>	<i>\$11.25</i>	<i>\$14.99</i>	<i>\$17.39</i>	<i>\$17.80</i>	<i>\$19.15</i>
<i>1 July 2008</i>	<i>3.0%</i>	<i>\$11.58</i>	<i>\$15.44</i>	<i>\$17.91</i>	<i>\$18.34</i>	<i>\$19.72</i>

7.5 *Career Path Progression through the Grades & Steps*

Step 1 – All employees for the first three months of employment will be on an evaluation period – See terms and conditions section.

Step 2 – An employee shall progress to Step 2 on successful completion of the evaluation period. See terms and conditions section.

Step 3 – An employee shall progress to Step 3 through a combination of at least 15 months' service or the skills and knowledge gained from training received through Tourism Holdings Limited, or possess an agreed to equivalent from a provider of training recognised by the employer. The employer will use their best endeavours to ensure relevant Courses are made available to the employee to ensure that the transition can take place between steps 2 and 3.

Step 4 – An employee shall progress to Step 4 on completion of three years' satisfactory employment or having met the training requirements of Tourism Holdings Limited or possess an agreed to equivalent from a provider of training recognised by the employer.

Step 5 – An employee shall progress to Step 5 on the completion of 5 years' satisfactory employment or effective participation in additional training as required by the employer during this period of employment.

- [4] The non-union applicants are employed by the respondent as retail assistants and are members of the first applicant union:-

<i>Name</i>	<i>Start Date</i>	<i>Wage</i>
<i>Kazue Costar</i>	<i>30 March 2007</i>	<i>\$14.41</i>
<i>Noelene Love</i>	<i>1995</i>	<i>\$17.29</i>
<i>Glenys Iti</i>	<i>4 April 2008</i>	<i>\$13.39</i>
<i>Carol Drew</i>	<i>1 February 2007</i>	<i>\$13.93</i>
<i>Wendy Austin</i>	<i>1 February 2007</i>	<i>\$14.85</i>

[5] The applicants say that the respondent is not paying the non-union applicants the correct wage according to the provisions of clause 7.5. They maintain Kazue Costar should be on step 3 (\$17.91), Noelene Love on step 5 (\$19.72), Glenys Iti on step 2 (\$15.44); Carol Drew on step 3 (\$17.91) and Wendy Austen on step 3 (\$17.91).

[6] The respondent says it has not acted in breach of the terms of the collective and the non-union applicants are not entitled to wage arrears.

The merits

[7] The respondent company purchased the assets of Glow Worm Enterprises Limited on or around 1 February 2007. It offered employment to the non-union applicants. The Authority accepts that it was not a term of such offers of employment that service would be treated as continuous.

[8] Before the commencement of the non-union applicants' employment by the respondent, previous collective employment agreements covering employees at the respondent's Waitomo Cave workplace recorded rates of pay that applied only to cave guides. Even though those previous collectives covered employees other than cave guides, pay rates for such other employees were not recorded in applicable collective agreements.

[9] The Authority accepts that reference to "cave staff" alongside specified rates of pay was "dropped" from the collective 1 July 2005 to 30 June 2007 ("the 2005 collective").

[10] It is accepted too that the union did not notify a claim to extend the coverage of cave guide pay rates to other employees in bargaining for the 2005 collective. It is also accepted that the union and the respondent had not negotiated about or agreed upon extending the coverage of the cave guide pay rates to other employees under the 2005 collective.

[11] The respondent maintains that it did not enter into the 2005 collective believing that the specified pay rates applied only to its cave guides. It says that the union did

not notify a claim to extend the coverage of cave guide pay rates to other employees in bargaining for the 2007 Collective.

[12] Following on from that, the respondent says that it and the union did not negotiate or agree upon extending the coverage of cave guide pay rates to other employees under the 2007 Collective. It says that it entered into the 2007 Collective in the belief that the specified pay rates applied only to its cave guides. In accordance with that belief, it has not extended the cave guide rates to its other employees, including the present non-union applicants.

[13] The respondent's position now is that the pay rates at clause 7.3 of the 2007 Collective apply only to its cave guides, that clause 7.3 does not properly record the terms agreed between the parties and that its decision to enter into the 2007 Collective was influenced by a mistake.

[14] The Authority accepts that no claim had ever been made by any party prior to or during 2007 that the printed rates of pay would be extended to apply to all staff and further, that there were never any negotiations to the same effect.

[15] The Authority finds that there has been an error or mistake in the negotiations between these parties. The phrase or notation "cave staff" was omitted by the union from the 2005 collective when it was drafted and which the parties then went on to execute.

[16] The applicants seek a compliance order. A compliance order is a discretionary remedy. I am satisfied that the compliance now sought by the applicants is not appropriate. I do not support an order to compel the respondent to do something which was never agreed between the parties and I am satisfied that it was not agreed. This is an equity and good conscience jurisdiction. I cannot in equity and good conscience order compliance in respect of something which was not agreed. I am not prepared to "enrich" the applicants without any foundation for doing so. I consider the applicants claim inappropriate.

[17] In the particular circumstances, I decline to exercise my discretion to grant compliance.

The determination

[18] **The application for compliance is refused. The consequential orders sought by the respondent are in my view unnecessary and they too are refused.**

The costs

[19] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Langton is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Oldfield is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority