

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 171/10
5165994

BETWEEN

NICK WALLINGFORD
Applicant

AND

CHIEF EXECUTIVE OF THE
BAY OF PLENTY
POLYTECHNIC
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Peter Cranney, counsel for Applicant
David France, counsel for Respondent

Investigation Meeting: 25 March 2010

Determination: 14 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Nick Wallingford has brought to the Authority for determination a dispute about the interpretation, application or operation of the agreement under which he is employed by the respondent, the Chief Executive of the Bay of Plenty Polytechnic.

[2] Mediation was undertaken but did not resolve the problem.

[3] Mr Wallingford's employment is covered by the Academic Staff Multi-Employer Collective Agreement of 2008. This is as a consequence of his membership of the Tertiary Education Union (TEU), which is a party to that agreement with the employer.

[4] He is one of a number of the Polytechnic's employees who have reached the Senior Academic Staff Member (SASM) grade, for which the collective agreement provides a salary that ranges between \$64,375 and \$76,535.

[5] The dispute in this case arises from a claim by Mr Wallingford that the Chief Executive has not applied the provisions of the collective agreement correctly, so as to allow him the opportunity of progressing towards, and ultimately reaching if he can, the maximum salary for his grade.

[6] Progression by a SASM is decided by reviewing an employee's advancement or attainment. In this regard clause 4.3.3 of the collective agreement provides:

Progression within the SASM Grade

- (a) *Progression within the SASM Grade will be by annual review of the employee's professional practice which will refer to the SASM criteria in Schedule C. This review will be carried out according to policies and procedures developed and reviewed in consultation with [TEU].*

[7] Where it is decided that a SASM's progression has been such as to warrant an increase in pay, the collective agreement provides that the increase shall be no less than \$500 per annum. Under that amount may only be paid to enable employees who are less than \$500 below the maximum salary to move to that upper limit.

[8] Although Mr Wallingford, who became a SASM in 2001, has had several pay increases given to him after a number of annual reviews, these have not taken him to the maximum salary prescribed in the collective agreement.

[9] The Chief Executive considers that Mr Wallingford is no longer able to receive any further salary increases under clause 4.3.3 and consequently is no longer able to reach the maximum salary prescribed for the SASM grade. For the employer it is submitted that this situation is in accordance with the terms and conditions of the collective agreement and the way they are intended to operate or apply.

[10] The employer relies on guidelines published to define the principles, criteria and procedures of the progression system for academic staff members, including SASMs. Those guidelines are said to have been developed and reviewed in consultation with the TEU, Mr Wallingford's union.

[11] The current guidelines identify eight criteria for progression within the SASM grade. The Chief Executive contends that if a SASM successfully applies for progression each year based on the achievement of just one criterion, the extent of the employer's obligation is to reward a salary increase of no less than \$500 for that progress. Even if the SASM applies for progression on the basis that he or she has successfully achieved two or more of the eight criteria in a particular year, the obligation on the employer is still to provide a salary increase of no less than \$500.

[12] The Chief Executive contends that collective agreement does not require the employer to provide a minimum salary increase of \$500 per criterion successfully achieved in any year.

[13] In total, from five applications he has made over several years for progression, Mr Wallingford has received an increase of \$4,000 after achieving all eight of the criteria stipulated in the guidelines. The Chief Executive considers that the guidelines do not provide that upon that achievement a SASM must necessarily go to the top of the salary range specified in the collective agreement. He does not regard the ultimate purpose of the progression system as being to enable a SASM to reach the maximum salary for that grade.

[14] In support of his view the Chief Executive relies on a provision in the guidelines which, with reference to the eight criteria, states:

- *Each specific criteria (sic) can be rewarded only once.*

[15] I find in determining this dispute that there are two closely related issues arising out of it. The first is the quantum of any pay increase given when, by annual review, it is determined that a SASM should progress within that grade. The second is whether the Chief Executive is entitled to reward the achievement of each of the eight specific criteria once only, as the guidelines state.

[16] As to the first issue, I consider that the Chief Executive has applied the collective agreement correctly whenever he decides to reward a SASM's total progression in any one year with a \$500 increase in pay.

[17] The parties to this dispute have acknowledged that the Chief Executive does have discretion as to how much the reward should be, although it is one that must be

exercised reasonably and not arbitrarily. Therefore he could fix the increase at \$500 or at any greater amount, providing the maximum salary is not exceeded.

[18] There is nothing before the Authority to show, and no allegation has been made by the applicant to this effect, that the Chief Executive has improperly exercised his discretion with regard to the quantum of any increase fixed by him for Mr Wallingford or any other SASM.

[19] Mr Wallingford complains that the Chief Executive's published Guidelines and Criteria are inconsistent with the terms of the collective agreement, because whereas the latter identifies 18 criteria for progression the former provides only eight.

[20] In my view, whether there are eight or 18 (or 21 apparently at one time), the result of achieving any or all of them in one period of annual review may still be the same, that only one payment of at least \$500 is required to be made. There is nothing expressly or impliedly requiring that the minimum amount must be rewarded for each criterion where more than one has been achieved. The exact amount of the reward is a matter for the assessment of the Chief Executive in his discretion.

[21] As to the second issue, I find that the 2008 Guidelines and Criteria imposing a once-only limit on rewarding each specific criterion are, to that extent, inconsistent with the collective agreement.

[22] There is nothing expressed or implied in the collective agreement to prevent a SASM, such as Mr Wallingford, from reapplying in successive years for an assessment and from being rewarded in respect of any number of criteria for which he has been previously rewarded.

[23] Part 4 of the collective agreement provides for career progression and remuneration. The Statement of Intent introducing that part reads:

The following provisions recognise the need for academic staff members to develop as professional teaching practitioners and the desirability of integrating professional development and remuneration with the acquisition and application of professional practice skills and attributes.

[24] In normal usage 'development' is an ongoing or evolutionary process and, unless a clear intention to the contrary has been expressed or can be implied, is not something that stops at a particular point in time or upon the happening of a particular

event, at least while employees are continuing their professional practice for the same employer.

[25] Of relevance in this regard is the wording of the factor 10 requirements (a SASM grade criterion) in Schedule C:

Demonstrate commitment to ongoing professional development both within their discipline and as an educator:

[26] The concept of ‘ongoing’ I find is not something limited or bound by time or event, so long as an employee such as Mr Wallingford remains on the SASM Grade.

[27] The ‘need’ of academic staff members to develop is expressly recognised in the Statement of Intent. The integration of development and remuneration provides a clear incentive for SASMs to continue and advance their development, and for this to be measured periodically rather than on a once-only basis. Limiting rewards on a once-only per criterion basis seems likely to act as a disincentive to continuing or ongoing development by SASMs.

[28] I agree with the submission that it is also contrary to the idea of a reviewing annually, for the achievement of a particular criterion once to bring an end to further reviews in relation to that criterion.

[29] At clause 1.10.3 of their agreement the parties have provided that “*where policies are inconsistent with the provisions of this agreement, the agreement will prevail.*”

[30] I therefore consider that under the prevailing collective agreement Mr Wallingford is entitled to apply for progression more than once, and as frequently as annually if he wishes, in relation to criteria he has previously met successfully. It can reasonably be expected by the Chief Executive he will demonstrate that his development has continued beyond the point or level achieved at the time of any previous assessment.

The criteria for career progression

[31] Schedule C of the collective agreement identifies these, referring to them as factors or characteristics as well as criteria. For the SASM there are 18.

[32] There is no express requirement for them to be assessed singly rather than in combination of two or more, although it is claimed that prior to this dispute they were applied in that way so that the achievement of any one of the 18 (or 21) was rewarded with \$500.

[33] The 8 criteria in the guidelines seem to be created by compounding the 18 criteria into several groups. That does not appear to be inconsistent with the collective agreement. As long any criterion has not been changed in substance, it seems open for the Chief Executive and the TEU to agree to combine any of them into groups of two or more.

[34] As to the possibility that the criteria have been changed in substance, I note in Appendix B at 'specific criteria' 1.1(a) the requirement for a SASM to hold "*higher or additional professional qualification.*" That seems to depart from the collective agreement under which there was no express requirement for higher formal qualifications to be held. Inconsistency in this or any other regard is to be resolved under clause 1.10.3, in favour of the collective agreement provisions.

[35] The parties may wish to review consistency of the criteria regard and may refer any dispute back to the Authority.

Determination

[36] I therefore find that the Chief Executive of the BOP Polytechnic has not applied the collective agreement correctly in denying Mr Wallingford the opportunity of making successive applications for assessment on the same criterion or criteria, whether successfully met in the past or not. The collective agreement is expressly required to prevail over the guidelines.

[37] This determination largely has effect now and in future. Mr Wallingford may in the past have been disadvantaged by the Chief Executive's application of the employment agreement in this way if, because of the approach the Chief Executive was taking, he did not apply again for assessment under a criterion he had progressed on previously.

[38] If any disadvantage has been caused to Mr Wallingford it is a matter that should initially be discussed between the parties, with or without the assistance of a

mediator, with a view to reaching agreement if possible as to how the problem may be addressed.

[39] Leave will be reserved to the parties to apply for further directions from the Authority in respect of that or any other issue.

[40] Costs are reserved, although counsel will be aware that in relation to disputes costs awards are not usually made.

A Dumbleton
Member of the Employment Relations Authority