

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 193
5384713

BETWEEN

STEVE ROOD
Applicant

A N D

THE CHIEF EXECUTIVE OF
MANUKAU INSTITUTE OF
TECHNOLOGY
Respondent

Member of Authority: T G Tetitaha

Representatives: P Cranney, Counsel for Applicant
S Cook/A Stuart, Counsel for Respondent

Investigation Meeting: 6 November 2012

Submissions Received: 30 October 2012 from Applicant
2 November 2012 from Respondent

Date of Determination: 15 May 2013

DETERMINATION OF THE AUTHORITY

- A. A determination declining to make an order pursuant to s.131 of the Employment Relations Act 2000 for the recovery of wage arrears.**
- B. Submissions on costs to be filed within 21 days of the date of this determination.**

Employment relationship problem

[1] Steve Rood was employed full time as a lecturer of graphic design and photography by the Manukau Institute of Technology (MIT). His employment was terminated on 2 March 2012. Mr Rood disputes termination was by agreement and seeks payment in lieu of notice for the period 2 March to 29 April 2012. MIT disagrees.

[2] MIT had decided to reduce the number of full time equivalent (“FTE”) teaching positions and sought applications from employees for voluntary redundancy.

[3] On 23 February 2012 Mr Rood met with Grant Thompson, the then Head of the School where he worked. Mr Rood told Mr Thompson he was applying for voluntary redundancy and “*wanted to leave as soon as possible so he could take up a new position.*” There was no discussion of notice period and whether he would be paid in lieu of notice.

[4] At the same time Mr Rood sought advice from his union representative, Chan Dixon, regarding the redundancy. She advised Mr Rood to raise the voluntary redundancy and seek immediate release together with a redundancy calculation.

[5] Mr Rood applied for redundancy by email to Mr Ken Larsen, Faculty Dean, on 27 February 2012 asking for release from employment as soon as possible and an indicative severance calculation. This email was copied to Ms Dixon.

[6] Upon receipt of the email, Mr Larsen had a short conversation with Mr Rood about the voluntary redundancy and his need to take up new employment on the following Monday 5 March 2012. There was no discussion about payment in lieu of notice.

[7] Mr Larsen subsequently emailed Mr Rood accepting his proposal for voluntary severance and request for immediate release *because of the new employment you will be taking up next week and your Head of School’s information to me that the School can cover your absence this term.*

[8] On 28 February 2012 Mr Larsen discussed with Mr Peter Quigg, Director of Academic Operations, whether Mr Rood should be paid in lieu of his notice period. They did not consider payment in lieu of notice was required given immediate release was requested and although inconvenient, others within his department could cover his duties.

[9] On 29 February 2012 Mr Rood met with Mr Thompson. He received a letter from MIT stating his final day of work was 2 March 2012 and he would not be paid out for the balance of notice period up to 29 April 2012. He received redundancy compensation in accordance with the employment agreement and payment of holiday

and long service leave due and owing. The letter asked that Mr Rood sign the bottom of the letter in acknowledgement and acceptance of the above terms.

[10] On 2 March 2012 Mr Rood's employment ended. Mr Rood did not return to work at MIT and started his new employment. MIT did not require Mr Rood to return to work his notice period.

[11] On 5 March 2012 that same day, Ms Dixon wrote to MIT disputing non-payment of a notice period to 29 April 2012. The letter stated:

"... there were conversations with Mr Rood about departure date, which was agreed to be Friday 2 March, but there was never a conversation with Mr Rood about non-payment of notice period. ..."

[12] The parties were unable to resolve this matter and it has now come before the Authority for determination.

Issues

[13] This is a dispute about the interpretation and application of the Academic Staff Collective Employment Agreement for the period 1 January to 31 December 2012 (collective agreement) regarding notice in a redundancy situation. The issues of interpretation are:

- a) Was there an agreement to vary the date Mr Rood was discharged?
- b) If yes, was MIT required to make payment in lieu of notice?

Was there an agreement to vary the date Mr Rood was discharged?

[14] The collective agreement required full time lecturers to give two months' notice of termination unless in a surplus staffing situation.¹ There was no dispute there was a surplus staffing situation leading to the request for voluntary redundancies.²

[15] In a surplus staffing situation, 'notice' requirements were set out in clause 11.4:

¹ Clause 7.6(a)

² Clause 11.3 sets out a surplus staffing situation.

11.4 Notification

Where a surplus staffing situation in terms of clause 11.2 arises the employer shall advise the employees affected not less than two months prior to the date by which the surplus staff are to be discharged. This date may be varied by agreement between the parties. Alternatively the employer may terminate the employee's employment and pay two months salary in lieu of notice.

[16] Mr Rood submits clause 11.4 means the date of discharge can only be varied by agreement between the Chief Executive Officer of MIT (CEO MIT) and the Tertiary Education Union (TEU) as they are "parties" as defined in clause 1. There was no agreement between the parties so defined. Accordingly MIT has unilaterally terminated Mr Rood's employment and must pay Mr Rood two months salary in lieu of notice.

[17] MIT disagrees. It submits there can be and was agreement between Mr Rood and MIT to vary the date of termination and there was no contractual entitlement to payment of two months' notice in lieu. Alternatively it argues there was an additional term agreed to allow variation of the termination date between the employee and employer pursuant to s61.

[18] The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.³

[19] Mr Rood and Mr Larsen reached agreement on the termination date of 2 March 2012.⁴ Neither party sought to involve the Union or CEO MIT in reaching this agreement.

[20] Clause 11.3 does not restrict agreement to vary termination date to the Union or CEO MIT only.

³ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

⁴ Letter MIT to Rood dated 29 February 2012 and letter C Dixon to MIT dated 5 March 2012

[21] It is a matter of common sense and efficacy for individual employees to be capable of negotiating their individual exit date under the collective agreement, without waiting for intervention of their union. Otherwise there is risk of individual employees being unable to agree any earlier departure date until the Union official was available. Delays may have effect upon their ability to secure subsequent work.

[22] It cannot have been intended for the definition of parties able to reach agreement about an individual employee's termination date within clause 11.4 to be restricted to the CEO MIT and the TEU only.

[23] Alternatively the agreement for early termination reached between the employee (Mr Rood) and the employer (represented by Mr Larsen) could be an additional term pursuant to s61. There was evidence of mutual agreement for early termination and it is not inconsistent with the collective agreement.

[24] The Authority determines the parties could have and did agree to vary the termination date for Mr Rood to 2 March 2012.

Was MIT required to make payment in lieu of notice?

[25] At the time the parties discussed Mr Rood's early departure date prior to the expiry of the period of notice, there was no agreement or discussion about payment in lieu.

[26] Where there is a contractual right to terminate an employment agreement by a payment in lieu of notice, it is *necessary for the employer to give clear and unambiguous notification to the employee that that right is being exercised, even in a situation where the employee could arguably be expected to infer that the right has been exercised.*⁵

[27] There is no evidence MIT was clearly exercising its right of early termination under clause 11.4. Payment in lieu of notice was never discussed between the parties prior to Mr Rood's departure.

[28] The circumstances do not fit the historical basis for claiming payment in lieu of reasonable notice. Traditionally payment in lieu of notice was made to prevent claims for damages by employees for breach of an implied term of reasonable notice:

⁵ *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] ICR 117, [2013] 2 WLR 50

The traditional view has been that reasonable notice should be given, and failure to do so will give rise to a claim for damages. The damages are calculated on the basis of the loss of earnings for the period of what would have been proper notice, less any earnings gained or which should have been gained elsewhere by the employee acting properly to mitigate his loss. On this basis a payment in lieu of notice is a payment on account of damages or in satisfaction of damages.⁶

[29] The facts do not support the basis for a claim for damages. Mr Rood made no losses for which a claim for damages for payment in lieu of reasonable notice would arise. He had another job to go to starting 5 March 2012. He was no longer available to work for MIT. MIT could have insisted he work a reasonable notice period of two months. They did not.

[30] Given the above finding, the Authority determines Mr Rood was not entitled to payment in lieu of notice.

Determination

[31] The Authority makes the following determination and direction:

- A. A determination declining to make an order pursuant to s.131 of the Employment Relations Act 2000 for the recovery of wage arrears.
- B. Submissions on costs to be filed within 21 days of the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority

⁶ *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641; (1996) 5 NZELC 98,381; [1995] 2 ERNZ 398, 404