IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 135
5389254

	BETWEEN	TERTIARY EDUCATION UNION First Applicant
		LAWRIE GRAY AND THIRTEEN OTHERS Second Applicants
	A N D	VICE CHANCELLOR OF LINCOLN UNIVERSITY Respondent

Member of Authority:	M B Loftus
Representatives:	Simon Mitchell, Counsel for Applicants Raewyn Gibson, Advocate for Respondent
Investigation meeting:	11 June 2013 at Christchurch
Submissions Received:	At the investigation meeting
Date of Determination:	3 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about whether a clause in the applicable collective employment agreement, *Emergency Call-Out*, entitles the second applicants to penal payments for work performed immediately after two Christchurch earthquakes.

Background

[2] The applicants perform a range of support and maintenance tasks at the University's Lincoln campus. Their terms and conditions are governed by the Services Staff Collective Employment Agreement.

[3] Contained therein is a clause entitled Emergency Call Out. Part thereof reads:

> *The following shall apply only to Trades Staff and Campus Support Staff. This clause only applies if the employee has left the workplace.*
>
> *(a) The employer may require an employee to work in emergency situations. Emergency situations include but are not limited to fire, flood, earthquake, and breakdown of machinery or equipment.*
>
> *(b) An employee who is called in an emergency situation shall be paid as follows: …*

[4] This is followed by a range of provisions detailing employee entitlements once they have been called out.

[5] On Saturday 4 September 2010 there was an earthquake which caused considerable damage to the University's infrastructure. As a result the University was closed to students until Monday 13 September. That, in turn, led to the majority of staff being advised they should stay at home but they *may work from home to the extent they can.*

[6] This did not, however, apply to the applicants and between 4 and 13 September they performed work on the campus. Worked performed over the two weekends attracted additional payments in accordance with the Emergency Call Out clause but that completed between Monday 6 September and Friday 10 September inclusive was paid at normal rates.

[7] The earthquake of 22 February 2011 also resulted in a decision to close the campus with staff being advised it would, for them, reopen on Wednesday 2 March. That said, and notwithstanding the advice, a number of groups continued to work on site in the intervening period. The majority of such staff were engaged in support functions and included groups such as senior management, finance, IT, human resources, library, and those engaged in hostel and catering functions. Also included were the applicants.

[8] This time work was performed during what would, but for the earthquake, have been normal working hours. The applicants were paid accordingly and the provisions of the Emergency Call Out clause were not applied.

[9] They believe it should have been.

Determination

[10] As both parties stated the principles of interpretation of agreements are well settled and both quoted *Vector Gas Limited v. Bay of Plenty Energy Limited* (2010) 2 NZLR 444 when enunciating those principles.

[11] In particular both cited paragraph [19] which reads:

> *The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. …*
> *The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The Court embodies that person. To be properly informed the Court 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. …*

[12] Further on the Court went on to say at paragraph [23]:

> *Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be construed as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.*

[13] While a very simplistic summary of a significantly more comprehensive submission, the argument for the applicants is this was an emergency as both defined and envisaged by the sub-clause. This is evidenced by inclusion of *earthquake* as an example of an emergency and the clause should therefore apply.

[14] The University position is the clause can not apply as an employee does not become eligible for payment until two criteria are met. As Ms Gibson put it:

> *the provisions of clause 13 are only applicable when an employee is* 'called out' *to work in an emergency situation (as defined in clause 13(a)); that call out of necessity occurring outside of the employee's ordinary working hours.*

[15] In support of this submission the University refers to a number of phrases contained within the clause. Emphasis is placed on the second sentence which reads

this clause only applies if the employee has left the workplace and is then required to be called out due to the emergency situation (clause 13(b)).

[16] The clause also refers to on-call rosters; anticipates the duration of a call-out may be reasonably short; and provides for the payment of travel allowances which recognises that emergency call-outs will require the employee to travel to the workplace outside of their ordinary working hours.

[17] Finally, it is argued that clause 13(i) reinforces that an employee will only be called back during the period they are *off duty* and prior to their *normal starting time.*

[18] In responding to the University's contention that eligibility is dependent upon a second criteria – namely a call back, the applicants advise they accept that would normally be the case as what constitutes an emergency is normally defined by a requirement for timely and urgent rectification as opposed to the type of work performed which does not differ to any significant extent. That said, it is argued this case provides an exception by virtue of two factors. First, this was an unusual event whose magnitude was far beyond that contemplated by the parties when the clause was written and, second, the applicants were called back in the sense that other staff were not.

[19] I prefer the University's position. The words are, for the reasons outlined by Ms Gibson, clear. There are two prerequisites for payment – an emergency and a requirement to attend the workplace out of normal hours. While the first requirement was fulfilled, the second was not. The work was generally performed during what would otherwise have been normal working hours and the little that wasn't was remunerated appropriately.

[20] I also note Mr Mitchell's argument this was an unusual event whose magnitude was not considered by the parties at the time they wrote the clause. That argument would suggest the outcome sought by the applicants is inappropriate given *Vector Gas*. It is difficult to suggest the parties intended an outcome that was beyond their contemplation.

[21] The argument this became a call-out by virtue of the fact others were not working is also flawed in that the evidence shows a number of other occupational groups were in the workplace. They were performing their normal work during what would be their normal hours and neither received nor sought additional payment. The

evidence is also that others who were precluded from coming to the campus may well have been performing work from other locations. In any event, and despite a reluctance to concede the fact, the evidence from the applicants who appeared was that they could have departed to attend to personal issues arising from the earthquakes if they so desired. Attendance at work was not compulsory and payment would have continued had they been absent.

Conclusion

[22] For the above reasons I find in the University's favour and conclude the applicants were paid in accordance with their employment agreement. They are not therefore entitled to the penal payments they seek.

[23] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority