IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 115
5450166

	BETWEEN	NATIONAL UNION OF PUBLIC EMPLOYEES INCORPORATED Applicant
	A N D	CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Andrew McKenzie, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	11 July 2014 at Christchurch
Submissions Received:	11 July 2014
Date of Determination:	4 August 2014

DETERMINATION OF THE AUTHORITY

A. **The respondent has been reimbursing the mileage claims of its School and Community Dental Service employees at an incorrect rate since 2007, although its liability is limited to the period commencing on 28 February 2008. The parties are to seek to agree within the next 12 weeks what quantum, if any, is to be paid to the affected employees to rectify the effects of this error.**

B. **Costs are reserved.**

Employment relationship problem

[1] The applicant (NUPE) has raised a dispute concerning the interpretation, operation and application of the collective agreement in force between the parties in relation to the payment of motor vehicle allowances for school and community dental employees.

[2] The applicant claims that the respondent (CDHB) has been paying dental therapists and dental assistants their mileage allowance at an incorrect rate since 2007. The dental therapists and assistants have been paid a mileage allowance at the rate of 50c per kilometre which includes their travel between home and work, less the first 20 kilometres. All other staff members within the CDHB have received a mileage allowance calculated at a rate equivalent to the Inland Revenue Department rate since 2007, but do not receive reimbursement of mileage between their home and work.

[3] The respondent accepts that the dental therapists and assistants are paid mileage at a different rate to all other staff within the CDHB but argue that this is due to an agreement between the parties in or around 2005 that, as part of the arrangement whereby dental therapists and assistants would get paid for travel between home and work (less the first 20 kilometres) their mileage rate would be paid at 50c per kilometre. In the alternative, the respondent relies upon the wording of the collective agreement to justify not paying the home to work element of the dental staff's mileage at the IRD rate.

Brief account of the events leading to the dispute

[4] In 2005, because of a change in the way that dental therapists and assistants operated, resulting in their workplace potentially varying from day to day, a forum was convened to discuss the then current practice relating to clinic arrangements for dental therapists and assistants.

[5] The Authority was shown a document headed *Proposal for Recommendations to come from the Combined Forum: Reimbursement of Travel Expenses for Dental Therapists and Assistants.* This contained the following paragraphs:

> *The employer recognises that employees should not be unfairly disadvantaged in terms of travel costs when variations to their place of work occur (at the employer's request). However, the employer's expectation is that employees will continue to make their own way to*

work and be responsible for the cost of travel to and from work. In that respect the following is proposed.

Agreed Principles

1. *Minimise travel through clinic allocations*

   - *Allow flexibility within team, with work being allocated fairly and consistently*
   - *Clinic allocations to be based on team and service requirements.*

2. *Fair reimbursement for any travel required by the employer in addition to standard requirements to make their own way to and from work*

   - *No unfair disadvantage to the employee.*

[6] As a result of this Forum, an agreement was reached in accordance with which special provisions were incorporated into the collective employment agreement between the parties relating to travel for school and community dental service employees only. These were contained in clause 12.6 of the successive collective agreements in force between the parties from 2007 until the current date.

[7] The following is an extract from the collective agreement dated 1 November 2007 to 31 October 2010:

12.6 ***Travel Expenses and Incidentals***

12.6.1 When travelling on employer business, the employee will be reimbursed for costs on an actual and reasonable basis on presentation of receipts, including staying privately.

12.6.2 Employees who are instructed to use their motor vehicles on employer business shall be reimbursed in accordance with the IRD mileage rates as promulgated from time to time. The IRD rates that applied at the commencement of this agreement are as follows:

Annual Business Use Reimbursement per Km

Km	***c/Km***
1 – 3,000	*62c*
Over 3,000	*19c*
Or	
Flat rate	*28c*

> *12.6.3 General: in circumstances not addressed by this clause, any expenses incurred on behalf of the employer shall be reimbursed in accordance with CDHB policies.*
>
> *The following provisions apply to School and Community Dental Service employees only:*
>
> *12.6.4 One Board vehicle will be made available full-time within each of the three rural teams. This vehicle needs to be managed as per the CDHB Vehicle and Transport Policy. How this vehicle is utilised within the team, will be at the team's discretion.*
>
> *12.6.5 All approved work-related travel between clinics or other CDHB work places/locations is to be reimbursed. This includes any travel specifically for the purposes of delivery of equipment between workplaces.*
>
> *12.6.6 Employees will be able to claim reimbursement of all work-related travel, including distances travelled to and from work, over 20 kilometres per day. This is to be claimed fortnightly and signed off by the relevant manager/coordinator before being forwarded to Payroll for processing. The parties acknowledge that this arrangement is in recognition of the travel requirements/service delivery needs that are specific and unique to the School and Community Dental Service and that this will not apply or made to apply to any other service within the organisation.*
>
> *Note: sub-clauses 12.6.4 to 12.6.6 incorporates* [sic] *the terms of the agreement reached between the parties during 2005 in accordance with the developed and agreed principles relating the reimbursement of travel expenses.*

[8] In the 1 April 2010 to 30 April 2012 collective agreement, the terms of 12.6 were the same, save for clause 12.6.2 which stated as follows:

> *12.6.2 Employees who are instructed to use their motor vehicles on employer business shall be reimbursed 70c per km in accordance with the IRD mileage rates as promulgated from time to time.*

[9] In the 1 May 2012 to 31 August 2014 collective agreement, clause 12.6.2 stipulates that the rate will be 74c per kilometre, but otherwise clause 12.6 remained unchanged.

The Issues

[10] There are two issues for the Authority to determine:

a. Had a binding agreement been reached between the parties that the dental therapists and assistants would have their mileage reimbursed at a different rate compared to all other staff?

b. Does the wording of clause 12.6 preclude the dental therapists and assistants from being paid the same mileage rate as all other staff?

Was there a binding agreement?

[11] The evidence of the parties does not assist in assessing the reason why the mileage rate paid to dental therapists and assistants diverged from the rate paid to all other staff under the collective agreement. Evidence was given on behalf of the respondent by Megan Gibbs, Service Manager of the Community Dental Service. She commenced employment with the respondent in January 2006, at which time, I understand, all staff were reimbursed their mileage at the rate of 50c per kilometre, whether it included a home to work element or not. Ms Gibbs was unable to explain why there was a divergence in the rate from 2007, and I understand that she was not responsible for the decision by the respondent to bring into effect such a divergence.

[12] Evidence was given on behalf of the applicant by Janice Gemmell, who has been employed by NUPE as an organiser since 1998. The respondent relies on emails from Ms Gemmell to the respondent in which she acknowledges a 50c per kilometre rate for dental therapists and assistants. However, she is adamant that she made such statements simply because she believed that an agreement had been reached due to the fact that there was, in practice, a divergence in the rate.

[13] Ms Gemmell was involved in discussions in relation to the special home to work exception that was put in place for dental therapists and assistants, and says that she is certain that the discussions were in relation to the principles to be established, without any agreement that a special or capped mileage rate was to be applied to dental therapists and assistants going forward.

[14] The respondent is unable to contest that evidence as it can produce no written documentation recording such an agreement, nor can they produce a witness who can

give evidence about such an agreement. I therefore accept the evidence of Ms Gemmell that no such agreement was reached between NUPE and the CDHB in relation to a special rate that was to be paid to dental therapists and assistants going forward.

Does the wording of clause 12.6 preclude the dental therapists and assistants claiming mileage at the same rate as other staff?

[15] Having established that no binding agreement was reached between the parties that a special mileage rate was to be applied to the dental therapists and assistants, the Authority must determine whether the wording of clause 12.6 itself entitles the respondent to pay dental therapists and assistants at a different rate to all other staff.

[16] The principles of contractual interpretation in the employment context are well established and there have been a number of reasonably recent cases in the Court of Appeal and Employment Court that assist.

[17] In the Employment Court case of *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149, His Honour Judge Ford neatly summarised at [17] the principles of contractual interpretation as set out in the Supreme Court case of *Vector Gas Ltd v Bay of Plenty Energy Ltd*, [2010] NZSC 5, [2010] 2 NZLR 444 as follows (omitting footnotes):

> *In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time*

[18] Ms Shaw argues on behalf of the respondent that there is a clear difference between the concept of using motor vehicles *on employer business* (as referred to in

clause 12.6.1) and claiming reimbursement for *all work related travel* (as referred to in clause 12.6.6). She argues that *work related travel* is a wider concept than *employer business. Work related travel* encompasses travel between home and work but such travel is not on employer business she says. Ms Shaw relies on this difference to argue that dental therapists and assistants may only receive the rate of 74c per kilometre when they are actually travelling on employer business, once they have arrived at their first place of work for the day.[1]

[19] Ms Shaw's argument means, of course, that the dental therapists and assistants have been underpaid with respect to that portion of any journeys they undertake after arriving at the first workplace of the day, as they would have been paid at only 50c per kilometre for that portion of any travel. Ms Shaw says that the respondent does not necessarily accept that ramification of her argument, but I cannot see how it does not inevitably follow from her submissions, save that, between 1 November 2007 and 31 October 2010, dental therapists and assistants may have been overpaid in respect of their annual business use over 3,000 kilometres, when the reimbursement rate was 19c per kilometre.

[20] According the words *employer business* and *work rated travel* their ordinary meanings, I accept Ms Shaw's submission that the phrase *work related travel* expresses a wider concept than *employer business. Work related travel* can clearly include travel undertaken to get to work. However, travelling from home to one's place of work is not travel undertaken on *employer business* as the ordinary meaning of the phrase *on employer business* connotes undertaking the business of the employer.

[21] Whilst one might be able to argue that it is for the benefit of the business of the employer for the employee to actually travel from their home to their place of work, the actual travelling from home to work, without more, is not part of the employer business. By contrast, once the employee has arrived at the employer's place of business, by travelling from that place of business to another place of business of the employer, the employer benefits from that travel. Looked at another way, the employer has no say exactly where the dental therapist and assistants live, but does decide where the employee's places of work are to be.

[1] The current IRD rate is actually 77c per kilometre, but that discrepancy need not trouble the Authority at this stage

[22] Having accepted that the concept of *work related travel* is wider than travel undertaken on *employer business,* the next step is to ascertain whether that difference means that dental therapists and assistants are not entitled to be paid at the prevailing IRD rate per kilometre during that portion of their travel which comprises travel from their home to their first place of work for the day (less the first 20 kilometres).

[23] Clause 12.6.6 is silent as to the rate at which school and community dental service employees are able to claim reimbursement of their work related travel. Whilst it is clear from the wording of clause 12.6.2 that, once they arrive at their first place of work for the day, any further travel (which is on *employer business)* must be reimbursed at the prevailing IRD rate, there is no indication in clause 12.6 at what rate the home to work portion of their *work related travel* is to be reimbursed. In practice, it is reimbursed at 50c per kilometre.

[24] In 2005, when the arrangements set out in clause 12.6.4 to 12.6.6 were first agreed on, if the School and Community Dental Service employees had had their home to work travel reimbursed at a rate that was different from that at which all other employees had their *employer business* travel reimbursed, one might possibly be able to infer that an agreement had been reached that the home to work travel element of School and Community Dental Service employees was fixed by agreement at 50c per kilometre. However, there is ample evidence to show that non School and Community Dental Service employees had their travel reimbursed at 50c per kilometre at well. It is therefore not possible to draw that inference.

[25] In the absence of any evidence, as examined above, that such an agreement had been reached, and in the absence of any specific rate set out in clause 12.6.4 to 12.6.6 for *work related travel,* the inference that can be drawn is that the intention was that School and Community Dental Service employees would have all of their *work related travel* reimbursed at the same rate as other employees' travel on employer business. That was the case between 2005 and 2007 and it is possible to draw the inference that that should have continued to be the case from 2007 to the present day.

[26] Even though the home to work portion of the *work related travel* is not travel on employer business, that does not mean that it has not been the intention of the parties to the three collective agreements since 2007 that the School and Community Dental Service employees would not enjoy the same rate for all of their *work related travel*.

[27] If Ms Shaw's argument was correct, one would expect to see in the collective agreement reference to the rate at which *work related travel* or travel between home and work was to be reimbursed. There is no such reference. In the absence of an agreement that the School and Community Dental Service employees would have their *work related travel* pegged at 50c per kilometre, the end conclusion that one can reach is that that *work related travel* should be reimbursed at the only rate that is stipulated in clause 12.6, namely 74c per kilometre as set out in the current collective agreement.

[28] Furthermore, I do not believe that the wording of sub clauses 12.6.1 and 12.6.2 precludes an obligation on the employer to pay travel between home and work at the same rate as travel on *employer business.* The current wording of sub clause 12.6.2 stipulates that:

> *Employees who are instructed to use their motor vehicles on employer business shall be reimbursed 74c per km in accordance with the IRD mileage rates as promulgated from time to time.*

[29] The sub clause does not say that only employees who are instructed to use their vehicles on employer business shall be reimbursed 74c per kilometre. This wording makes it perfectly feasible for employees undertaking travel on employer business and dental therapists and assistants undertaking work related travel to both be reimbursed at the prevailing IRD rate. In other words, the wording does not make these two concepts incompatible.

[30] The only evidence that does support Ms Shaw's position is the practice that has actually been occurring. However, I prefer the evidence of Ms Gemmell that this is a practice that has arisen out of a misunderstanding, which she shared for many years. That practice, however, does not establish a contractual right or obligation when it is based on a misapprehension.

[31] I would also reject any argument that custom and practice has established a right to pay a differential rate to school and community dental staff. This is because the practice has been to pay all of their mileage claims at 50c a kilometre, despite the clear express obligation to pay their travel on employer business at the IRD rate since 2007. Therefore, the practice has been inconsistent with the express terms of the collective agreement, which prevents a binding contractual arrangement from being formed by implication.

[32] Turning to apply the cross check referred to by Judge Ford in *New Zealand Professional Firefighters Union*, I note that documents put before the Authority which were prepared in respect of the Combined Forum make no mention of any differential rate for school and community dental staff. Similarly, extracts of previous collective agreements which were provided made no reference to differential rates for such staff.

Conclusion

[33] I conclude that the respondent has been reimbursing *work related travel* undertaken by School and Community Dental Service employees since 2007 at the incorrect rate. The correct rates to have been applied were those stipulated in clause 12.6.2 of the three successive collective agreements.

Directions

[34] By agreement of the parties, the Authority was to examine the question of liability only, without examining what the quantum may be due to the affected employees should it be found that the respondent had been acting in breach of its obligations under the successive collective agreements.

[35] Accordingly, I now direct that the parties seek to agree how the respondent's liability is to be satisfied and the affected employees compensated. It is likely that a reasonably complicated and careful accounting exercise will have to be undertaken to establish the effect of this determination on the affected employees. However, s. 142 of the Employment Relations Act 2000 sets out that no action may be commenced in the Authority in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose. The statement of problem was received by the Authority on 27 February 2014, which limits the respondent's liability to the period commencing on 28 February 2008.

[36] I therefore direct that the parties should be given a period of 12 weeks from the date of this determination within which to seek to come to an agreement on quantum. If, after 12 weeks, no agreement has been reached, the parties may seek the assistance of the Authority in determining quantum.

Costs

[37] Mr McKenzie asked that costs be reserved but indicated that he believed that costs should lie where they fall. Ms Shaw did not express a view on costs and, accordingly, costs are reserved. However, the parties should seek to agree how costs are to be dealt with between them. If they cannot come to that agreement, any party seeking costs should serve and lodge a memorandum of counsel no later than 12 weeks from the date of this determination. The other party may then serve and lodge a memorandum of counsel in response within a further 14 days.

David Appleton
Member of the Employment Relations Authority