

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 218  
5528561**

BETWEEN                      SERVICE AND FOOD  
   WORKERS UNION NGA RINGA  
   TOTA INC  
   Applicant

AND                              SKYCITY AUCKLAND  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson

Representatives:            Tim Oldfield, Counsel for Applicant  
   Kylie Dunn, Counsel for Respondent

Investigation Meeting:      22 July 2015 at Auckland

Submissions received:      22 July 2015 from Applicant and from Respondent

Determination:              24 July 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, the Service and Food Workers Union Nga Ringa Tota Inc (the SFWU) has applied to the Authority to resolve a dispute about the interpretation and operation of a clause in a collective agreement.

[2]     Specifically the SFWU claims that the percentage increases set out in Schedule A of the collective agreement between SKYCITY Auckland Limited (SKYCITY), Unite Union on behalf of the SKYCITY Employees' Association (UNITE) and the SFWU (the Collective Agreement) apply to all the rates paid to employees under clause 9.5 of the Collective Agreement.

[3]     The Respondent, SKYCITY Auckland Limited (SKYCITY) claims that the percentage wage increases in Schedule A apply only to the roles listed in Schedule A, and that other Schedules of the Collective Agreement contain other mechanisms for wage and salary increases.

[4] Specifically, SKYCITY claims that where an employee's higher position is listed in Schedule A, the increase in Schedule A applies, but where the higher position is listed in Schedule B, or Schedule C, the mechanisms for increase in those Schedules apply. Where the higher position is outside the Collective Agreement, SKYCITY determines the appropriate higher position rate with regard to the starting rate for the higher role.

## **Issues**

[5] The issue for determination is whether SKYCITY has correctly applied the appropriate rate to employees acting up in a higher position in accordance with clause 9.5 of the Collective Agreement.

## **Background Facts**

[6] SKYCITY operates an entertainment complex in Auckland which includes a casino, theatre, two hotels, a convention centre and several bars and restaurants. It employs approximately 3,400 employees in relation to its Auckland operations, of whom approximately 809 are members of either the SFWU or UNITE.

[7] SKYCITY employs members of the SFWU and UNITE in accordance with the terms of the Collective Agreement. The Collective Agreement covers the period 1 January 2013 to 30 June 2015 and applies to:

*3.1 This Agreement covers all waged Employees who are members of either union and who work at the SKYCITY Auckland site in any of the jobs listed in Schedule A.*

*3.2 Subject to the terms and exceptions set out in Schedule C, this Agreement will also cover union members working at SKYCITY Auckland in the salaried positions set out in Schedule "C"*

*3.3 This Agreement does not cover any other salaried positions at the SKYCITY Auckland site ...*

### *Schedule A*

[8] Schedule A of the Collective Agreement (Schedule A) applies to waged positions as itemised in a list which sets out the minimum start rates for various positions. The statement set out above the designated positions states:

***SCHEDULE A – Minimum Start Rates*** *The following Minimum Start Rates will apply to the positions listed below (subject to the terms of an Employee’s personal letter).*

[9] Following the statement is a list of positions with minimum start wage rates applicable from 2013, 2014 and 2015. After the list is the statement:

*The above rates are minimum start rates. For the avoidance of doubt, all paid and printed rates as of 31 December 2012, will increase by 3% on 1 January 2013, by 2.5 % on 1 January 2014 and by a further 2.5 % on 1 January 2015.*

[10] Some employees whose positions are listed in Schedule A are paid above the printed minimum start rates set out in the list, and they received the percentage increase on their actual salary rate on 1 January 2013, 1 January 2014 and 1 January 2015.

#### *Schedule B*

[11] Schedule B of the Collective Agreement (Schedule B) applies to Rigger Assistant positions and minimum wage rates are set out in a list. The minimum wage rates effective dates are, as in Schedule A, effective from 1 January 2013, 2014 and 2015 respectively, however the minimum wage rate paid to an employee on completion of 12 months and 3 years continuous service are subject to a condition of: “*acceptable performance and attendance*”.

#### *Schedule C*

[12] Schedule C of the Collective Agreement (Schedule C) applies to salaried employees whose roles are identified in clause 2.3 of Schedule C. Clause 2.1 of Schedule C states:

### ***REMUNERATION – SALARY AND BENEFITS***

*2.1 The Employee’s salary and benefits are set out in the Employee’s personal letter. An Employee’s base salary is payable fortnightly by direct credit to the Employee’s nominated bank account. The Employee’s salary is subject to annual review with effect from the 1 October each year based on their performance as assessed in accordance with Company policy. SKYCITY does not have to increase the salary of the Employee.*

[13] Some members of the SFWU and UNITE work from time to time in a higher paid job and are paid in accordance with clause 9.5 of the Collective Agreement which states:

*SKYCITY may need an Employee to work from time to time in a higher paid job within their department. If this happens the Employee will be paid either:*

- *At the starting rate for the higher position for the hours the Employee works in that position; or*
- *At a higher rate all the time in return for SKYCITY being able to ask the employee to work in the higher paid job at different times.*

*SKYCITY will determine which rate will apply to the work carried out and will advise the Employee of the appropriate rate at the time they are asked to work in the higher paid job. If circumstances change, the applicable rate will be reviewed and discussed with the Employee at that time and may be altered as applicable.*

[14] Members of the SFWU and UNITE who work in accordance with the first bullet point of clause 9.5 of the Collective Agreement (the first option) are paid at a higher rate for the time they are acting up in that higher role and at the rate applicable to their lower position when they are not acting up in a higher role.

[15] Alternatively, employees who work in accordance with the second bullet point of clause 9.5 of the Collective Agreement (the second option) are paid at a higher rate all the time in return for SKYCITY being able to ask the employee to work in the higher paid job at different times. However this approach is rarely used and the dual rate approach is in reality the only method applied.

[16] There is a dual benefit to having an employee work in a higher position from time to time in that SKYCITY benefits by having flexibility with regard to rostering in an operation which operates 24 hours a day. The employees who work in a higher position benefit by having opportunities for further training, the opportunity to upskill and increased earning capacity.

[17] The higher positions in which an employee may be asked to work up in may include positions listed in Schedules A, B or C of the Collective Agreement, or may fall outside of the Collective Agreement. Higher positions falling outside the coverage of the Collective Agreement are salaried positions where salary is determined by performance criteria and increases are not guaranteed but dependent on performance.

[18] The SFWU claims that SKYCITY has incorrectly not applied the percentage wage increases to the minimum start rates to all the higher rates which are paid to dual rate employees when they work from time to time in a higher rate position.

[19] SKYCITY claims that Schedule A of the Collective Agreement does not set out the starting rates for the higher positions referred to in clause 9.5 unless the position is included in those listed in Schedule A. SKYCITY claims that the increases set out in Schedule A were only intended to apply to the roles set out in Schedule A.

## **Determination**

### **The Law relating to collective agreements**

[20] In *NZ Amalgamated Engineering, Printing and Manufacturing Union v Amcor Packaging (New Zealand) Limited*<sup>1</sup> Judge Ford introduced a summary of the law regarding the interpretation of collective agreements as follows:<sup>2</sup>

*The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd. That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc made it clear that the principles of interpretation prescribed in Vector had equal application to employment agreement. The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. Vector highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.*

[21] In *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*<sup>3</sup> The Employment Court stated:<sup>4</sup>

*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*

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<sup>1</sup> [2011] NZEmpC 135

<sup>2</sup> At [12]

<sup>3</sup> [2011] NZEMPC 149

<sup>4</sup> At [17]

*its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve.*

[22] A recent Supreme Court decision, *Firm PI 1 Ltd v Zurich Australian Insurance Limited*<sup>5</sup>, the Court stated in respect of contractual interpretation:<sup>6</sup>

*It is sufficient to say that the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background” it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.*

[23] The judgment sounded a cautionary note however, the Court stating that:<sup>7</sup>

*... where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.*

[24] The Collective Agreement sets out the remuneration of union members in Schedules A, B and C.

[25] The introductory paragraph to Schedule A states that the minimum start rates which are outlined against the positions listed below the introductory paragraph will apply to the positions listed in Schedule A, subject to the terms of an Employee’s personal letter. Schedule A contains a list of over 70 positions and minimum wage rates, and the list is followed by the statement that

*The above rates are minimum start rates. For the avoidance of doubt, all paid and printed rates as of 31 December 2012, will increase by 3% on 1 January 2013, by 2.5 % on 1 January 2014 and by a further 2.5 % on 1 January 2015.*

[26] Some of the employees in the listed positions are paid above the minimum start rate for the position listed in Schedule A, and I consider that the reference to “*paid and printed rates*” is inserted to ensure that those employees working in the listed positions set out in Schedule A receive the percentage wage increases outlined in Schedule A of the Collective Agreement.

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<sup>5</sup> [2014] NZSC 147

<sup>6</sup> at [60]

<sup>7</sup> Ibid at para [93]

[27] I find support for this conclusion in the reference in the introductory paragraph to: “*subject to the terms of an Employee’s personal letter*” which indicates that the minimum start rate listed against the positions set out in Schedule A is subject to terms contained in an employee’s personal letter which may include a higher hourly rate for the designated job.

[28] Those employees whose positions are listed in Schedule B receive a wage and minimum wage rates as specified as applicable from 1 January 2013, 2014 and 2015, however the minimum wage rates paid to employees on completion of 12 months’ and 3 years’ continuous service are subject to a condition of: “*acceptable performance and attendance*”.

[29] I find there is no such condition placed on the wage increases to be paid to employees whose positions are listed in Schedule A.

[30] Those employees whose positions are listed in Schedule C are not paid a wage, they are paid a salary which is: “*subject to annual review with effect from the 1 October each year based on their performance*”.

[31] I find that there are significant differences to the increases applicable under Schedules A, namely:

- There are no stated minimum rates for the positions set out in Schedule C;
- the salary paid to an employee is reviewed annually on 1 October each year, not 1 January each year;
- the salary paid is dependent upon an employee’s performance; and
- there is no guarantee that the salary will be increased.

[32] A higher position could also be a salaried position not identified in the Collective Agreement, these positions are subject to an annual salary review and increases are based upon performance and not guaranteed.

[33] I find that there is a clear differentiation between the payments made under Schedule A to those made under Schedules B and C in the Collective Agreement, and also between the payments made under Schedule A and those payments made to salaried employees whose positions are not identified in the Collective Agreement.

[34] I find that the Schedule A statement: “*For the avoidance of doubt, all paid and printed rates as of 31 December 2012, will increase by ... and by a further 2.5 % on 1 January 2015*” cannot be applied to all paid rates in the Collective Agreement since those minimum wage rates referred to in Schedule B to be applied after the employee achieves 12 months’ or 3 years’ continuous service are dependent on: “*acceptable performance and attendance*”; and salary increases for employees whose positions are listed in Schedule C are dependent on an employee’s performance as assessed at the annual review on 1 October each year.

[35] I find that Schedule A stand alone, such that the guaranteed pay increases stated under the listed positions in Schedule A are applicable only to the positions in that Schedule.

[36] The reference in the first option of clause 9.5 to the starting rate for the higher position I find to be unequivocal. The wording states that when working in a higher role the employee will be paid at the starting rate for that role.

[37] I find that the appropriate hourly rate for the period of time the employee was acting up if the higher role is included in the list of positions contained in Schedule A, is the Minimum Starting Rate for that higher position which in that case would have been adjusted in 2013, 2014 and 2015 by the percentage increase which applied to all the positions listed in Schedule A.

[38] However if the higher role is not contained in the list of positions contained in Schedule A, I find that the appropriate hourly rate in respect of the first option in clause 9.5 of the Collective Agreement is the starting rate for that higher role which is not listed in Schedule A, as is clearly stated in the wording of the first option under clause 9.5.

[39] In respect of the second option under clause 9.5 of the Collective Agreement I find that the higher rate applied, which is the rate with the percentage increase applied, is explained by there being a criterion which must be fulfilled in order to qualify for the higher rate at all times. Specifically that in order to qualify for the higher rate an employee must be available to work in the higher paid job at different times: “*... in return for SKYCITY being able to ask the Employee to work in the higher paid job at different times*”

[40] I determine that applying an ordinary and natural meaning to the wording of clause 9.5 means that the percentage pay increases set out in Schedule A of the Collective Agreement do not apply to the rate paid to dual rate employees when working in the higher role in accordance with option one of clause 9.5 of the Collective Agreement unless the higher role is a listed position set out in Schedule A.

## **Costs**

[41] Costs are reserved. I accept that this was a genuine dispute about the interpretation, application or operation of the provisions of the Collective Agreement and I am not persuaded that this is a matter in which costs should be awarded.

[42] However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

**Eleanor Robinson**  
**Member of the Employment Relations Authority**