IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 322
3038111

	BETWEEN	PETER WADDELL Applicant
	AND	THE AUCKLAND DISTRICT HEALTH BOARD Respondent

Member of Authority:	Tania Tetitaha
Representatives:	H White, counsel for the Applicant M Piper, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions [and further Information] Received:	25 February 2019 from the Applicant 1 March 2019 from the Respondent
Date of Determination:	31 May 2019

DETERMINATION OF THE AUTHORITY

A. The Auckland District Health Board is ordered to pay Peter Waddell the sum of $42,424.94.

B. Costs are reserved. Parties are to file costs submissions within 14 days of the determination if they cannot be resolved between themselves.

Employment Relationship Problem

[1] This is a dispute about the applicant's entitlement to claim a retirement gratuity. The parties have agreed to deal with this matter without holding an investigation meeting. They have reached an agreed statement of facts and filed written submissions.

[2] There is a non-publication order pertaining to the terms of settlement between the parties dated 7 January 2009. Paragraphs [5] to [7] and [24] are to be redacted from the published determination.

Agreed Facts

[3] The applicant was employed as a psychologist with the respondent from 1981 until 2017. The respondent recognises the applicant as having at least the equivalent of 36 years continuous full-time service in the service of the New Zealand Health Boards, with no material breaks in continuity.

[4] On 7 January 2009 the applicant entered into a confidential settlement with the respondent.

[5] [redacted]

[6] [redacted]

[7] [redacted]

[8] In around September 2010 the respondent was bargaining for the first time with the Association of Professional and Executive Employees Incorporated (APEX) for a MECA which covered the work the applicant did.

[9] On 12 September 2010 the applicant resigned his membership of the PSA and therefore became employed on individual terms and conditions of employment based on the PSA MECA (in accordance with s 61(2) of the ERA).

[10] On 13 September 2010 the applicant became a member of APEX but continued to be employed on individual terms and conditions of employment based on the PSA MECA because at that point APEX had not entered into a collective agreement with the respondent.

[11] On 1 October 2010 the respondent entered into a MECA with APEX (the APEX MECA) for the first time (although the MECA had already existed for some time with other health boards).

[12] Accordingly on 1 October 2010 the applicant became employed under the terms of the APEX MECA due to its coverage of his role and his membership of the APEX union.

[13] The applicant has remained a member of APEX and all versions (including subsequently agreed rolled-over versions) of the APEX MECA contained the following clauses:

> 27.0 SAVINGS CLAUSE.
> Except as specifically varied by this agreement, and except as further varied by way of the variations clause, nothing in this agreement shall operate so as to reduce the wages and conditions of employment applying to any employee at the date of this agreement coming into force.
>
> 28.0 EMPLOYEES TRANSFERRING FROM INDIVIDUAL EMPLOYMENT AGREEMENTS TO THIS AGREEMENT.
> Where an employee on an individual employment agreement elects to be bound by this Collective Agreement (by virtue of coverage and union membership) their previous terms and conditions of employment shall no longer apply unless otherwise agreed in writing between that employee and their employer.

[14] The PSA MECA included a retirement gratuity. This was set out in appendix N.

[15] Neither the APEX MECA nor the settlement agreement contained terms specifically referring to a retirement gratuity.

[16] On or about 24 April 2014 the applicant asked for and received an estimate of his potential retirement gratuity. The estimated retirement gratuity was $42,424.94. Upon retirement the respondent declined to pay the applicant the retirement gratuity on the basis he did not have a legal entitlement to it.

[17] The applicant filed proceedings in the Employment Relations Authority on 31 August 2018 seeking payment of the retirement gratuity.

Issues

[18] There is a single issue for determination, namely does the applicant have the right to receive the retirement gratuity provided for under his previous PSA MECA?

What is the effect of clause 28 upon the applicant's eligibility for the retirement gratuity?

[19] The applicant submits his terms and conditions included the retirement gratuity provided for under the previous PSA MECA as it was part of his individual terms and conditions at the time the APEX MECA was entered into and he was entitled to retain that term and did not agree to any variation.

[20] The respondent submits the effect of clause 28 was that his previous individual terms and conditions of employment no longer apply "unless otherwise agreed in writing". There was no written agreement to him retaining those terms and conditions.

[21] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended the words in dispute to bear.[1] This requires an objective approach to ascertain:[2]

> … 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.

[22] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.[3]

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1 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

2 *Affco New Zealand Limited v New Zealand Meat Workers And Related Trades Union Incorporated* [2017] NZSC 135 at [39] citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

3 See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

[23] Clause 27 specifically prohibits the reduction of wages and conditions of employment applying to any employee at the date of this agreement coming into force. On one reading it is an agreement in writing to preserve those terms and conditions. However it does provide for specific variation. It states nothing in the agreement shall reduce the wages and conditions of an employee "except as specifically varied in this Agreement" or "further varied by way of the variations clause".

[24] [redacted]

What is the effect of continued payment of the CPE?

[25] I accept the respondents submissions that the payment of the CPE under the settlement agreement was unrelated to the PSA MECA. It was on its face a settlement of a personal grievance and not intended to form a term of employment. As a consequence its continued payment is irrelevant to this dispute.

Does estoppel arise on these facts?

[26] The applicant refers to his reasonable belief the retirement gratuity remained part of his terms and conditions of employment. This is because he joined the Union prior to clause 28 being negotiated and at a time when the retirement gratuity remained a term and condition of employment. He also acted consistently with the retirement gratuity remaining a term of condition in employment when he applied for the calculation. At no time prior to retirement was he made aware he was ineligible. It is only upon retirement he was advised he is ineligible.

[27] For the applicant to show estoppel, he must prove:[4]

a) A belief or expectation by the applicant has been created or encouraged by words or conduct by the respondent;

b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed;

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4 *Wilson Parking NZ Ltd v Fanshawe 136 Ltd* [2014] 3 NZLR 567 at [44].

c) The applicant reasonably relied to its detriment on the representation; and

d) It would be unconscionable for the respondent to depart from the belief or expectation.

Was there a belief or expectation by the applicant created or encouraged by words or conduct by the respondent?

[28] The applicant had a reasonable belief and expectation he would receive his retirement gratuity by applying for the calculation. The Gratuity Calculation Sheet that he received on 9 May 2014 includes a note confirming his application for the retirement gratuity had been received:

> A gratuity application has been received for the employee named below and the calculation has been completed. This payment must be approved before it can be paid. Please obtain the approvals indicated below and return to the HR Information & Payroll Services …

[29] The wording and the receipt of the calculation are sufficient conduct by the respondent to show they encouraged the applicant's belief and expectation he would receive this gratuity upon retirement. The calculation of his retirement gratuity was completed by the respondents payroll on 9 May 2014. The total amount calculated as payable was $42,424.94.

Was there an express representation that is clearly and unequivocally expressed?

[30] It is reasonable to assume HR would have assessed his eligibility at the time he applied for the gratuity calculation. If this was a contractual term no "approval" is required. If he was eligible, then the only issue for HR to "approve" is the correct amount of payment. The note at the top of the calculation does not undermine the representation of applicants eligibility for the retirement gratuity.

[31] The fact the calculation is undertaken by a payroll employee "without authority" does not undermine the representation being made as to eligibility. The respondent should have been aware the APEX MECA applied to the applicant and he was therefore ineligible for the retirement gratuity at the time of the calculation. This is reasonable to assume knowledge because the respondent is required to record the title and expiry of the applicant's collective agreement as part of his wage record pursuant to s130(f) ERA. Therefore it should have been aware the APEX MECA applied to the applicant. It cannot rely on staff incompetence or wage record defects as the basis to defray liability for its conduct.

[32] The applicant should have been informed by the respondent at the time of the calculation he was ineligible for the retirement gratuity. Failure to do so fostered his continuing belief of eligibility.

Did the applicant reasonably rely to his detriment upon the representation?

[33] There is little doubt the applicant did face detriment because he was not told until he retired that he was in fact ineligible.

[34] If he had known in advance he was ineligible for the retirement gratuity, he could have either negotiated an exit that included this benefit or alternatively rejoined the Union with the more favourable collective agreement. Because he was unaware of his ineligibility until after his employment had terminated, he has lost the chance of recovering the gratuity of $42,424.94.

Is it unconscionable for the respondent to depart from the belief or expectation?

[35] In my view it would be unconscionable given the information it held and its conduct in providing the retirement gratuity calculation.

[36] The respondent is estopped from denying payment to the applicant.

[37] The Auckland District Health Board is ordered to pay Peter Waddell the sum of $42,424.94.

[38] Costs are reserved. Parties are to file costs submissions within 14 days of the determination if they cannot be resolved between themselves.

TG Tetitaha
Member of the Employment Relations Authority