IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 443
3077752

	BETWEEN	THE NATIONAL UNION OF PUBLIC EMPLOYEES (NUPE) Applicant
	AND	THE CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT Respondent

Member of Authority:	Geoff O'Sullivan
Representatives:	Andrew John McKenzie, counsel for the Applicant Nicholas Burley, counsel for the Respondent
Investigation Meeting:	7 July 2020
Submissions [and further Information] Received:	22 July 2020 from the Applicant 29 July 2020 from the Respondent
Date of Determination:	28 October 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] NUPE has raised a dispute under s 129(1) of the Employment Relations Act 2000 (the Act) concerning the interpretation, application and operation of clause 9.2.2 of the collective agreement between the parties covering the period from 8 June 2018 to 30 September 2019 (the CEA).

[2] In its statement of problem, NUPE asks the Authority to determine:

(a) What constitutes additional duties such as to engage clause 9.2.2 (the threshold dispute); and

(b) What criteria are relevant to the decision whether to pay an allowance (the entitlement dispute).

[3] The issue which has caused the dispute revolves around the Chief Executive of the Inland Revenue Department's (IRD) requirement that some employees covered by the CEA undertake what is called "burn down and collaboration work", which was not undertaken before but which IRD says is within the scope of the relevant employee's job expectation and/or are reasonably incidental to them. NUPE disagrees with that characterisation on the basis the duties are not specifically identified in the job expectation for the positions and accordingly clause 9.2.2 of the CEA is triggered and the process set out therein therefore applies. I set out clause 9.2.2 below:

> **Additional duties**
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> Employees can be required to, from time to time and for reasonable periods, carry out other duties or activities not specifically identified in the job expectation for their position. This may include working in other areas and teams within Inland Revenue.
>
> The additional duties and/or responsibilities to be undertaken and the skills of the employee will be taken into account when making decisions about requiring employees to carry out other duties or activities not specifically identified in the job description for their position.
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> Where an employee is required to perform duties or activities in addition to their normal work, an allowance may be paid at Inland Revenue's discretion. In determining the amount of any allowance, the range of additional duties and/or responsibilities undertaken and the skills of the employee will be taken into account. This may be based on a percentage of the person's salary.
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> If an employee believes that Inland Revenue's request to carry out other duties or activities not specifically identified in the job expectation for their position is unreasonable they will advise their manager and outline in writing the rationale for, and provide information supporting, their view.
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> The manager and the employee will jointly discuss Inland Revenue's requirement to carry out the other duties or activities and the employee's views, with the intention of reaching an agreed resolution. At the employee's request their representative may also participate in these discussions.
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> If a successful agreed resolution of the matter cannot be achieved through this discussion, the manager will make a final decision.
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> Unless otherwise agreed, the employee will perform the additional duties or activities as requested by Inland Revenue while the parties are endeavouring to resolve the matter.

The Authority's investigation

[4] The Authority's investigation was held in Christchurch on 7 July 2020. At the investigation meeting the Authority heard evidence from James Kinney and Quentin Findlay for NUPE and Emily Scarlet and Karen Rhodes for IRD. Accordingly, any determination of the Authority in relation to the matter deals only with the issues raised by Mr Kinney and Mr Findlay insofar as they relate to them.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including the evidence of the parties and the submissions of their representatives.

Issues

[6] The issues identified by the parties for investigation and determination are:

(a) Do the tasks IRD require Mr Kinney to carry out constitute additional duties within the meaning of clause 9.2.2 of the collective employment agreement?

(b) If so, has the IRD complied with the clause?

(c) Does the Authority have jurisdiction to decide that, if clause 9.2.2 of the CEA is engaged, what criteria are relevant to the decision whether to pay an allowance?

Relevant law

[7] In *Kiwirail v Mobbs*, Judge Corkill set out the legal principles relating to the interpretation of employment agreements.[1]

> [24] In *The Malthouse Ltd v Rangatira Ltd*, the Court of Appeal provided a convenient summary of the correct approach to contractual interpretation, as stated by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, and Firm *PI 1 Ltd v Zurich Australian Insurance Ltd*. The Court stated:
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> > [19] Briefly, these authorities confirm that New Zealand courts take an objective approach to contractual

[1] *KiwiRail Limited v Mobbs* [2020] NZEmpC 139

interpretation which does not limit the background material available to interpret the contract. *That material must however be reasonably relevant, and it must be objective; evidence of a party's individual subjective intentions is inadmissible to interpret the contract.*

[20] *Vector* established that there need not be an ambiguity in the meaning of a contract before regard can be had to extrinsic evidence to shed light on its meaning. That conclusion put to bed the need for counsel to prove that contracts had such ambiguities, and instead emphasised the need for courts to take a contextual approach that inquired into the meaning of contracts against the background information known to the parties.

[21] As the Supreme Court later clarified in *Firm PI*, the text of the contract remains "centrally important". The Court there noted that:

> If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning that will be a powerful, albeit not conclusive, indicator of what the parties meant.

[22] The provisional meaning derived from the language of the contract is cross-checked against the contractual context. As Tipping J explained in *Vector*:

> [24] In some recent cases it has been suggested that contractual context should be referred to as a "cross-check". In practical terms that is likely to be what happens in most cases. Anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view is, in a sense, then checked against the contractual context. This description of the process is valid, provided the initial view is provisional only and the reader is prepared to accept that the provisional meaning may be altered once context has been brought to account. The concept of cross-check is helpful in affirming the point made earlier that 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 of achievement...

> [23] *It follows that, though there is in principle no limit to the amount of "red ink" a court can use in interpreting a contract (as Lord Hoffman famously said in Chartbrook Ltd v Persimmon Homes Ltd), there is a practical need for the party seeking to rely on the red pen to point to clear evidence justifying its use. As Tipping J explained in Vector, the exercise "is and remains one of interpretation". There are limits to what the courts can do under the guise of interpretation, and words can only be construed with meanings that they can reasonably bear (subject, as Tipping J recognised, to Vector, considerations of rectification, private dictionary use by the parties, and similar).*
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> (Footnotes not included.)

[8] Accordingly, in the present case, the starting point in interpretation is to reach a provisional meaning of the words contained in clause 9.2.2 and then assess that view against the context of a wider setting and the objectives intended at the time the agreement was entered into.

Background

[9] In 2003, the Employment Court issued its decision in *Chief Executive of the Inland Revenue Department v Parkes (No. 2)*.[2] The Court, in that case, considered clause 9.2 of the then applicable collective employment agreement and considered amongst other things the then clause 9.2.2 headed "Additional duties" which provided:

> Where an employee is required to perform duties in addition to their normal work, and these additional duties are not those of a higher level position, the payment determined as above, may also be payable.

[10] Although the current clause under consideration differs somewhat to that considered by the Court in *Parkes* above, the Court made it clear that in considering the provision an analysis of "job expectations" was required. Further, the Court noted that the job expectation defined the range of work to be performed by the IRD's employees. Whilst the Court found the IRD could lawfully require employees to do work in addition to their job expectations, this was only to the extent that such work was to be performed for a finite period of time and for a relatively small percentage of the employee's total work time.

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2 [2003] ERNZ 540

[11] In the current claim, Mr Kinney and Mr Findlay say first they are carrying out additional duties within the meaning of clause 9.2.2 of the collective, and secondly, as was the situation in *Parkes*, this has been carrying on for a significant period of time and is not a small percentage of their total work time. Further, they say, there has been no consideration (as required in terms of clause 9.2.2) of an allowance.

[12] NUPE and indeed Mr Kinney and Mr Findlay do not dispute the lawfulness or reasonableness of the instruction to undertake the additional work but say that the additional work is significantly greater than the six per cent level referred to in *Parkes*, and there should have been consideration of a discretionary allowance.

[13] IRD through Ms Rhodes and Ms Scarlet promulgated the view that job expectations do not specifically identify everything an employee does and that the work Mr Kinney, especially, was carrying out was within the scope of the role description. Their evidence was that all that had happened was the IRD changed the way those functions were performed, which included changes in the way IRD's customers interacted with it. They stated that the new role requirements did not change in any essential way, the work employees such as Mr Kinney and were undertaking beforehand such as dealing with customers, providing information and resolving problems. They were simply doing these tasks in different ways. It seemed to be conceded however that this was a departure from the way in which "job expectations" (JEs) had been viewed in the past.

[14] It seemed the major difference between the parties' approach to clause 9.2.2 was that NUPE (especially through the evidence of Mr Kinney) measured tasks against normal duties and a specific job expectation when IRD thought he should have considered key outcomes. Mr Kinney's evidence was that he spent time on an online portal from four to five hours a week. He spent whole weeks doing nothing but work outside his job expectation.

[15] Mr Kinney noted he was employed as a technical specialist and the work he normally had undertaken was tax technical work. He was no longer doing this and didn't know who was. He said that the tasks he was undertaking were very low level, e.g. refunds, and he once did a hundred in a day, all of about $5.

[16] He observed this was a largely customer role and he was now doing customer compliance work instead of his previous role. He was working around questions relating to GST registration (as opposed to technical GST questions) and was worried about mistakes, so

while he accepted the work was straightforward if you knew what you were doing, he felt out of his depth. He pointed out he was a chartered accountant and although he had done GST tasks some 15 years ago under a different system, he did not feel confident to give the advice he was now required to give. In any event, his evidence was a customer service role was a new additional role.

[17] In response to this, it was put to Mr Kinney that at least in terms of key outcomes, nothing had changed. It was put to him that the job expectation for technical adviser (document 3 of the bundle) provided: "*Working collaboratively to provide technical leadership within legal and technical services (LTS) in the areas of case law and policy, and guidance on case management strategies*". Mr Kinney's view was that such statements could not be construed as being particular to the job expectation of a technical adviser and could be found in almost any job expectation. He stated that such statements didn't stop the new customer service role from being an additional duty.

[18] The IRD also relied on document 5 of the bundle (Role purpose) which provided:

> You will provide an end to end technical and commercial support and advice service to improve customer experience and long term compliance, and champion IR's customer-centric and intelligence-led culture.

[19] It was put to Mr Kinney that the role purpose was wide enough to mean that the change to the roles was not additional to the roles but was reasonably incidental to them.

[20] Mr Kinney stated he did not see the role purpose as a description of duties.

[21] Mr Findlay also advised he saw the additional duties as being outside the normal role. He states that when he asked how long the tasks would be going on for, the response was *"How long is a piece of string"*.

Analysis

[22] It is reasonably clear to me that the work Mr Kinney is required to undertake fits into the category of additional duties in terms of clause 9.2.2 of the CEA. The same is likely to be true in the case of other employees covered by the CEA and in a similar position. The burn down and collaboration work were duties not specifically identified in the JEs for the positions. There is no doubt that the duties are well within the capability of Mr Kinney, especially when training is available. In looking at whether or not a task is an "additional

duty" and using the guidance provided by the Court in *Parkes*, this involves an analysis of the job expectation which must be approached as the Court noted, on the basis of the words actually used in them. If the tasks are not reflected in the wording of the job expectation then by definition they must be additional.

[23] As indicated above, this does not mean an employee cannot be required to undertake them, quite the contrary. The additional duties could be seen as reasonable and necessary however without agreement that does not mean those additional duties can carry on indefinitely especially when they may comprise a significant amount of the work undertaken by an employee.

[24] Further, where, as I have found, Mr Kinney is required to perform duties or activities in addition to his normal work, it triggers the requirement for IRD to exercise a discretion as to whether or not an allowance may be paid.

[25] The evidence presented on behalf of the IRD indicated that although it had not accepted the work being carried out by Mr Kinney constituted additional duties, nonetheless in deciding that it did not, a similar type of approach was taken to that which would have been undertaken in deciding whether or not to consider an allowance. The parties discussed their different perspectives although they failed to reach an agreed resolution.

[26] For the reasons given shortly, I am not able to consider that aspect any further. Suffice it to say the tasks Mr Kinney has been required to carry out constitute additional duties and thus clause 9.2.2 of the CEA is engaged and the clause requires the IRD to consider payment of an allowance.

The relevant criteria to be used in respect of the allowance

[27] The second matter the Authority has been asked to resolve, namely what criteria are relevant to the decision whether or not to pay an allowance (the entitlement dispute) would require the Authority to set terms and conditions of employment. As Mr Burley rightly notes, the Authority has no power to fix terms and conditions of employment, these are up to the parties. Section 101(d) of the Act means the Authority is not in a position to resolve this issue for the parties.

Conclusion

[28] NUPE is correct in its interpretation of clause 9.2.2 of the CEA in respect of its application to Mr Kinney. Work not specifically identified in the job expectations comprises "additional duties" in terms of clause 9.2.2 of the CEA. The IRD is contractually obliged to exercise its discretion as to whether or not an allowance should be paid in respect of additional duties.

[29] The Authority does not have the jurisdiction to decide what the applicable criteria should be for the payment of an additional duties allowance in terms of clause 9.2.2 of the CEA, although it should be noted the IRD must be capable of justifying its conclusions.

Costs

[30] Costs are reserved and it does seem this is a case where costs should perhaps lie where they fall. Both parties have had a measure of success, however, if either party seeks an award of costs, they need to file and serve a memorandum within 14 days from the date of this determination. The other party is then to file and serve any reply memorandum within seven days of receipt.

Geoff O'Sullivan
Member of the Employment Relations Authority