

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 165
3137240

BETWEEN KRISTIN LUSH & NICOLA
JOSEPH
Applicants

AND DOMINION TEACHING
ASSOCIATES LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Applicants in person
Saburo Takayasu, company director of the Respondent

Investigation Meeting: 27 January 2022 by audio-visual link

Submissions received: 1 October 2021, 11 November 2021, and 21 January
2022 from the Applicants
23 October 2021 and 10 January 2022 from the
Respondent

Determination: 27 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants bring a claim against Dominion Teaching Associates Limited (Dominion) for outstanding redundancy payments of \$3,259.86. The applicants say this amount is owed to them and three other former employees of Dominion. In broad terms, this case turns on an email (15 June 2020) between Dominion and the applicants' union representative in which the parties' collective employment agreement was allegedly varied with respect to the calculation of redundancy pay. For the reasons that follow, I find in favour of the applicants and order Dominion Teaching Associates Limited to pay the applicants \$3,259.86 no later than 4 pm Thursday 19 May 2022.

The Authority's investigation

[2] The applicants' statement in problem was filed with the Authority on 6 May 2021 and a statement in reply was lodged by Dominion on 15 May 2021. The parties attended mediation but the matter did not resolve there. On 3 September 2021, the Authority held the first of two case management conferences in which timetabling directions for the filing of witness statements and submissions were made. The Authority indicated that it could determine the matter on the papers unless there was a need to hear further from the parties or their witnesses.¹

[3] A second case management conference was held on 2 December 2021 because of issues arising from the information the parties had subsequently provided to the Authority. Further submissions were sought and an oral submission hearing by Zoom was held on 27 January 2022.

Relevant facts

[4] The applicants are former teachers of Dominion which operated as a private English language school in Auckland. In place at the material time was a collective employment agreement between Dominion and the applicants' union, Unite Union Incorporated (Unite) which was signed on 17 January 2020.

[5] Clause 41 of the collective agreement sets out the parties' redundancy provision. Redundancy was defined as the situation where the termination of an employee's employment by the employer was attributable, wholly or mainly to the fact that the employee's position was or would become superfluous to the needs of the employer.

[6] Clause 41 provided for a redundancy payment the amount of which would depend on whether the employee worked their two-week notice period and how long they had served the company. For example, where an employee worked their two-week notice period, an additional payment of four weeks' pay of redundancy compensation would be paid. For employees who had been with the company for more than five years, an additional two weeks' pay (a total of six weeks) of redundancy compensation was to be paid.

¹ Minute of the Authority dated 7 September 2021.

[7] Where an employee elected not to work their two-week notice period, Dominion paid the employee two weeks' in lieu of notice. For employees of more than five years' service, they would receive an additional two weeks' pay (a total of four weeks).

COVID-19

[8] On 28 February 2020, the first community COVID-19 case was reported in New Zealand. Shortly afterwards, the country moved to Alert Level 4 on 25 March 2020 where it remained until the nation moved down to Alert Level 3 on 27 April 2020.

[9] On 23 March 2020, Dominion applied for and was granted the initial 12-week COVID-19 wage subsidy. While in receipt of the wage subsidy, an agreement was reached between Dominion and its employees that staff would work only 80 percent of their contracted hours. It does not appear that Dominion was able to afford to pay more than this in light of its other outgoings and business overheads.

[10] Private training establishments such as Dominion were affected financially by the loss of overseas students. Saburo Takayasu, a director of Dominion, wished to close the business because he did not want the company to continue trading whilst insolvent. However, he was persuaded by his former school director and principal, Andrew Fisher, to continue trading for little while longer in light of the Wage Subsidy Extension (WSE).

[11] The WSE was available from 10 June 2020 to 1 September 2020 and was provided to employers and self-employed people who would otherwise have had to lay off staff or reduce their hours due to COVID-19. Dominion continued to trade subject to an application being made for the WSE for the company's remaining employed staff.

[12] Mr Fisher emailed his teaching staff (Kristin Lush and Nicola Joseph included) to let them know that he wished to apply for the WSE as soon as possible (15 June 2020). However, in order for him to do so, he needed the agreement of his staff that they would continue to work the current 80 percent working week under the existing agreed terms for a further eight weeks or from 29 June to 21 August 2020.

[13] On 15 June 2020, at 12.39 pm, Mike Treen, from Unite emailed Mr Fisher the following:

Subject: Proposed agreement with Unite

That all union members have reduced hours equivalent to 80 percent of their contracted hours from June 29, 2020 to 21 August, 2020.

Staff accept the need to take an agreed amount of annual leave before the subsidy's end. This will be done with agreed notice and this annual leave will be paid at the average weekly earnings for the year prior to March 27, 2020.

That redundancy is covered by the terms of contract and the *weekly payout is based on average earnings prior to March 27, 2020* [emphasis added].

[14] Seven minutes later, at 12.46 pm, Mr Fisher emailed Mr Treen the following response:

Thanks Mike

I will go ahead and apply for the Wage Subsidy Extension for your members.

Best

Andrew

[15] Dominion subsequently applied for the WSE and staff were employed for a little while longer. However, by late August 2020, Dominion had made its last teaching staff member redundant. Mr Fisher was also made redundant on 21 October 2020. With his departure and with Mr Takayasu living in Australia, Dominion no longer has any staff working for it in New Zealand.

[16] After looking at their final pay, the applicants and three of their former co-workers realised that they had each not been paid correctly in terms of redundancy pay which was to be based on their average earnings prior to March 27, 2020.

[17] In calculating redundancy compensation, Dominion had relied on an employee's ordinary pay entitlement and not their average earnings pre-COVID. Mr Takayasu submits that the applicants are mistaken and that they have mixed up two totally separate issues; the payment of annual leave under the Holidays Act 2003 for which average weekly earnings would apply, and redundancy pay the calculation of which was provided for in clause 41 of the collective employment agreement as described above.

The issues

[18] The issues requiring investigation and determination were:

- (a) What did the parties agree to as to how the applicants' redundancy pay would be calculated?
- (b) Once this is established, does the respondent owe anything to the applicants by way of unpaid redundancy pay?

The parties' agreement

[19] It is observed that the applicants' collective employment agreement with Dominion does not define or provide a mechanism as to what constitutes a weeks' pay in the calculation of redundancy pay. The collective employment agreement is silent on this point. I find that this was the reason why the applicants asked Mr Treen to clarify this on their behalf with Mr Fisher which Mr Treen did in his email of 15 June 2020 proposing that redundancy be covered by the terms of contract and that the weekly payout be based on average earnings prior to March 27, 2020.

[20] Mr Takayasu submits that he would never have agreed to the proposal because the collective employment agreement did not expressly provide nor envisage that "average weekly earnings" from the Holidays Act 2003 would apply to the calculation of redundancy pay. However, whether Mr Takayasu would have personally agreed to the proposal is irrelevant because his former school director and principal had the authority to accept (or reject) Mr Treen's proposal. As school director and principal, Mr Fisher was responsible for the language school's day-to-day operations especially with Mr Takayasu based in Australia.

[21] While I understand Mr Takayasu's frustration and genuinely held perception that the applicants have made a last minute change of the collective employment agreement to obtain a better redundancy arrangement for themselves, Mr Fisher was free to reject the proposal. Indeed, the applicants expected there to be more discussion and consultation with him and were surprised that he had promptly agreed to the proposal.

[22] Time was of the essence however which Mr Fisher's email to his staff concerning the WSE makes clear. There was a benefit to both parties by Mr Fisher's consent to the proposal. For Dominion, knowing that staff would continue to work 80 percent of their contracted hours for the next 12 weeks to 21 August 2020 provided certainty for the company in an uncertain time. For the applicants and their colleagues

who had seen the impact the COVID-19 pandemic on their employment, the new arrangement provided them with greater peace of mind.

Conclusion

[23] When I stand back and objectively look at the relevant email train between Mr Fisher and his staff and Mr Treen and Mr Fisher on or about 15 June 2020, the reasonable person would conclude that Mr Fisher had accepted Mr Treen's proposal concerning average earnings pre-COVID being used to calculate redundancy pay. While Mr Takayasu would not have agreed to the proposal himself, his agent, Mr Fisher did. I find no malice or ill will on the part of Mr Takayasu towards his staff. I find him to be a credible witness who genuinely believes that Dominion was not contractually liable to pay the applicants more than what the relevant collective agreement provided.

[24] However, I find that the collective agreement was subsequently varied by Mr Fisher acting in his authority as Dominion's school director and principal. This served as a valid and binding variation to the collective employment agreement. It follows therefore that redundancy was to be paid based on average earnings prior to March 27, 2020.

Orders

[25] As to the quantum sought, apart from opposing liability to pay, it has not been suggested by Dominion that the actual amount of \$3,259.86 was incorrect. I therefore order Dominion Teaching Associates Limited to pay the applicants \$3,259.86 by 4 pm Thursday 19 May 2022.

[26] As the applicants have been successful with their claim they are entitled to a refund of the Authority's filing fee of \$71.56 which Dominion is to order to pay also by 4 pm Thursday 19 May 2022. As the parties are both self-represented, I order that any other incurred costs lie where they fall.

Peter Fuiava
Member of the Employment Relations Authority