IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 147
3214119

	BETWEEN	LINDA HARRIS Applicant
	AND	RESCARE HOMES TRUST INCORPORATED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Jock Lawrie, counsel for the Applicant Stacey Fletcher and Laura Quinn, counsel for the Respondent
Investigation Meeting:	28 September and 22 November 2023 in Auckland and by audio-visual link
Submissions received:	22 November and 13 December 2023 from the Applicant 29 November 2023 from the Respondent
Determination:	14 March 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This employment problem is about the meaning of the phrase "For all eligible Employees" and the word "may" as they appear in cl 37 of a collective employment agreement between Rescare Homes Trust Incorporated (Rescare) and the Public Service Association (PSA) dated 1 April 2019 to 31 October 2021 (the collective agreement).

How did the Authority investigate?

[2] Linda Harris' case comprised written witness statements from herself, former Rescare community support worker, Mele Masina Tameilau, PSA union organiser Fiona Ormsby, former PSA union organiser Ashok Shankar, and former PSA representative, Richard Wagstaff. For Rescare, the Authority received written witness

statements from its chief executive Michelle Creighton, current Rescare board of trustees and former chairman, Grant Power, and former chief executive officer of NZCare Limited (NZCare) Peter Cottier. NZCare was a third party who was involved in the transfer of staff from Mangere Hospital (MH) to Rescare at its inception in September 1998.

[3] Ms Tameilau, Mr Shankar, Mr Wagstaff and Mr Cottier attended the investigation meeting by audio visual link on Microsoft Teams. There was good audio quality and visual connectivity with the witnesses whose evidence came across clearly. All witnesses answered questions under oath or affirmation from me and the parties' representatives who also made oral and written closing submissions.

[4] As part of its investigation, the Authority requested and received two previous collective employment agreements between Rescare Management Limited (RML) and the PSA. RML is the entity to which former employees of Spectrum Care Trust (Spectrum) transferred their employment from NZCare following the closure of MH in the mid-to-late 1990s.

[5] I was also provided with a 1996 collective employment contract between the PSA and Spectrum which contains a grandparenting clause of a retirement gratuity provision. RML was not a party to that collective agreement.

[6] 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.

What are the issues?

[7] The issues requiring investigation and determination are:

(a) What is meant by "eligible employees" at cl 37 of the collective agreement?

(b) Was Ms Harris an "eligible employee"?

(c) Whether cl 37 of the collective agreement applies only to employees who had transferred from MH?

(d) What factors can properly be taken into consideration by the chief executive officer of Rescare when exercising the discretion to grant a retirement gratuity to an eligible employee?

(e) Depending on what findings are made concerning the above issues, what remedies and costs should be awarded if any?

What are the relevant facts?

[8] Rescare, a not for profit charitable trust in Auckland, provides residential and vocational support to adults with an intellectual disability. Ms Harris commenced employment with Rescare initially as a support worker on 24 March 2003. She had not come across from MH or NZCare. In 2006, she was promoted to Team Leader of the Activities Day Centre, a position she held until her retirement on 31 October 2022 for medical reasons.

[9] On 9 October 2022, Ms Harris provided written notice to her employer and stated that she was looking forward to receiving her retirement gratuity after almost 20 years of service pursuant to cl 37 of the collective agreement which relevantly states:

> 37. Retiring Gratuities
>
> For **all eligible Employees** the following provision shall apply:
>
> The Chief Executive Officer **may** pay a retiring gratuity to staff retiring from the Employer who have had no less than 10 years' service with the Employer.
>
> …
>
> [emphasis added]

[10] Rescare has not paid Ms Harris the retirement gratuity because it maintains that to be considered for one she needed to have transferred from MH to Rescare at inception. Ms Harris does not accept that restrictive interpretation which is not supported by the express words of cl 37 or in the collective agreement's interpretation clause. In other words, Rescare's interpretation is not supported by the ordinary and natural meaning of the text of cl 37.

[11] Ms Creighton and Mr Power gave background evidence of Rescare's inception which was established following the closure of MH which took care of patients with an intellectual disability. In response, a group of like-minded parents and caregivers decided to establish their own private community-styled residential village for their

family members who were residents of MH. A business case for Rescare was made from which the organisation had its genesis.

[12] By 1 March 1995, Rescare had received its first contract from the Ministry of Health which meant that the transfer of certain residents from MH could commence. Because accommodation was not yet available, Rescare residents and staff remained at the MH site for a period. The formal transfer of staff and residents to the newly-constructed Rescare villages occurred sometime afterwards in the mid-to-late 1990s.

[13] Rescare outsourced the management of its service delivery through Peter Cottier of NZCare. On 1 March 1995, existing employees of MH who until then had worked for Spectrum transferred their employment to NZCare so as to retain continuity of service.

[14] RML was established on 25 September 1998. On or about this time, employees formally transferred their employment from NZCare to RML, again with a view to providing continuity of service.

[15] Presently Rescare has two residential villages one in Weymouth and another in Flatbush, Auckland. Its other related entity is The Rebecca Chapel Charitable Trust which owns the 20 homes, the two swimming pools and two vocational buildings that Rescare uses for its residents. The trust also has other investments accumulated over the last 28 years the returns on which are used to fund ongoing repairs and maintenance on the residential units, pools and other amenities.

[16] It was former PSA organiser Ashok Shankar's evidence that from 1997/1998 to 2010, the retiring gratuities clause was not renegotiated or amended. The previous iterations of cl 37 have essentially remained unchanged as a result.

[17] PSA organiser Fiona Ormsby stated that on or about June 2019, she initiated bargaining for a new collective agreement. During that process, Ms Ormsby stated that Rescare's then counsel found a memorandum dated 23 January 1997 from Peter Cottier of NZCare to Grant Power, then chairman of Rescare (the memo), which was tabled to support the view that cl 37 was now null and void as it only applied to certain named staff none of whom were still employed by Rescare.

[18] The memo has the subject line of "Long Service/Gratuities" and further states:

> This will serve to clarify the situation as regards long time staff who qualify for the above entitlements through their length of service under the terms of the Collective Employment Contract.

[19] The names of staff to whom the memo applied were redacted but each had a dollar value beside their name representing that staff member's gratuity entitlement. In relation to the combined entitlement, Mr Cottier's memo to Mr Power recorded that the sum was not transferred across from Spectrum but was being held in trust and was to be paid within the terms of the collective employment contract upon the retirement of the staff members concerned.

[20] The memo makes no express reference to the PSA who received a copy of it for the first time shortly after it was discovered in July 2019. Ms Ormsby disagreed with the claim that retiring gratuities were only available to certain employees of MH but rather it was for all employees provided they had worked for Rescare for no less than ten years.

[21] In the end, no consensus could be reached between the parties about the correct interpretation of "eligible employees" in cl 37.

[22] Mr Power accepts that the memo is not forward looking. Even so, he is of the view that it set conditions for the future around eligibility for a retirement gratuity. As one of Rescare's founding members, Mr Power stated that in 1997, the organisation took on a lot of debt to fund construction of the new homes and that it was totally reliant on cashflow to manage costs and to service debt. Rescare was therefore not in a position to take on an open-ended liability with regard to retirement gratuities.

[23] Mr Power explained that having MH staff transfer over to Rescare provided continuity of service and was the least disruptive to the residents with whom MH staff were very familiar. From his perspective, it made little sense to recruit a whole new workforce and it is his recollection that a significant number of staff had come from MH after Rescare took over on 1 March 1995.

[24] Ms Ormsby stated that, in September 2021, the PSA initiated bargaining for a new collective agreement and during negotiations proposed that the word 'may' in cl 37

be replaced with the word ‘will’ so that the second paragraph would read “The Chief Executive Officer *will* pay a retiring gratuity to staff retiring from the Employer who have had no less than 10 years’ service with the Employer”. However, Rescare did not accept the proposal and no agreement was reached between the parties for any changes to be made to cl 37.

[25] It was Ms Creighton’s evidence that the word “may” conferred on her as chief executive a discretion to pay an eligible employee the retirement gratuity. Ms Creighton explained that Rescare contracts with Whaikaha, the Ministry of Disabled People, and that there has been a recent change in funding. Previously, the residential living fund that each resident received from Whaikaha went directly to Rescare. However, it is now proposed that the funding go first to the resident or their legally appointed guardian who then determines how that money is spent. The proposed change is yet to be implemented but is likely to affect Rescare’s operations in the future.

[26] Ms Creighton further stated that because funding for Rescare is tied to the number of residents it supports, its income increased or decreased as the number of residents also increased or decreased. For example, when a resident died it took time to find a suitable replacement in order to maintain Rescare’s level of funding because the organisation needed to make certain that the new resident was a good fit without compromising the safety and wellbeing of the existing residents.

[27] At the time Ms Creighton gave her evidence in the Authority, Rescare had 112 residents and three vacancies which meant that its annual funding was less than what it was normally. In the time it took to fill those vacancies, the organisation lost revenue as ongoing expenses such as staff costs, utilities, cleaning and maintenance, grounds upkeep, vehicle maintenance, and running costs continued to be incurred.

[28] Ms Creighton stated that shortly before Ms Harrison’s request for a retirement gratuity payment in October 2022, she had attended a meeting of the board on 27 September 2022 and presented a profit and loss statement that forecasted an operating deficit of $600,000 which was neither sustainable nor acceptable to the board. Based on the financial position of the organisation alone, Ms Creighton stated that even if Ms Harris was eligible for the retirement gratuity, which she was not because she had not transferred from MH, she would not have approved the payment.

[29] Former Rescare community support worker, Mele Tameilau, gave evidence in support of Ms Harris's claim. Before commencing employment with Rescare in September 2004, she worked as a petrol forecourt attendant and therefore had not transferred to Rescare from MH. Despite not being an employee of MH, Ms Tameilau was still paid a retirement gratuity when she resigned in August 2022 after 18 years of service.

[30] Ms Creighton stated that she had mistakenly approved Ms Tameilau's request for a retirement gratuity payment because she had been working for Rescare for approximately three months when the request came across her desk. After payment had been made, Ms Creighton learnt from her board that only staff who had been at MH were eligible for the retiring gratuity.

[31] Ms Creighton's witness statement to the Authority includes a table of 21 former employees of Rescare who retired after 10 years of service. While the table does not show who applied for the retirement gratuity, it indicates that Rescare has paid the gratuity to only four employees in its history, including Ms Tameilau whose payment was made in error. The three other employees who received retirement gratuities had all transferred to Rescare from MH.

[32] One of the three MH employees who received a retirement gratuity was Ruth Goldsworthy who retired in May 2019 because of a terminal illness. Ms Creighton was not chief executive at that time but states that Rescare's income statement for the relevant financial year records a net $1M surplus which was largely due to a $1.4M donation from The Rebecca Chapel Charitable Trust without which a $400K loss would have been made instead.

What is the relevant law?

[33] The proper approach to be used in contractual interpretation is an objective one the aim of which is to ascertain the meaning that the document in question would convey to the reasonable person having all the background knowledge reasonably available to the parties in the situation they were at the time of the contract.[1] If the language at issue construed in the context of the contract as a whole has an ordinary

[1] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432 at [60].

and natural meaning that will be powerful albeit not conclusive indicator of what the parties meant.[2] But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.[3]

Application

[34] I first turn to consider the meaning of "eligible employees" in cl 37 of the collective agreement which relevantly states that "for all eligible employees the following provision shall apply". Both parties accept that the words at issue here are nowhere defined in the collective agreement and the history of the parties collective bargaining negotiations with each other indicates that they have simply agreed to disagree on what was meant.

[35] Ms Harris invites me to adopt the ordinary and natural meaning of the text which is that retiring gratuities are available to all retiring employees irrespective of whether they transferred from MH provided the requisite 10 year service period has been served. It was submitted that such an interpretation is supported by two other provisions in the collective agreement, firstly, the second paragraph to the introduction which renders null and void any previous agreement that purports to provide compensation, remuneration or reward, and secondly, Appendix 1 to the collective agreement, which for the purpose of any service-related provision to the collective agreement, allows MH employees the additional benefit of having their service at MH taken into account.

[36] I do not find Appendix 1 particularly helpful in interpreting what is meant by 'eligible employees' in cl 37 because Appendix 1 defines what is meant by 'continuous service' which are words not found anywhere in cl 37 but are mentioned several times in cl 26 which concerns long service leave. To try to draw a connection between Appendix 1 and cl 37 by relying on the word "any" as it appears in the phrase "*any* service related provision" in Appendix 1 is to place too much of a gloss on one word.

[37] Rescare's position is that only employees who transferred from MH from inception and who have since worked for it for no less than10 years are eligible for a retirement gratuity. It points to the memo from Peter Cottier of NZCare to Grant Power,

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[2] At [63].
[3] At [63].

then chairman of Rescare, as a helpful piece of extrinsic material which is relevant when considering the intention of the parties at the time.

[38] The purpose for which the memo is used by Rescare is not to adduce evidence of another employment agreement but as relevant background material. As a result, the null and void provision mentioned above in the second paragraph to the introductory is not engaged. I accept that the memo is not forward focused because it does not specifically refer to non-MH employees who might join Rescare in the future. Even so, Mr Power stated that he did not expect the memo to be forward looking in this regard because he understood that the retiring gratuity would apply to MH staff only.

[39] Mr Power further stated that Rescare's board of trustees treated the memo as defining the liabilities the organisation would be exposed to in the future. Consistent with that evidence was Mr Pottier's comment that the purpose of the memo was to be a "wash up" of any potential liability for Rescare.

[40] I find Rescare's desire to not have an open-ended liability especially at the start-up phase of its operations makes commercial sense particularly when it would take some time for it to be become financially sustainable.

[41] While the memo does not expressly refer to the PSA, this is not controversial. It was Mr Power's evidence that in March 1995, a significant number of staff had come from MH and that he could not recall Rescare having to recruit staff itself at the time. That evidence aligns with Mr Pottier who commented that when Rescare started, it did not have a recruitment process going and most of Rescare's staff originated from Spectrum. Although Mr Cottier did not negotiate the collective agreement between RML and the PSA, it was his evidence that there was an assumption that employees would move from NZCare to RML under the same terms of employment.

[42] Rescare was essentially the product of like-minded and concerned parents and caregivers who wanted to have their family members, former residents of MH, cared for when the model of care for the intellectually disabled was deinstitutionalised. In creating the business, Rescare was doing so from scratch with no workforce of its own, no accommodation to house its residents, and no administration and management systems in place. However, what it did have was a business plan, a contract with the

Ministry of Health, and experienced staff from MH who Rescare needed brought over given their familiarity with the residents and the need to provide continuity of service during a period of uncertainty and rapid change.

[43] Ms Harris submits that I adopt an alternative approach which suggests that at the time cl 37 was drafted, neither party agreed to any grandparenting of the retiring gratuities clause in the 1996 Spectrum collective agreement. However, I find the alternative approach too speculative given evidence that there was an underlying assumption that staff from Spectrum would transfer to Rescare on the same terms and conditions.

[44] The doctrine of contra proferentem does not apply against Rescare as it is not clear which party suggested the wording of cl 37.

[45] I agree with Ms Harris that the table set out in Ms Creighton's written witness statement of the number of people who have been awarded retirement gratuities is misleading and must be regarded with caution. The table does not comprehensively record all those who applied or requested payment of a retirement gratuity. It was Ms Harris's evidence that no one talked about cl 37 because information about it was not well disseminated to staff. As a result, post-contract conduct does not assist Rescare.

Conclusion on meaning of eligible employees

[46] The retirement gratuity was to ensure that Rescare's residents, some of whom were family relatives of the founding families, had continuity of service from MH staff with whom they were very familiar. When I read cl 37 together with the memo, evidence that employees had moved from NZCare to RML under the same terms of employment, and noting also Rescare's background history, I find on a cumulative and objective basis that "eligible employees" in cl 37 means those employees from MH who had transferred to Rescare at inception.

Whether there was a discretion to pay the retirement gratuity?

[47] Given the outcome, it is not necessary that I also define what the parties meant by the word "may" as it appears in the second paragraph to cl 37 which states: "The Chief Executive Officer **may** pay a retiring gratuity". I have considered the

submissions of counsel regarding *Matthews v Bay of Plenty District Health Board*.[4] However, I find that the second paragraph to cl 37 is not engaged unless Ms Harris was also an MH employee which she is not.

[48] It follows that I must also find no breach of Rescare's good faith obligations under s 4(1A) of the Act in terms of Ms Creighton being responsive and communicative to Ms Harris regarding the exercise of her discretion.

[49] The question of what the word "may" means in cl 37 is best reserved for such a time when its interpretation will be determinative of the final outcome. That is not so here but if the parties think it useful, I am prepared to direct them both to mediation if required.

What about costs?

[50] The Authority's Practice Direction, effective 1 February 2024 sets out in one document an outline of the steps parties appearing before it can expect which includes the award of reasonable costs and expenses. [5] There are certain categories of cases where there is a presumption that parties bear their own costs. The present case falls within one of these categories: disputes about the application, interpretation or operation of a collective agreement.[6]

[51] For this reason, my preliminary view on costs is that these should lie where they fall. If either party wish to be heard further on the issue of costs, they are to contact the Authority Officer so that a case management conference can be scheduled.

Peter Fuiava
Member of the Employment Relations Authority

[4] [2019] NZEmpC 49.
[5] https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf
[6] Practice Direction pg.5 at 6.