IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2024] NZERA 282
3237039

	BETWEEN	VICKY GREEN Applicant
	AND	COMPASS GROUP NEW ZEALAND LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Emily Griffin, counsel for the Applicant Paul McBride and Natasha Reid, counsel for the Respondent
Investigation Meeting:	14 February 2024 in Blenheim
Submissions received:	14 February 2024 from Applicant 14 February 2024 from Respondent
Determination:	13 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Vicky Green is employed by Compass Group New Zealand Limited (Compass) as a Cook and is involved in food preparation in the health sector. The parties are in dispute about two things. Firstly, the interpretation of the words "pay parity" in a written variation (the variation) to Ms Green's individual employment agreement (employment agreement) made in 2020 and secondly, placement on the pay scale when Ms Green later joined the union and came under the Collective Agreement between Compass and E Tu Incorporated (the SECA).

[2] As a result of these two things Ms Green says she was underpaid over several years and she seeks a compliance order, an enquiry into the quantum of wage arrears and costs.

[3] Compass says Ms Green was paid correctly because the variation recorded a one-off increase to her wages after she returned from parental leave to provide parity with a co-worker who carried out the same work. Compass' position regarding her current salary is that Ms Green was placed on the correct step of the pay scale based on her skills and abilities and she has therefore received wages she was entitled to under both the individual employment agreement and then the SECA.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Ms Green, and on behalf of Compass from Alistair Wright, Operations Manager Nelson/Marlborough and Peter Jennings, Director of People and Culture. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[5] The issues to be resolved are:

(a) Whether the variation in 2020 intended Ms Green's wages to keep pace with future increases under the applicable collective agreement; and

(b) Whether Ms Green was placed on the correct salary step when she joined the union.

The variation to Ms Green's individual employment agreement

[6] By agreement Ms Green and her manager entered into a written variation to the individual employment agreement between the parties dated 17 November 2020. The reason for the variation is recorded as "pay parity" and the document is signed by Ms Green's previous manager. Mr Wright took over from that manager. The variation changed Ms Green's position description to Cook and her wages increased from $23.30 per hour to $26.08. A remuneration approval form completed at the same time, is consistent with the written variation, other than Ms Green's new position title which was recorded as Chef and not Cook.

The parties' submissions

[7] Ms Green's position is that the words "pay parity" in the variation were intended to mean parity with the wage rates of employees who were union members. It was her understanding that from the time the variation was entered into in 2020, her wages would keep pace with all future wage increases negotiated in the Collective Agreements between the parties.

[8] It was not in dispute Ms Green approached Mr Wright after the next increase in wages under the SECA, after her variation was entered into, to ask why the wage increase under the SECA had not been applied to her.

[9] Ms Green's evidence of her recollection of the variation being discussed was of sitting down to meet with her manager. She was told her pay was being brought in line with others in the cafeteria and the company had pay parity so it would put her in line with what others were being paid. Submissions were also made on Ms Green's behalf that the following should be taken into account:

- The SECA rate for a Grade D Cook was used as a pay parity measure for the variation.
- The variation reflects the conversation between Ms Green and her manager at the time.
- The position description records Ms Green's position as Cook.
- Ms Green did not have the relevant qualifications at the time she was placed on the Grade D Cook rate and she does not currently have the relevant qualifications but nonetheless she was placed on that rate.
- The bargaining fee provision in the SECA is an opt out scheme although Ms Green has never paid a bargaining fee.
- After Compass implemented the NZQA qualifications framework in 2018, the SECA provided discretion for Compass to place employees on any step of the relevant scale.
- Ms Green was on parental leave at the time the NZQA qualification framework came into force.

[10] Compass says the variation can only mean parity with another co-worker Ms Green was working with at the time. This was a one-off increase and it cannot have been intended to give her pay parity with all future wage increases under the SECA because that would have represented an unlawful passing on of union members' terms and conditions to a non-union member.

[11] Compass did not provide any direct evidence about the manager's intent at the time the variation was signed. Mr Wright gave evidence of his understanding from the manager he was taking over from, that the variation was to provide Ms Green with parity with another employee. He did not dispute that Ms Green approached him to query her hourly rate in March 2021, after the first increase in wages under the SECA since the variation was entered into with Ms Green by Compass.

[12] Compass made further submissions to support its position the variation represented a one-off wage increase and that there was no ongoing agreement to pass on SECA terms and conditions to Ms Green:

- Ms Green has applied an ex post facto subjective interpretation of the term "pay parity".
- The words on their face do not vest any substantive ongoing rights and Mr Wright's evidence puts them into their proper context.
- Wage rates for all individual employment agreements (not just Ms Green) were reviewed in November 2020.
- Ms Green did not pay a bargaining fee to become bound by the SECA (cl 43 of the SECA) so the bargaining fee arrangement in the SECA was never triggered.
- Passing on future SECA wage increases would have been unlawful under s 59B of the Act.
- Ms Green is not qualified enough for her wages to be at the level of a Grade D Cook or for her wages to have kept pace with those of a Grade D Cook.

[13] Compass also says it is immaterial whether Ms Green was referred to as a Cook or a Chef, noting there is no rate of pay for the position of Chef in the SECA. What is important is the text of the written variation and the individual employment agreement between the parties with reference to the 2020 variation, cl 1 of the employment agreement, setting out the nature of service, cl 4, setting remuneration and KiwiSaver and cl 28 which provides for performance and salary reviews from time to time with such a review being at the discretion of the employer.

[14] I was also correctly reminded the Authority cannot embark on an exercise in fixing terms and conditions.[1]

Rules of interpretation

[15] The principles of interpretation relating to contracts also apply to employment agreements.[2] The proper approach is an objective one with the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably be available to the parties at that time. The objective meaning is taken to be that which the parties intended and while context (background and document as a whole) can inform the meaning, focus on the text remains important.[3]

[16] The Employment Court has confirmed that background material must be reasonably relevant, objective and should not include a party's subjective intentions about what was meant.[4]

[17] When there is ambiguity as to what an agreement means the principle of contra proferentem applies and applies in the context of employment agreements. The Employment Court recently stated:[5]

> The Supreme Court has also noted on several occasions that, where there is ambiguity in a provision, the principle of contra proferentem applies, which means any ambiguity is interpreted against the party that drafted the agreement. Given the way employment agreements are generally entered into, that principle is consistent with one of the objects of the Employment Relations Act 2000, being to address the inherent inequality of power in employment relationships.

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[1] Employment Relations Act 2000, s 161(2).
[2] *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111 at [74]-[78].
[3] *Firm PI 1 Ltd v Zurich Australasian Insurance Ltd* [2014] NZSC 147 at [60]-[63].
[4] *KiwiRail v Mobbs* [2020] NZEmpC 139 at [24].
[5] *Supercity Towing Limited v Huch* [2023] NZEmpC 205 at [20].

Analysis

[18] While Compass submits there is nothing in the written variation entitling Ms Green to any further wage increases in line with any future changes to the SECA, there is equally nothing in the text of the variation that indicates she was not.

[19] Based on the text of the variation, both parties' interpretation with regard to future wage increases are reasonable. The text itself does not provide any assistance as it simply records "pay parity" as the reason. This could be either a one-off increase or linked to future SECA increases. With regard to the parties submissions, I note the variation moved Ms Green's wages up to the level of a Grade D Cook in the wage tables set out in the SECA, at a time when there was an individual employment agreement between the parties indicating at the very least there is some link to the SECA wage rates.

[20] With regard to Compass' submissions, passing on SECA terms and conditions could have the appearance of a passing on, however, the way s59B of the Act is constructed and the bargaining fee provision being an opt out scheme means Compass could have intended to pass on SECA wage increases despite those concerns.

[21] The individual employment agreement does not provide any assistance. The performance review clause while it exists and appears to be relevant, provides that such a review does not confer any right or expectation of any increased remuneration and there is nothing to indicate the variation could not be considered to be a right or expectation to future wage increases.

[22] It is my conclusion the 2020 written variation to the employment agreement is ambiguous as to what "pay parity" meant. None of the background and context matters raised by the parties assist in understanding what the parties intended at that time. The evidence of Ms Green about what her manager said and therefore intended at the time would generally be preferred because it was direct evidence. Mr Wright's evidence was second hand and although he is recorded on the form as the manager Ms Green would be reporting to, he had not taken up the substantive role at that time. However, none of these assists with the plain meaning of the text.

[23] The principle of contra proferentem applies in this matter because the text and meaning of the 2020 variation are ambiguous and both parties have adopted different interpretations based on what they think it should mean. That means the ambiguity is

interpreted against the party that drafted the agreement and I should prefer Ms Green's interpretation, that "pay parity" in the variation was intended to mean parity with all future wage increases under the relevant SECA, unless her interpretation was unreasonable. I find it is not unreasonable because the text is capable of having that meaning without straining the meaning of the text. It simply states "pay parity".

Compliance order

[24] Having favoured Ms Green's interpretation of the 2020 variation to the employment agreement, under s 137((1)(a)(i) Compass is ordered to comply with the terms of Ms Green's individual employment agreement.

[25] The Authority notes it would have been unlikely Ms Green's wages could have been decreased at the point in the time she joined the union. However, if the parties are unable to agree on whether there are wages owing for the period of employment under the SECA, leave is reserved to return to the Authority.

Costs

[26] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Green may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Compass will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[27] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[6]

Sarah Kennedy-Martin
Member of the Employment Relations Authority

[6] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1