IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 204/10
File Number: 5297755

	BETWEEN	Norman Brooker and 21 Others (see Schedule A attached) Applicants
	AND	Care Park New Zealand Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	Peter Cranney for the Union Karen Soich for the Company	
Investigation Meeting	Wellington, 3 December 2010	
Submissions Received	7 December 2010	
Determination:	21 December 2010	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Is the respondent (the Company) liable for payment of redundancy compensation?

[2] Is the Company in breach of undertakings to pay redundancy compensation to the applicants such that a personal grievance results?

[3] Mediation did not resolve this employment relationship problem.

The Investigation

[4] During a telephone conference call on 20 September 2010 and subsequently the parties agreed to a one day investigation in Wellington on 3 December. Timelines were also put in place for the provision of witness statements and an agreed bundle of documents (however the latter was not provided).

Background and Summary of Parties' Positions

[5] The key facts are not in dispute and can be summarised as follows:

[6] The respondent is an incorporated company that provides car parking and car valet services. It was contracted to the Air New Zealand (Air NZ) to provide those services at Wellington International Airport (the Airport, the Agreement). The agreement between the Company and Air NZ provided for the latter to reimburse the respondent all staff costs associated with the provision of the valet car parking operation, *"including oncosts"* (letter of 29 June 2010 from the Company to Air NZ and attached to the witness statement of Mr Don Swann).

[7] The applicants were employed by the Company at the Airport as car valet workers.

[8] The applicants and the Company were parties to a collective agreement.

[9] On or around 7 October the Company wrote to the applicants stating, amongst other things, that Air NZ had confirmed the decision to terminate the Agreement for the supply of valet services at the Airport. It advised the applicants that they would be made redundant effective 7 November (letters to each of the applicants dated 7 October 2009).

[10] Because of an expectation by the Company that it would recover the cost of redundancy pay from Air NZ, the respondent also advised the applicants in the same letter that they would be *"… paid out any monies owing … being redundancy … etc upon your exit"* (above).

[11] As it happened, Air NZ later refused to compensate the Company for the cost of redundancy payments and the respondent then declined to make any redundancy payments to the applicants.

Parties' Positions Summarised

[12] The applicants say the Company is in breach of clause 17.1 (a) of the Collective Agreement between Care Park New Zealand and the Service and Food Workers Union Inc 1 December 2007-31 December 2009 (the collective agreement).

[13] Clause 17.1 a. provides as follows:

> *Where for a commercial reason* (the Company) *makes the decision to restructure that creates a surplus of staff and no other suitable work can be found elsewhere in the Company, then redundancy applies.*

[14] The applicants say the redundancies were the result of *"a commercial reason"* initiated by the Company and redundancy compensation is therefore payable.

[15] The applicants also say the Company is bound by its promise to pay redundancy; the consideration being that the applicants remained in the respondent's employ throughout the notice period until terminated as redundant.

[16] The applicants seek payment of redundancy pay, *"compensation for distress"* (par 3.2 of the statement of problem) and costs.

[17] The Company says there were no unjustified dismissals and that the applicants were made redundant because of Air NZ's decision to terminate the Agreement. Redundancy compensation is not payable because of clause 17.1 b. of the collective agreement. It provides verbatim as follows:

> *Where through an action out of the control of* (the Company) *creates a surplus of staff and no other suitable work can be found elsewhere in the Company, then no redundancy applies.*

[18] The Company says it was Air NZ's decision to terminate the Agreement and it was therefore *"an action out of the control of* (the Company)"; clause 17. 1. b of the collective agreement. The contract was not terminated for poor performance or breach of contract, etc, which conduct would have been within the control of the Company.

[19] The Company also says that, as it happened, it generously gave the applicants 1 month's notice and not the week's notice of termination required by the collective agreement.

[20] The Company was mistaken in its reasonable belief at the time as expressed in its letter of 7 October 2009 that redundancy compensation was payable, as its expectation Air NZ would meet that cost has been proven wrong.

[21] It is not bound by any promise to pay redundancy.

[22] The Company also says that no personal grievances were raised within 90-days.

[23] In correspondence dated 22 October 2010 the Company raised concerns as to the accuracy of the list of named applicants but that matter, I understand, was no longer at issue by the completion of the Authority's investigation.

Discussion & Findings

Interpretation and Application of Collective Agreement

[24] I am satisfied that the meaning of the applicable redundancy clause is unambiguous, and clearly applies to the relevant facts. The decision to terminate the Agreement was unarguably at Air NZ's initiative. There is no evidence to the contrary. The redundancies were not initiated by the Company and were not of its making. There is no evidence to conclude that, but for Air NZ's actions, the Company would not be continuing the applicants' employment today.

[25] It therefore cannot be said that, for a commercial reason, the Company made a decision to restructure that in turn created a surplus of staff and there was no other suitable work elsewhere. Clause 17. 1 a. plainly does not apply.

[26] The redundancies instead clearly arose as a consequence of the circumstances envisaged by clause 17.1 b. of the collective agreement, wherein the redundancies resulted from an action out of the Company's control.

Promise of Redundancy

[27] I also do not accept that the Company required the applicants to remain in employ for the duration of the notice period so that they might then be eligible for redundancy compensation. There is no evidence to that effect. The written notice provided to all applicants is evidence of the contrary. It said, amongst other things, that:

> *… your current role … will be made redundant, effective 7 November 2009. You are guaranteed employment at your full rate of pay, and based upon your current rostered hours, up to this date.*
>
> …
>
> *Due to the unusual nature of this redundancy/contract termination and Air New Zealand's intention to provide additional staffing during the transition period, please note that* ***we have no issue with your taking as much time as you need to attend interviews or to attend to other matters relating to your seeking new employment****.*
>
> (emphasis added; letters dated 7 October 2009 to the applicants)

[28] There was therefore no consideration on the applicants' part as claimed, i.e. that they remain in employment for the duration of the notice period so as to be eligible for redundancy compensation. They were obliged, unless resigning, to work out their notice periods. There was no evidence of the employees agreeing to stay in the Company's employment any longer than they wanted to. The consideration for the applicants staying on was payment of an additional 3 weeks' notice and salary whereas the collective agreement only required notice of one week.

[29] Claims by the applicants that they were required to remain in employment up to 7 November (e.g. par 15 of Bhikhu Bhula's witness statement) are reliant on that person's understanding and do not result from advice or instruction from the Company, in particular its letter of 7 October.

[30] What the evidence does make clear, and which I do not understand the respondent to deny, is that Company management plainly communicated to the applicants their (mistaken, as it turned out) expectation that Air NZ would provide funding for redundancy compensation. However, as is made clear above, and regrettable and distressing as it is for them, I do not accept that management's ill-founded optimism created in law a legal entitlement for the applicants to be paid redundancy compensation as provided by their employment agreement.

[31] I note here that there is no evidence of the Company deliberately misleading the applicants in respect of its expectation they would receive redundancy compensation.

Personal Grievance Claims

[32] The focus of the applicants' union has throughout been in respect of the disputed entitlement to redundancy compensation. There is no evidence of it, or the applicants individually, expressly filing notices of personal grievance until the lodging of their statement of problem (on 3 March 2010).

[33] The union's letter of 17 December 2009 (statement of problem) clearly communicated its intention:

> *Unless I receive a written undertaking by Friday 11th December 2009 that the payments will be made and when they will be made I will take the following action:*
>
> - *File proceedings with the Employment Authority;*
>
> *a) To recover any outstanding monies for redundancy compensation.*
>
> *b) Costs associated with the proceedings*
>
> *c) Penalties for the breach*

[34] The letter did not specify any personal grievances. It therefore does not meet the requirements of s. 114 of the Employment Relations Act 2000.

[35] An email followed from the union on 25 February 2010 seeking confirmation that the Company did not intend to pay redundancy compensation. Again, no mention was made of personal grievances.

[36] The statement of problem filed on 3 March identified *"Unjustified dismissal"* (par 1) as one of the problems the applicants wanted the Authority to resolve. No particulars were given other than a claim that non-payment of redundancy compensation *"Creates a personal grievance in that the contract and various undertakings to pay were breached"* (clause 2.13).

[37] Unspecified *"compensation for distress"* was also claimed (par 3.2).

[38] This late notice of grievance was lacking in detail and was well outside of the statutory 90-day notice period. The applicants are not claiming exceptional circumstances in order to raise their concerns outside of that period and the respondent does not consent to it being raised outside of the period.

[39] It follows from the above that the applicants' notice of grievance is out of time and cannot proceed.

Determination

[40] I readily accept counsel for the applicants' description of his clients as *"loyal and decent employees"* (par 35 closing submissions). And I do not doubt that the applicants were much distressed as a result of being lead to expect redundancy compensation that has never been paid to them. However, for the reasons set out above, those expectations do not rest on any legally enforceable obligation and the applicants' claims are dismissed.

[41] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority