

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 136/09
5122059

BETWEEN

JUDITH ANNE BURKE
Applicant

AND

COMPASS GROUP NEW
ZEALAND LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Judith Burke
Michael Wecke, Advocate for Respondent

Investigation Meeting: On the papers and by way of supplied information

Determination: 25 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Judith Burke says that after 21 years service with the Nelson Marlborough District Health Board and other qualifying organisations, the last being Compass Group New Zealand Limited (Compass Group), she is entitled following her resignation in November 2007 to a retiring gratuity.

[2] The entitlement for a retiring gratuity grand-parented to those employees employed prior to 1 February 1993 in the Nelson Marlborough Area Health Board collective employment contract for hospital service employees 15 February 1993-31 January 1994.

[3] Initially Compass Group said that Ms Burke was not entitled to a retiring gratuity because she had not completed ten years qualifying service as at February 1993. Further, Compass Group said that when they commenced the food service

contract in October 2000 Ms Burke was not referred to in a list of staff provided by the Nelson Marlborough Area Health Board who had a gratuity entitlement. In its statement in reply the respondent made it clear that it wanted conclusive evidence of Ms Burke's eligibility to retiring gratuity.

[4] In order to progress the matter the Authority held several telephone conferences with Ms Burke and the Human Resource Manager for Compass Group, Michael Wecke. During the telephone conferences and with the helpful cooperation of both Ms Burke and Mr Wecke, the Authority was able to identify the information that would assist in answering the question as to Ms Burke's eligibility for retiring gratuity.

[5] Ms Burke and Mr Wecke are happy for the Authority to determine the matter on the basis of information provided. The Authority did experience some delay in obtaining final information as to Ms Burke's employment conditions prior to February 1993. Regrettably this has delayed the release of this determination.

The issue and Analysis

[6] The issue for the Authority is whether Ms Burke had an entitlement to a retiring gratuity when she retired in November 2007.

[7] Ms Burke commenced her employment with the Nelson Marlborough District Health Board from 31 October 1986. She remained employed by the Nelson Marlborough District Health Board until 31 May 1995 when, effective from 1 June 1995, the Board contracted out the hospital services contract which covered Ms Burke's employment to Spotless (Medirect).

[8] The District Manager for Human Resources and Payroll at the Nelson Marlborough District Health Board, Heather Smith, confirmed that Ms Burke transferred to Spotless with 8 years and 7 months service with the Health Board. In October 2000 the Compass Group commenced the food services contract.

[9] Ms Smith was able to confirm that Ms Burke was covered prior to the collective employment contract 15 February 1993 to 31 January 1994 by the New Zealand Area Health Boards' Domestic Workers' Composite Award. Ms Smith was also able to confirm that as verified by the electronic payroll system, Ms Burke was a member of the Combined Unions in 1993.

[10] Mr Wecke stated in his email dated 30 April 2009, that earlier contractual arrangements were important because of the wording in clause 24 of the employment contract of 15 February 1993 to 31 January 1994 being the contractual provision on which Ms Burke based her claim for a retiring gratuity.

[11] I am satisfied that Ms Burke's employment at the time of contracting out with Spotless was covered by that collective contract on the basis of Ms Smith's letter of 10 November 2008.

[12] Clause 24 of the collective contract is headed *Retiring Gratuities*. I do not intend to set the clause out in full as many of the provisions, including the retiring gratuity formula, are not in dispute. I shall, however, set out the first two subclauses in full:

24.1.1 For employees who are party to this collective employment contract prior to 1 February 1993, the employer may pay a retiring gratuity to those employees retiring from the Board, who have had no less than ten years service with qualifying organisations (ie. the existing qualifying service of employees employed by the Board prior to 1 February 1993 is recognised).

24.1.2 The provisions of clause 24 will not apply to employees who were not parties of this contract prior to 1 February 1993.

[13] The clear purpose of the clause is to enable those employees who were party to the collective employment contract prior to 1 February 1993 if they can establish they have the ten years qualifying service to receive a retiring gratuity on retiring from the Board. It is clear that these provisions will not apply to employees who were not party to the contract prior to 1 February 1993. I am satisfied that Ms Burke was party to the collective employment contract prior to 1 February 1993 being covered by the Award and a union member.

[14] I am not satisfied that the clause provides employees in order to qualify for a retiring gratuity require ten years service as at 1 February 1993. Although service prior to 1 February 1993 is recognised towards qualifying for the retiring gratuity, there is no reference of the years of qualifying services required prior to that date.

[15] The reason Ms Burke would not have been on the list of employees eligible for a retiring gratuity when the hospital service was contracted out to Spotless in June 1995 can be explained on the basis that at that point Ms Burke had not completed ten

years service. As to why there was no list setting out employees who were party to the collective employment contract prior to 1 February 1993 and therefore could become eligible to be paid a retiring gratuity, I can only speculate. The absence of a list, however, cannot defeat underlying entitlements.

[16] There was not evidence of applicable collective contracts or agreements from 1995 until 2003 that covered Ms Burke's employment.

[17] In 2003 there was a Nelson Marlborough District Health Board collective agreement from 1 July 2003 to 30 June 2005. Mr Wecke submits there is no evidence that Ms Burke was covered by that collective agreement. Ms Burke maintains that she was throughout her career a member of the Union on site and covered by collective arrangements in place. I am satisfied that that was in all likelihood the position. There is no evidence at any stage of any individual arrangements between Ms Burke and Spotless or Compass Group. I am further strengthened in my view by Mr Wecke's own investigations into the Compass Group payroll as to what the position may have been following 2005. Those investigations did support that Ms Burke was a member of a union and therefore covered by a collective agreement in 2006 which made provision for retiring gratuities for those employees employed prior to February 1993. I am quite satisfied that until a new collective agreement came into force on 1 July 2007 Ms Burke's right to a retiring gratuity which arose under the 1993 to 1994 collective employment contract was preserved and not extinguished.

[18] From September 2006 to November 2007 when Ms Burke was a member of the Reunited Employees Association (REA). There was a collective agreement negotiated between REA and Compass Group expressed to come into force on 1 July 2007. It contains no provision at all with respect to retiring gratuities. Ms Burke was not aware of the provisions of the new collective agreement and the omission of the clause with respect to retiring gratuities when she retired in November 2007.

Determination

[19] Ms Burke was employed prior to 1993 by the Nelson Marlborough District Health Board and prior to 15 February 1993 her employment conditions were covered by an award. Although there seems to be no evidence of any collective arrangements in place from 1995 to 2003, the next collective agreement from July 2003 to June

2005 contains the entitlement for those employees employed prior to February 1993 to a retiring gratuity and that this provision appears, on the face of the evidence, to have simply rolled over for 2006.

[20] I do not find that the omission of any reference to a retiring gratuity from the last contractual agreement that covered a few months of Ms Burke's employment before her retirement is sufficient to extinguish her right to receive the retiring gratuity on qualifying service up to July 2007. I find that Ms Burke is entitled to a retiring gratuity on her retirement. I am satisfied that Ms Burke is entitled to receive the retiring gratuity because she was a party to the collective employment contract prior to 1 February 1993 and has had no less than ten years service with a qualifying organisation.

[21] In accordance with the scale provided which has remained unchanged, Ms Burke has had 'not less than 20 years and less than 21 years service'. This entitles Ms Burke to a maximum retiring gratuity of 71 consecutive days pay.

[22] I shall leave the actual amount of the retiring gratuity to Mr Wecke and Ms Burke to calculate. I will reserve the right for either party to come back to the Authority if assistance is needed in that regard, by the 30 September 2009.

[23] I have considered whether there should be interest payable on that amount. I find in this case there was a genuine dispute about the nature of the employment conditions as they pertained to Ms Burke. Mr Wecke fully co-operated with attempting to understand what those arrangements are. I am not minded in those circumstances to make an order with respect to interest.

Costs

[24] Ms Burke is entitled to recovery of her \$70 filing fee and I order Compass Group to pay her the same.