

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 74

File Number: 5302247

BETWEEN Val Hawtree
Applicant

AND Spotless Services (NZ) Limited
Respondent

Member of Authority: Denis Asher

Representatives: Jamie Waugh for Ms Hawtree
Paul McBride for the Company

Investigation Meeting Whanganui, 27 April 2011

Submissions Received On the day of the investigation

Determination: 6 May 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Is Ms Hawtree entitled to a retirement gratuity? Was Ms Hawtree unjustifiably disadvantaged by the respondent's (the Company's) failure to pay her a retirement gratuity? If she was, what if any remedies are available to her?

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

[3] Each party seeks costs.

The Investigation

[4] During a telephone conference on 19 January 2011 the parties agreed to a one-day-investigation in Whanganui on 27 April 2011 as well as timelines for filing an amended statement of problem and witness statements.

Background

[5] Ms Hawtree commenced working at Whanganui hospital on 19 January 1978. Her role was that of a food services supervisor.

[6] During her time at the hospital Ms Hawtree worked for various employers, including Good Health Wanganui (now known as the Whanganui District Health Board).

[7] At the time her employment ceased with Good Health, and by confirmation dated 30 August 1996, Ms Hawtree was paid a gratuity of \$4,725.85 “*in recognition that she would no longer have future access to a retirement gratuity*” (par 2 g. of the statement in reply received 8 December 2010).

[8] On 21 November 2001 her employment transferred to the respondent.

[9] During the latter half of 2009 Ms Hawtree discussed with her divisional manager the possibility of retirement.

[10] In a letter dated 3 September 2009 the applicant’s divisional manager wrote to her as follows (verbatim):

Thank you for meeting with me several times recently to discuss your impending retirement. ...

Spotless is very appreciative of the many years of good service you have provided us Like most good things, we too do eventually draw to a close. I therefore understand and accept your decision to retire and wish you all the very best for the future.

By retiring, you will hold a valid claim for a retiring gratuity originating from your employment with the forerunner of the present Whanganui District Health Board. With your agreement I shall seek this on your behalf (it would be paid to you through Spotless).

I ask that we mutually agree and indicate your date of retirement below. All monies owing to you including holiday leave ... and retiring gratuity will be calculated in full to this date

...

(signed)

Divisional Manager Central

(attachment to amended statement of problem received 25 February 2011)

[11] In a reply dated 15 September, Ms Hawtree said:

Dear ...

With reference to prior discussions and your letter of 3rd September 2009.

As you know I have expressed interest in retiring from my position ...

I would, subject to confirmation of eligibility for a retirement gratuity, offer my final day of work to be Tuesday 20th October 2009.

I accept and appreciate your offer to act on my behalf regarding the gratuity.

(signed)

(above)

[12] In an email sent to the applicant on 16 October, the divisional manager advised (amongst other things):

... I have your retirement date agreed as 20 October, and am using that date for the purposes of calculating your retirement gratuity. ...

(above)

[13] In an advice dated 18 October Ms Hawtree confirmed it had been mutually agreed that her last day of employment would be 20 October 2009 (attachment to statement in reply received 8 December 2010).

[14] A “*retirement worksheet*” (the worksheet) was sent to Ms Hawtree by email on 28 October 2009. It used a commencement date of 19 January 1978 and a “*date for gratuity calculation*” of 20 December 2009: by the latter date the applicant would have been retired two months. It calculated a total nett gratuity payment of \$10,728.55 (attachment to amended statement of problem received 25 February 2011).

[15] Ms Hawtree replied by email on the same day, 28 October, and confirmed that “... *all appears in order ...* ” (above).

[16] As it happened, no gratuity payment was made to the applicant.

[17] By letter dated 25 March 2010 her then representative filed a claim with the Company for the retiring gratuity as well as a personal grievance (above).

[18] Remedies sought by Ms. Hawtree are payment of the retirement gratuity as calculated in the worksheet, i.e. \$10,728.55; interest on the same and compensation for humiliation and hurt of \$15,000.

Discussion and Findings

Retirement Gratuity Entitlement

[19] Ms Hawtree’s divisional manager insists that, in all his discussions with the applicant, their discussions about payment of a retiring gratuity were conditional on her entitlement to the same. The respondent’s position is clear: the collective agreement that provided the applicant’s terms and conditions of employment at the time of her retirement made no provision for payment of a retirement gratuity, and the discussions between the applicant and the divisional manager did not result in any variation being agreed to those terms and conditions such that a retirement gratuity would be paid.

[20] Ms Hawtree disputes her divisional manager's recollection. She says he "*suggested that I may wish to take early retirement and explained that if I was to take early retirement I would be paid a retirement gratuity During one of these conversations he said that he expected ... it would be somewhere between \$10,000.00 and \$12,000.00*" (par 9 of her first witness statement).

[21] Ms Hawtree says that she would not have retired "*had it not been for the promise that I would receive a retirement gratuity from Spotless Services*" (par 21 of her second statement, dated 7 April 2011).

[22] I accept the applicant's position in part: the correspondence supports Ms Hawtree's recollection of the nature of discussion between herself and the divisional manager. It is proof that the parties agreed, as a condition of Ms Hawtree's retirement, she would be paid a gratuity.

[23] I do not accept, however, that agreement was ever arrived at as to how much would be paid or what formula would apply. That is evidenced by the worksheet itself: the period of calculation covers the time for which Ms Hawtree was already paid out, and extends to a date two months after her actual retirement. Its calculation is clearly not accurate and would not have been relied on by the parties.

[24] During the Authority's investigation the applicant made it clear she was not seeking a double-dip; she also acknowledging no actual sum had ever been agreed.

[25] The lack of agreement as to quantum is reinforced by Ms Hawtree's own submission, that it was agreed "*that if the applicant retired she would receive a retirement gratuity (in the sum of approximately \$10,000.00)*" (emphasis added; par 1 a) of the applicant's closing submissions received on 27 April 2011).

[26] That absence of a contractual entitlement, either in Ms Hawtree's employment agreement or by way of variation as to a specific term conditional on her retirement, results in the applicant being ineligible for payment of any retirement gratuity.

Unjustifiable Disadvantage

[27] However, but for the agreement reached by the parties at the time, it cannot be said – fairly and reasonably, on a balance of probabilities basis – that Ms Hawtree would have retired at the time she did. That she did retire was because of her employer’s undertaking it would pay her a retirement gratuity. It did not. To that extent I accept the applicant has been disadvantaged: her divisional manager clearly agreed that, were she to retire, she would be paid a retirement gratuity. This has not happened. Ms Hawtree’s reasonable expectation was unilaterally set aside. While the amount was not agreed, the divisional manager did not go back to the applicant and say, ‘I’ve made a mistake, you’re not entitled to a retirement gratuity as I first thought; we’re not going to pay you anything. It’s therefore only fair and reasonable that you revisit your decision to retire or not’. Ms Hawtree was thereby unjustifiably denied the opportunity to decide whether she would or would not retire, without a retirement gratuity.

[28] These failings are in breach of the obligations of a good, responsive and communicative, employer: s. 4 of the Employment Relations Act 2000 (the Act), particularly toward a long serving employee whose services it is on record as valuing highly.

[29] Having been advised, plainly, she would be paid a retirement gratuity, it was incumbent on the respondent to communicate its change of stance to the applicant before allowing her to retire because of a mistaken expectation.

Remedy

[30] Ms Hawtree clearly expected to receive a retirement gratuity of “*approximately \$10,000*” (above) and was distressed by the respondent’s failure to make payment of that sum. The distress amply evidenced by Ms Hawtree, and her husband on her behalf, must be tempered by an appreciation that no agreement as to quantum was ever arrived at by the parties. Had the respondent turned its mind to the matter before the applicant retired, it would have communicated to her that in fact she had no entitlement to a gratuity by way of her collective employment agreement, and had been paid out monies in 1996 for loss of the same.

[31] Ms Hawtree's hurt and humiliation should be measured in the context of that loss of opportunity and what might have happened then.

[32] I am satisfied that, in all the circumstances, payment of \$3,000 for unjustified disadvantage is appropriate.

Contributory Fault

[33] There is no evidence of any actions by Ms Hawtree that contributed to the circumstances giving rise to her personal grievance.

Determination

[34] The Company unjustifiably disadvantaged Ms Hawtree and is to pay her the sum of \$3,000 (three thousand dollars) compensation for humiliation and hurt.

[35] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority