IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 326/10
5147848

	BETWEEN	NEW ZEALAND NURSES ORGANISATION Applicant
	AND	WHANGAROA HEALTH SERVICE TRUST Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Nicola Bush for Applicant Bryce Quarrie for Respondent
Investigation Meeting:	28 April 2009
Further information received	11 December 2009
Submissions received:	5 March 2010, 23 March 2010 from Applicant 19 March 2010 from Respondent
Determination:	19 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns a dispute about the interpretation, application and/or operation of Retirement Gratuity provisions contained in collective agreements to which the applicant (the Union) and respondent employer (the Trust) are or have been party.[1] The retirement gratuities are among provisions that were "*grandparented*" on or about 19 December 1996 when the Trust took over the provision of certain health services formerly provided in the Whangaroa district by Northland Health Limited. In doing so the respondent became the employer

[1] The *Whangaroa Health Services Trust Collective Agreements.*

of staff who had been covered by a collective agreement between the applicant and Northland Health Limited.

[2] Each of the agreements has an "*Appendix B"* which is entitled "*Entitlements Carried over from Previous Contracts with Northland Health and Carried Forward by Trust*" and contains the following statement:

"Entitlements in this section apply to employees hired before 1 July 1997."

[3] The provisions are expressed in the following (identical) terms:

"B.3.1 Employees who have served under the previous Northland Health Collective Contract and who qualified under that contract for a Retiring Gratuity will retain that entitlement. Employees retiring who have no less than 10 years service with Northland Health AND Whangaroa Health Services Trust may be paid a retirement gratuity within the scale given in B.3.2.

The provisions of this clause may also apply where early retirement is taken by an employee as an alternative to redundancy.

These provisions will apply to staff retiring on medical grounds who have had 10 years service. A claim under this clause should be accompanied by certification by two registered medical practitioners."

[4] The parties submitted an agreed statement of facts. The relevant background is set out there as follows:

"…on or about 19 December 1996, employees transferred from Northland Health Ltd to the Respondent, without payment of redundancy compensation, which they would have been entitled to had they not been offered employment on the same terms and conditions of employment.

6. The Respondent received a payment or credit of $10,734.92 from Northland Health towards the cost of gratuities to be paid in the future…This figure appears…to have

been calculated on the basis of two employees who would reach retirement age in the next ten years and would have the requisite service at that time.

7. It appears to have been anticipated by Northland Health that only a very few employees would actually be paid the gratuity before it was negotiated out of the collective agreement.

8. The Applicant and Respondent have been parties to collective employment contracts and agreements since 1996 which have included provisions for retiring gratuities.

9. The collective employment contract between the parties for the period 1.10.98 to 30.9.99 included for the first time the provision:

> *"These provisions will apply to staff retiring on medical grounds who have had ten years service. A claim under this clause shall be accompanied by certification by two registered medical practitioners."*

10. The issue of retiring gratuities was then not raised by either party during negotiations for collective contracts and agreements until around 2006.

11. At least some of the employees who transferred over from Northland Health to the Respondent were anticipating being paid the retiring gratuity when they left the Respondent.

12. The parties are not aware of any employees claiming or being paid the retiring gratuity by the Trust, prior to 2006.

13. In 2006, the Respondent advised an employee, Fidelma Ure, by way of letter dated 15 February 2006…that she was "entitled" to a gratuity payment on her departure from the organisation. However, on leaving the Respondent subsequently, Fidelma Ure was not paid the gratuity."

Issues

[5] The union says that all employees from 1996 who reach the service requirement are entitled to a gratuity payment when they retire (including those who retire on medical grounds.) The respondent disagrees, saying that it has a discretion as to whether or not to pay the gratuity. As well as this principal issue, supplementary issues have arisen, as follows:

i. If the payment is discretionary, how that discretion is to be exercised;

ii. to whom the gratuity applies, including:

a. whether the service requirement in the provision is met by the completion of a total of ten years service between the two organisations;

b. whether employees retiring on medical grounds must have service with Northland Health Ltd to qualify, and

c. whether employees had to be employed as at 1 January 1997 or 1 July 1997 in order to be eligible for the gratuity.

[6] On the last issue the positions of the parties have shifted somewhat. In opening submissions Ms Bush argued that "*employees should have had to be employed as at 1 January 1997 in order to be eligible for the gratuity, as this is essentially just after the time of transfer.*" At the investigation meeting the respondent advised that it considered the 1 July date was a "slip" and that employment at 1 January was required. By this time, however, the union was arguing that a literal reading of the clause should apply, so that employment as at 1 July would suffice. Both parties were also uncertain whether the matter had any practical consequence, in that it was unclear whether any employees commenced work between 1 January and 1 July 1997.

However, in case the matter does become of significance, this determination disposes of it.

[7] The statement of problem also raised one further issue: how the number of days specified as the gratuity in clause B.3.2 applies to part time employees, including those who previously worked longer hours than worked at the time of retirement. The Union's submission on this point is as follows:

"the work which staff have done on a full time basis previously should be taken into account when calculating the gratuity entitlement. Otherwise people could be seriously disadvantaged if they have reduced their hours prior to retiring, as is not uncommon."

[8] At the investigation meeting Ms Bush and Mr Quarrie advised that the parties would talk further on this issue and did not require it to be determined at this stage. Leave is reserved for the parties to seek further assistance on this point if they wish.

(i) Whether payment of the gratuity is at the discretion of the respondent and if so, how it should be exercised.

[9] Early in my investigation of this matter I asked the parties if they could provide information about past practice regarding payment of the gratuity (including prior to 1996.) Both have tried to obtain this evidence, but with limited success. On 11 December 2009 Ms Bush provided me with a letter from the current Chief Executive of the Northland District Health Board which was given to her in response to an Official Information Act Request. That letter (which is attached here as Appendix 1) includes the following relevant comment:

"I understand from the recollections of current Northland DHB payroll staff employed between 1992 and 1996 that gratuities were paid to the majority of those who applied and met the criteria set out in the employment agreements."

[10] In terms of relevant law, Ms Bush referred me to the Court of Appeal decision in *Wellington Regional Council v Edwards [1997] 1 ERNZ 100* as authority for the

proposition that there may be circumstances in which the context requires that the word "gratuity" be construed as meaning a payment as of right.

[11] That submission is accepted however it must be noted that before the Court of Appeal there was no dispute between Mr Edwards and his employer that:

"on the face of the documents comprising the employment contract Mr Edwards was entitled to … a retiring payment in some form"[2]

[12] This was because the relevant clause provided that on retirement an officer:

"who has at least ten years current continuous service with the same employer, ***shall be*** *entitled to a grant at the rate of one week's salary for each year of service to a maximum of 26 weeks."*[3]

(emphasis added by the Authority.)

[13] As the Trust pointed out, the relevant clause in the present case provides only that it "*may pay*" a gratuity. Mr Quarrie has submitted that this makes the payment of the gratuity discretionary and argues that in a "*private commercial contractual relationship*" a discretion vested in one party is restricted only by the requirement that it "*must not be exercised arbitrarily, capriciously or unreasonably*." He summarised the respondent's position by saying that its discretion as to whether to pay a retirement gratuity is uninhibited; or, in the alternative:

…its discretion, which includes a discretion to not pay a gratuity, as long as it is exercised taking proper considerations into account, is not able to be substituted by the Authority…

the Authority is limited …to determining that the respondent must consider, in good faith, the question of whether a retirement gratuity should be paid…

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[2] *Wellington Regional Council v Edwards [1997] 1 ERNZ 100, at page 102*
[3] *Wellington Regional Council v Edwards [1997] 1 ERNZ 100, at page 103*

…the Authority cannot order that a gratuity be paid …to do so would be for the Authority to apply its discretion in place of the respondent."

[14] For the Union, Ms Bush argued that in the event the Authority is not prepared to find that there is an entitlement to the gratuity in all cases, there should at least be a rebuttable presumption that the gratuity will be paid. In the Union's submission the exercise of that discretion should be:

i. a subject for consultation with the Applicant and staff, and preferably agreed upon;

ii. transparent, and

iii. legitimate, in the sense that irrelevant considerations should be excluded and relevant legislation (such as the Human Rights Act) should not be breached.

Determination

[15] A review of case law in this area has confirmed that although provisions for retirement gratuities (however expressed) have frequently been the subject of litigation in the employment institutions, very little of this is directly on point. Two relatively recent cases have however involved consideration of a provision containing "*may pay*" and have touched on the effect of those words.

[16] *In Sibly* v *Christchurch City Council 20 September 2001, unreported, CA 44/01* the Authority accepted the employer's assertion that it had a discretion whether or not to pay a retirement gratuity and found that the employer did not have a contractual obligation to pay the gratuity. The Authority did not receive argument on the issue of the way in which the discretion was to be exercised, and did not address the point, although it noted that the respondent in that case "*exercised the discretion not to pay the gratuity in the circumstances of Mr Sibly's voluntary redundancy*"[4]

[4] Upon challenge to the Employment Court Mr Sibly sought to argue that even if the payment was discretionary, he had not been treated fairly and reasonably in the exercise of the discretion. However

from which I infer that the Authority considered the respondent in that case to have acted within the proper exercise of the discretion.

[17] In the subsequent Employment Court case *South Canterbury District Health Board v Milner*, CC9/02, 12 April 2002, (unreported) the DHB had paid out a gratuity on the assumption that Ms Milner was, for health reasons, permanently leaving the workforce. When it learnt that she had in fact moved on to another job (albeit one she considered less damaging to her health) it sought to be refunded the payment. The applicable clause provided:

"The Chief Executive may pay a retiring gratuity to staff retiring from the company who have had no less than 10 year's service with the Company…"

[18] Once again, the decision does not directly address the general question of how the discretion ought to be exercised. However, the decision repeatedly refers to either the "*permissive form*"[5] of the provision or to the discretionary nature of the payment, as in this example:

"finally ceasing employment with Health South Canterbury whether on declared retirement or resignation is inherently and logically a prerequisite to qualifying at the company's discretion as a good employer, for the payment of a retiring gratuity."[6]

[19] The Court noted that "*to qualify at Health South Canterbury's discretion for payment of the retiring gratuity* [Ms Milner] *was required to establish that she was terminating her employment …upon grounds comprising enforced circumstances of ill health."*[7]

[20] Having found as a matter of fact that Ms Milner had been forced to leave due to ill health the Court declined to order repayment of the gratuity, because:

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the Court directed the parties to further mediation and it appears that the matter never fell to be decided.

[5] *Milner* paragraph [110].
[6] *Milner* paragraph [63].
[7] *Milner* paragraph [93].

"the payments were justly and appropriately made to her by the company, consonant with the exercise of its discretion pursuant to enabling provisions of her employment contract with the plaintiff."[8]

[21] Lacking the assistance of authorities more directly on point, I take my guide from these cases. In summary, *Sibly* and *Milner* confirm that retirement gratuities which an employer "*may pay*" are discretionary. They also give some indication of the scope of such a discretion by providing contrasting examples of how it may properly be exercised. It was found appropriate to decline payment in circumstances where the employment ended through voluntary redundancy, but not where it ended through ill health. This would appear to indicate that payment should be made unless there is a reasonable basis for declining to do so.

[22] The relationship here is an employment relationship, not a "*private commercial contractual relationship*" and has its own special character, determined by reference to a specialised body of jurisprudence. The parties' overarching statutory obligations to act fairly and reasonably and in good faith must inform the exercise of any discretion. In summary, therefore, I conclude as follows:

i. The gratuity is a discretionary payment;

ii. that discretion must be exercised in good faith;

iii. each case must be considered on its own merits,

iv. payment should be made unless fair and reasonable grounds exist for declining to do so, and

v. every affected employee should ne consulted on the question whether the discretion should be exercised in his or her favour.

[23] I note for completeness that Ms Bush also made a submission that the trust should not be permitted to benefit from the unjust enrichment which would occur if it were to retain the lump sum originally advanced to it to cover retirement gratuities.

[8] *Milner* paragraph [113.]

Given my findings (and the consequent likelihood that at least some staff will be eligible for gratuities) I do not consider it necessary for me to address that submission.

(ii) To whom does the gratuity apply?

[24] Mr Quarrie confirmed that the respondent is not suggesting that a total of twenty years service is required in order for a retiring employee to be eligible to be considered for the gratuity. Given this concession, I conclude that the clause must be construed to mean that a combined total of ten years service with both organisations will render a retiring employee eligible for consideration for the gratuity.

[25] The second part of this question relates to the words:

"These provisions will apply to staff retiring on medical grounds who have had 10 years service. A claim under this clause should be accompanied by certification by two registered medical practitioners"

[26] The evidence before the Authority was that these lines were added to the agreement in 1998. The applicant argues that the reference to ten years here must be interpreted as meaning ten years service with the Trust only, because it was never in the terms and conditions of staff when employed by Northland Health. In support it referred me to evidence from Ms Gilmour, an organiser with the Union, who said that "*the intention of the negotiating parties was for this provision to apply to all staff, not just those who came over from Northland Health.*"

[27] To accept the union's submission on this point would be to depart substantially from the plain meaning of the provision. It begins "*employees* ***who have served under the previous Northland Health Collective Contract*** *and who qualified under that contract for a Retiring Gratuity will retain that entitlement*" (emphasis added.) The final paragraph then refers to "*these provisions*" which can only be construed as referring to what is set out above it. I consider the addition serves to establish that the entitlement extends to those retiring on medical grounds (which *Sibly* was later to confirm anyway.) This leaves no ambiguity and no difficulty of application and so no need to imply additional words to make the provision work.

[28] As for Ms Gilmour's 12 year old recollection of events, I consider that very slim evidence on which to argue for a finding that the words of the contract are a mistake. I am not satisfied that there is an error to be rectified.

[29] I conclude, therefore, that the provisions apply only to staff who were once employed by Northland Health.

[30] On the issue of whether the provision applies only to employees hired before 1 July 1997, I note that I accept that one would normally expect the transfer date to be the qualifying date for employees who were to have the benefit of grand parented provisions. Again, however, it is unnecessary to adopt this date to give effect to the provisions, and there is insufficient evidence to suggest that it is a mistake which requires rectification. I do not consider there to be grounds, therefore, to depart from the plain words of the clause, which provide that employees employed by 1 July will be eligible for consideration for the gratuity.

[31] In summary, I conclude that the retirement gratuity provisions apply to staff retiring (or retiring on medical grounds) who meet all the following criteria:

i. they have been employed by both Northland Health and the Trust;

ii. they have at least ten years service in total between the two organisations, and

iii. they were hired before 1 July 1997.

Costs

[32] This issue is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority