

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Allan Pope (applicant)

AND Excell Corporation Limited (respondent)

REPRESENTATIVES Ian Davidson for the applicant
Ray Parmenter for the respondent

MEMBER OF AUTHORITY Denis Asher

INVESTIGATION MEETING 6 March 2002

SUBMISSIONS RECEIVED 8 March 2002

DATE OF DETERMINATION 14 March 2002

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed with the Authority on 9 October 2001 the applicant, Allan Pope, says the problems he wants to have resolved are the claims the respondent (the company) unjustifiably disadvantaged him, owes him arrears of wages and is in breach of s. 4 of the Act. He seeks compensation for humiliation, etc, payment of the arrears, a penalty and costs.

2. In its statement in reply received on 18 October the company denies the allegations.
3. The parties attended mediation but the employment relationship problem remained unresolved.

Investigation

4. The parties agreed to a one-day investigation meeting at commencing at 10.00 am on Wednesday 6 March 2002, in Auckland. As it happened much of the day was taken up by the parties' commendable, but ultimately unsuccessful, efforts to settle matters on their own terms.
5. The parties usefully provided in advance briefs of evidence and relevant documents.
6. The parties have relied on or addressed the same case law (see below).

Background

7. The parties disagree on the question of Mr Pope's eligibility for a standby allowance. Otherwise I am satisfied they are largely in agreement in respect of comparatively straightforward key facts which I have summarised as follows.
8. Mr Pope has worked for the respondent since 1987.
9. His current position is that of a contracts manager.
10. He is a waged employee currently receiving \$21.00 per hour.
11. Amongst other things he is responsible for managing a contract between his employer and the Auckland City Council (the contract, the Council contract).
12. The Council contract is about 4 years old.

13. It requires the company to, amongst other things, and outside of normal hours, clear broken bottles in council reserves, unblock drains, repair damaged signs and park equipment and release cars locked into parks.
14. Clause 1.4 of “*Appendix 1: Specifications*” (document 2) of the contract requires Mr Pope’s employer to provide a “*team leader position*” (above) to oversee the daily running of the entire contract, etc. The team leader is required by the contract to present a “*visible public profile... . At least two contact numbers shall be provided. The team leader or their nominated deputy shall be available 24 hours for security call-outs*”. The contract stipulates that *replacement of the team leader during the course of the contract shall require the prior approval of the (Council)* “.
15. At the time it tendered for the contract with the Council the company identified Mr Pope as one of the “*Contract Specific Staff*” (document 3). He was described as the team leader and as having “*taken ownership of and also been responsible for the complete assemblage of the ...*” contract tender “*as well as all liaison with Auckland City Council managers*” (above).
16. The General Conditions of Contract (document 7), amongst other things, require the company to provide to the Council a competent representative. Under the contract the Council is also able to object to the continuance of any person as the company’s representative and to insist on their replacement.
17. Adherence to the terms of the contract is not discretionary (document 9).
18. Mr Pope’s terms and conditions of employment are set out, *inter alia*, in an individual employment agreement (document 1).
19. Clause 9.1 of his agreement provides as follows:

*“Employees **who are required** to go on standby outside their normal working hours shall receive the following payments (etc).”*

(emphasis added)

20. Mr Pope says that even though the company has never expressly instructed him to be on standby the effect of conversations he has had with the respondent's managers and the operational matrix in which he works is such that he is effectively required to be on standby. He says he should therefore receive the relevant allowance as provided in his employment agreement.
21. Mr Pope says he or a nominated deputy is available on a 24 hours basis for call-outs.
22. The company disagrees. It says it does not require Mr Pope to be on standby. His position description does not require that he be on standby (document a). The company says the provisions of clause 9.1 therefore do not apply.
23. It also says that a memo dated 22 December 2000 (document d) positively told the applicant not to be on standby.
24. There is no issue about Mr Pope's normal hours of work in respect of this dispute.

The Parties' Positions

The applicant's position

25. Amongst other points, Mr Pope submits that eligibility for the disputed allowance does not rely alone on an express instruction, such as the words 'you are to be on standby'.
26. Consistent with the meaning of "*standby*" as defined in the New Shorter Oxford English Dictionary, he has been and remains in a "*state of being immediately available to come on duty if required*"; he is ready for duty.
27. This situation arises because, while not expressly instructed to be on standby (par 11 of his brief), the expectation of the company that he meet the requirements of the contract with the Council amounts to the same thing.
28. In other words, standby can be inferred from the nature of the duties expected of him: *New Zealand Labourers etc v Otamatea District Council* [1985] ACJ 522.

29. He is the designated team leader. He is expected to provide 24 hour 7 days a week coverage under the Council contract.
30. The contract between the respondent and the Council contractually binds Mr Pope to make himself available for those duties. In other words, the requirement between the Council and his employer is an implied term of his employment agreement.
31. There is no dispute about the terms of Mr Pope's employment agreement and – taking the relevant arguments into account – the respondent is contractually bound to pay him standby allowance.
32. The respondent has never instructed Mr Pope not to be on standby. Document d does not instruct him not to be on standby.
33. The respondent has disadvantaged Mr Pope in that it has paid other employees the standby allowance when they undertook the same duties as the applicant while denying Mr Pope the same.
34. The respondent has not acted in good faith.

The respondent's position

35. Amongst other arguments, the respondent submits the following.
36. The alleged disadvantage is the failure to pay standby, i.e. the alleged breach. If there is no breach there can be no grievance. If there is a contractual entitlement the breach does not affect Mr Pope in his employment because there is a contractual entitlement: *NZ Association of X-Ray Workers ... v Auckland Area Health Board* [1989] 3 NZILR 451.
37. In short there is not a grievance available but if there is it is a waste of energy given the claim for lost wages for breach of contract.
38. The claim of \$20,000 for humiliation, etc is at a completely unsupportable level.

39. The claim for damages for a breach of s. 4(1) of the Act is a “*throw away*” claim and should be discouraged by the Authority as contrary to rule 8.04 of the “Rules of Professional Conduct for Barristers and Solicitors” (6th Edition) (par 18 of the respondent’s opening submissions).
40. It would be quite wrong in all the circumstances to punish the company by way of the claim for a penalty under ss. 133-136 of the Act.
41. The only relevant contract is the employment agreement between the applicant and the respondent: the requirements of the company’s contract with the Council are irrelevant to the applicant’s claim.
42. The contract with the Council anyway stipulates that two contact numbers shall be provided and the team leader or the nominated deputy shall be available 24 hours for the security call-outs.
43. The company has never required Mr Pope to be on standby. The company therefore did not know Mr Pope was on standby and it could not blame him for not being on standby. Therefore, in the absence of “*mutuality*” (sub-par 20.4.3, “Law of Contract in New Zealand”), Mr Pope cannot expect to be paid for standby.
44. The proposition of positive requirement by the company is supported by a decision of the Arbitration Court delivered by Castle J in *NZ Labourers etc v Hastings City Council* [1984] ACJ 303.
45. The company has positively told Mr Pope not to be on standby (document d).
46. The company’s management would not have incurred a major cost (that of the standby allowance) without including it in the tender for the Council contract. It did not.
47. Mr Pope’s claims that he limited his activities and actually was on standby for the duration of his claim, and that he took so long to claim the allowance are not credible. That he did not claim the allowance for so long implies his life was not disrupted and he did not consider himself to be on standby.

48. Credibility is an issue and the balance is against believing Mr Pope.

Findings

49. I accept the respondent's position that the dispute and the grievance effectively duplicate the same claim as they cover the same matters. Mr Davidson properly largely conceded the same during the investigation.

50. At the heart of this employment relationship problem is the question of Mr Pope's entitlement to a contractual provision. Is he eligible for standby allowance? There is no evidence of the company selectively excluding Mr Pope from payment of this allowance while willingly paying it to others. For these and other reasons set out below I do not accept that Mr Pope has made out his claim he has been unjustifiably disadvantaged by the Company, or that an order for damages in respect of a breach by the Company of s. 4 of the Act or his employment agreement is appropriate.

51. However, I do accept that Mr Pope has a contractual entitlement to the standby allowance provided in his employment agreement. I reach these conclusions for the following reasons.

52. It is not disputed he played a major role in developing the contract to meet the Council's tender requirements.

53. It is not disputed the Council contract was important to the respondent both in itself and because it acted as a precedent for other, similar contracts.

54. It is not disputed the company, in tendering for the council contract, emphasised the role of the applicant in meeting the respondent's obligations to provide appropriate operational and technical leadership (document 3).

55. It is also not disputed that, after winning the Council's contract, the respondent required Mr Pope to undertake the role of contract manager charged with meeting the respondent's contractual obligations to the Council.

56. Except in respect of the steps Mr Pope took in respect of himself and others, it is not disputed the company did not otherwise provide the Council with the names and contact numbers for other team leaders and their deputies to be available for 24-hour security call-outs.
57. The language and requirements of the Council contract are unambiguous: the contractor – the respondent – “*shall provide for a team leader position (who) will ... present a visible public profile (and) the team leader or their nominated deputy shall be available 24 hours for security call-outs*” (par 1.4, document 2).
58. The company knew of these requirements when it entered into the contract with the Council.
59. The importance of Mr Pope undertaking this role (and thereby ensuring performance of the Council contract) is underscored by another provision in the contract stipulating his replacement required the prior approval of the Council.
60. It is clear from the evidence that, as required by the contract, Mr Pope provided the Council with his mobile and home telephone numbers. It is similarly clear that – whilst employed by the respondent – the applicant also provided a contact telephone number for his nominated deputy. Less frequently, Mr Pope also provided a name and contact number for another of the respondent’s employees if he and his deputy were both unavailable (because of leave and other commitments).
61. I am satisfied that the requirement to be on standby can be properly inferred from the nature of the duties expected of Mr Pope: *Otamatea County Council* (above). I do not accept this decision should be seen as *per incuriam*. It is more recent than the *Hastings City Council* decision (above) and, on my reading of both decisions, I am satisfied the Court saw fit to make distinctions consistent with the facts of each. The same approach is called for in Mr Pope’s case.
62. From all of the factual details obtained through the investigation, I am also satisfied that the requirement of the respondent’s contract with the Council to provide 24 hour, 7 days a week availability for security call-outs became a term of the applicant’s

employment contract which has applied from the date the respondent won the Council contract to the present.

63. I do not accept the claim the company has made it clear to the applicant he is not required to be on standby (document d). The communication relied on, from the company to Mr Pope on 22 December 2000, includes the following:

“You have requested a formal statement from myself regarding the Standby Allowance.

It is the company’s view that the standby payments contained in (your employment agreement) do not apply to your circumstances. There is a premium paid to yourself ... which recognises your responsibilities and the fact that you may be called upon on some occasions outside your usual hours of work.”

64. That advice does not say, explicitly or implicitly, that Mr Pope is to desist from standing by. It does say clearly the company will not pay him the allowance on the ground, it suggests, he is already paid a premium for the same. There is no evidence of Mr Pope being paid a premium for standing by. Document 6 sets out the basis for the last increase in the applicant’s hourly rate. The approved increase took effect from February 1999. The reason given is instead, *“autonomous management and growth of Auckland client”*. The respondent does not suggest, and I would not be prepared to imply, the meaning of that phrase to incorporate a requirement to be on standby.
65. I note anyway that, consistent with clause 10 of his employment agreement, Mr Pope is paid a call-out allowance whenever he is called out outside of his usual hours of work, to meet the requirements of the Council contract.
66. There is another communication from the company dated 9 January 2001 to the applicant reiterating its view he is not entitled to the standby allowance as it is included in his hourly rate (document 5). It too conspicuously fails to direct the applicant not to be on standby.

67. During the investigation meeting I raised with the respondent the opportunity it had there and then to provide Mr Pope with simple, written advice that he was not required to hold himself ready on standby. To my knowledge the company did not avail itself of that opportunity. But of course it can do so at any point it might choose if it no longer requires the applicant to be on standby.
68. I do not accept that the resolution of this employment relationship problem relies in any way on credibility findings. I am satisfied it is a comparatively simple issue of determining instead whether or not a contractual obligation exists in terms of the provisions of an extant employment agreement.
69. Similarly, I do not accept that Mr Pope has somehow disintitiled himself to a provision of his employment agreement by any delay in bringing his claim and/or because he must have known it was there at the time the respondent entered into its contract with the Council. Nor do I accept the claim his longstanding knowledge of it implies his life was not disrupted and he did not consider himself to be on standby (as he failed to raise his claim until sometime into the life of the Council contract).
70. The argument of mutuality does not arise. The evidence is not of the company never regarding Mr Pope as being on standby but – when his claim was drawn to their attention – of having the view he was not entitled to the allowance and was already paid for it. It is sufficient to conclude that there is no reason to regard both parties as having other than purposefully entered into a meaningful employment agreement. Both are therefore entitled to expect performance of all of its provisions. In particular, in this case, Mr Pope is entitled to be paid standby allowance.
71. In summary, and as Mr Parmenter argues, I am satisfied the company ‘calls the shots’. It required Mr Pope to oversee and effect the operation of an important contract with one of its clients. It knew beforehand of the level of servicing expected by this client, a that the burden of responsibility would fall on the applicant, as team leader, on a 24-hour, 7 days a week basis. It knew of the standby allowance provisions provided for in its employment agreement with the applicant. It cannot escape the realities of this situation by claiming it never expressly directed Mr Pope to be on standby. It did not put in place alternate arrangements, consistent with the Council contract, whereby other team leaders or their deputies were available to meet

the 24-hours, etc requirement. Those are not the actions of a good employer. But, in all the circumstances, I am not satisfied that a penalty for breaching the Act and/or Mr Pope's employment agreement is appropriate and therefore decline to award the same.

72. The applicant accepts he has not put forward an accurate claim in respect of the actual amount of the standby allowance owed to him. In the first instance the parties should attempt to reach agreement on the quantum. It is also a useful opportunity for the parties to address, and attempt to resolve, the implications of this decision for their ongoing employment relationship.

Determination

73. Consistent with the findings set out above I hereby order the respondent to pay to the applicant outstanding standby allowance entitlements. In the event of any failure to reach agreement on the amount owing leave is reserved for the parties to make submissions in respect of their views as to what is owed to Mr Pope.
74. As requested, costs are reserved so that the parties might attempt to settle them in the same way.

Denis Asher

Member of Employment Relations Authority