

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 146/08
5100473

BETWEEN

CHERYL SMITH
First Applicant

JOAN BRADLEY
Second Applicant

JUDY MARSHALL
Third Applicant

LYNETTE MATHEWS
Fourth Applicant

SANDY O'CALLAGHAN
Fifth Applicant

AND

ROYAL NEW ZEALAND
PLUNKET SOCIETY
INCORPORATED
Respondent

Member of Authority: Dzintra King

Representatives: Peter Cranney, Counsel for Applicants
Maria Berryman, Counsel for Respondent

Investigation Meeting: 20 March 2008

Determination: 18 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a preliminary issue to ascertain whether or not a settlement was reached regarding the personal grievances filed by the applicants.

[2] The issue at the heart of each of the applicants' personal grievance claims is the effect on each individual employee of a reduction in hours resulting from the introduction of new fixed term employment arrangements in July 2006.

[3] In addition the applicants claim that they were permanent as opposed to fixed term employees.

[4] The respondent says that these claims, including the reduction of hours, were a matter of negotiation and agreement between Plunket and the applicants through their representative Union, the Association of Staff in Tertiary Education Te Hau Takitini o Aotearoa ("ASTE"). Ms Jane Dixon is the Assistance Secretary/Field Officer for the northern region of ASTE.

Background

[5] Parents as First Teachers ("PAFT") is a parenting education and family support programme administered by the Ministry of Education. The Ministry of Education contracts with provider organisations that have the responsibility for the delivery of PAFT services.

[6] Plunket is one of those provider organisations. Plunket provides PAFT services for eleven geographical regions. One of Plunket's areas is the Northland area. The applicants are responsible for the delivery of PAFT services for Plunket in that region. Provider contracts are negotiated with the Ministry of Education on a biannual basis.

[7] Each of the applicants is a parent educator and was employed by the respondent on a fixed term arrangement. The term of the fixed term agreements coincided with the term of the Ministry's funding period.

[8] The respondent's contract with the Ministry was due to end on 30 June 2006. After negotiations the Ministry advised Plunket that there would be a reduction in the level of services required for the next two year period. The Northland region was affected by this reduction.

[9] Plunket's General Manager Human Resources, Ms Lynn McKenzie, advised Russell Taylor, one of ASTE's representatives, of the Ministry's proposal by way of letter dated 21 April 2006. The reduction in service requirement was based on the

fact that whilst funding for the provision of the programme had not changed the cost of its delivery had increased.

[10] On 11 May 2006 Ms Dianne Lawson, Plunket's Operation Manager for the Northland region, wrote to each of the applicants and told them that contact had been made with ASTE to initiate some discussion about the steps that would be taken as a consequence of the reduction of funding for the Northland region. She asked the applicants to indicate their interest in new positions for the new contract period.

[11] For the Northland region the net affect of the reduction in funding was a reduction in the target family numbers from 221 to 157. There would need to be a reduction in required services of one full time equivalent ("FTE").

[12] Although the applicants were employed on fixed term employment agreements, rather than electing to simply allow the applicants' current fixed term agreements to expire and offering new arrangements, Plunket sought comments from each of the applicants and the Union about the way in which it might structure its employment arrangements. Each of the applicants registered her interest and sent identical letters raising a number of issues regarding the need for reduction in FTE being unclear, why the new PAFT positions were being called *new* and whether Plunket was trying to seek volunteers.

12 June Meeting and Proposal

[13] All the applicants attended this meeting together with Ms Dixon. Ms Lawson attended the meeting for the respondent.

[14] The outcome of the meeting was a proposal which Ms Dixon made on behalf of the applicants. This is headed "PAFT Northland – ASTE Proposal Without Prejudice". The pertinent part of this document states:

Note that this proposal is partly predicated on ASTE's belief that any loss of hours could result in there being grounds for personal grievance. However, the members concerned are prepared to resolve this situation by way of this proposal, such that matters are confidential and non-precedent setting.

[15] During the meeting of 12 June Ms Dixon made it very clear that the applicants considered that they would have personal grievances if the new full time equivalent

configuration was forced upon them. Ms Dixon referred to the personal grievance claims being resolved if Plunket would agree on three things. These were:

- (a) The FTE was reduced by 0.7 instead of 1;
- (b) That any staff forfeiting all of their hours would receive a payment by way of redundancy compensation and any staff forfeiting part of their hours would receive a partial redundancy payment;
- (c) That the new configuration would simply be implemented in accordance with the employee's preference in that no interviews would be required.

[16] The offer was then sent through as a written proposal essentially in the same terms on 13 June 2006.

[17] After discussing the proposal with the National Office, Plunket was unable to accept it because it was unable to fund the configuration proposed and was not in a position to pay financial compensation.

[18] The applicants' collective employment agreement expressly provided that no compensation was payable in the event of redundancy.

[19] This proposal clearly identifies the potential personal grievances as having to do with the reduction in hours. The loss of hours is the "situation" that is referred to in the proposal.

20 June Meeting

[20] The applicants and Ms Dixon were present at this meeting. Ms Dixon expressed her disappointment that Plunket had not agreed to the applicants' proposal and that its position had not changed.

[21] There is a dispute as to whether or not Ms Dixon advised Ms Lawson in this meeting that personal grievances would probably be raised irrespective of the configuration she came back with.

[22] Ms Lawson's evidence is that she could not recall Ms Dixon saying anything like that. If the applicants were still going to raise personal grievances she would not have been able to accept a further proposal from them. Ms Lawson said she

understood from the meeting that the employees would have one last think about their position, following which either there would be an offer to settle or grievances would be raised.

[23] Following the 20 June meeting Ms Dixon telephoned Ms Lawson to continue discussing the proposal to settle. The outcome of the telephone conversation was a revised offer which was emailed to Ms Lawson on 22 June 2006. This stated:

As advised by telephone this morning, the following is the FTE consideration which the Northland PAFT staff are proposing. The proposal is in light of your rejection of our 12 June proposal, and is proposed due to there being no further options open to them, and being mindful that they would prefer not to have to go through an interview process for positions that they already hold.

[24] The revised proposal differed in two respects. It was not an offer of 2.5 FTEs and no mention was made of redundancy compensation. Ms Lawson said she took this email to mean that Ms Dixon and the applicants had come to terms with the need to reduce by 1 FTE and were no longer considering taking personal grievances.

[25] As the revised proposal asked Ms Lawson to advise whether it was acceptable she wrote to Ms Dixon the next day, 23 June 2006, confirming that it was. Her email states:

Please advise the PAFT and FTE configuration is acceptable and I will have letters of offer to the available positions in the post this afternoon.

[26] New contracts consistent with the applicants' preferred FTE configuration were immediately sent to the applicants and signed and accepted by each of them with exception of Ms O'Callaghan who was voluntarily forfeiting the 0.5 FTE hours that she had been working

[27] In *Graham v. Crest Line Pty Ltd* [2006] 1 ERNZ 848 Colgan CJ confirmed:

An agreement between parties to settle litigation is called an accord in satisfaction. It is, to use the words of Scrutton LJ in 1933:

“The purchase of a release of an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.”

[28] The respondent says that it agreed to the settlement after the applicants put forward a written second proposal on 22 June. This was in effect a compromise which operated as a settlement and release.

[29] The revised proposal of 22 June 2006 referred to the actual consideration the applicants were seeking which was that they did not want to go through an interview process for positions.

[30] The consideration provided by the respondent was that it would agree to the applicants' preferred configuration of hours rather than simply electing to allow their fixed term agreements to come to an end and then inviting the applicants to apply for the reduced number of hours.

[31] I would add that the agreement to forgo litigation was also part of the consideration.

[32] Ms Dixon may well have told Ms Lawson in the final meeting that personal grievances would probably be raised irrespective of whether or not the proposal was accepted. Ms Lawson denies that this would have been said because under these circumstances she would have had no incentive to accept the offer put forward by the applicants.

[33] The two proposals were a continuum. The second proposal states that it is made in light of the rejection of the earlier proposal. The second proposal contains no specific reference to personal grievances.

[34] I agree with the respondent that if the applicants genuinely believed they were receiving both the benefits of the desired configuration proposal (that is, consideration), and reserving the right to still challenge this, it was incumbent upon them to make this known. Even if Ms Dixon's evidence that she advised Ms Lawson on the final meeting was correct she should have explicitly confirmed that in her revised proposal of 22 June.

[35] It was the reduction in hours that was the subject of the personal grievances. This was resolved by Plunket's agreement to the second proposal. The applicants cannot relitigate this issue.

[36] Costs were reserved. If the parties are unable to agree the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicants should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority