

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 12
5434655

BETWEEN

JUDITH TERPSTRA
First Applicant

SUSAN TERRY
Second Applicant

A N D

QUEENSTOWN LAKES
DISTRICT COUNCIL
Respondent

Member of Authority: M B Loftus

Representatives: Peter Cranney, Counsel for Applicants
Michael Quigg, Counsel for Respondent

Investigation Meeting: 18 September 2014 at Wellington

Submissions Received: At the investigation

Date of Determination: 30 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about the rights and obligations of the parties in a redundancy situation.

Background

[2] Ms Terpstra was employed by Queenstown Lakes District Council (QLDC) as a librarian. Ms Terry as a library assistant.

[3] Each was party to an individual employment agreement (IEA) which contained, as a subclause in a restructuring and redundancy provision, the following:

*If the Employee is made redundant during the currency of this agreement then he/she will be given **two months notice** of redundancy and he/she and the Chief Executive shall discuss and agree on any other terms of the redundancy.*

[4] The agreement also contains a completeness clause which provides that in the absence of written agreement the IEA determines all the terms and conditions and a provision which states there is nothing which requires the payment of redundancy compensation in the event of the sale or transfer of function when the new operator offers existing staff employment on existing terms and conditions.

[5] During the first half of 2013 QLDC conducted an organisational review. It culminated with the applicants being advised their employment would end by reason of redundancy on 7 August 2013. Others were similarly affected.

[6] The applicants' Union, the Southern Local Government Officers Union, then wrote to QLDC requesting a meeting to discuss redundancy compensation, references, a non-disparagement agreement and options for redeployment/re-engagement should circumstances change.

[7] A meeting followed on 11 September 2013 by which time the applicants' request had been further refined. With respect to money they then sought redundancy compensation (six weeks' pay for the first year of employment and two weeks' pay for each year thereafter), a further \$6,000 each for emotional stress and an extension to the notice period. Requests for a positive reference and an undertaking QLDC not undermine approaches from prospective employers by making disparaging comments remained.

[8] The last two points were conceded but QLDC made no offers in respect of the monetary claims. The rationale for doing so was enunciated in a letter dated 16 September 2013 where it is stated:

As a good employer it is important to QLDC that we maintain a fair and equitable process throughout the organisational review. To that end, there are other staff who have been made redundant, whose employment with QLDC has already come to an end. All staff in this situation to date have accepted the terms of their redundancy, being the provision of their contracted notice period. Consequently, we do not consider it appropriate to extend any additional payments to Judith and Sue in this instance.

[9] The applicants subsequently filed a claim in the Authority asserting the contractual provision cited in [3] above, along with the obligation to be a good employer imposed on QLDC by the Local Government Act 2002 required monetary compensation. They initially sought compensation at the rate of eight weeks' pay for the first year of service and three weeks for each year thereafter. That claim was withdrawn at the investigation meeting and the applicants now seek *a determination that the respondent is required to discuss and agree redundancy terms, in a manner consistent with the good employer obligation correctly construed.*

[10] QLDC denies the claim has validity.

Determination

[11] As already said this is a dispute with the applicants seeking an order that QLDC discuss and agree redundancy terms.

[12] While a simplistic summary of more detailed submissions the applicants argue the Court's conclusion in respect of similar claims supports a conclusion the Authority may make the orders sought.

[13] In *Timbercraft Industries Ltd v Otago and Southland Federated Furniture and Related Trades IUOW*¹ the Court of Appeal upheld the Labour Court's conclusion a provision requiring the parties negotiate redundancy compensation implied agreement would be reached and if that was not possible the Court could then determine quantum. The legislature responded by precluding such outcomes via s.46(3) of the Employment Relations Act 1991.

[14] In 2000 the Employment Relations Act was replaced with the Employment Relations Act 2000 (the Act). The express preclusion contained in s.46(3) also disappeared but there is now one that precludes the Authority from making a determination about any matter relating to bargaining or the fixing of new terms and conditions of employment.²

[15] Mr Cranney then notes that notwithstanding enactment of the Employment Relations Act a full Employment Court subsequently concluded *Section 46 ECA had*

¹ [1990] 2 NZILR 626

² Section 161(2) of the Employment Relations Act 2000

*not been replaced by any provision in the ERA which could be construed as cutting across the Timbercraft line of authority in the Court of Appeal.*³

[16] That decision was upheld by the Court of Appeal which concluded the proper question for the Authority to ask itself when considering whether the disputed provision is one that it is prohibited from giving a determination upon is whether the provision creates rights which are legally enforceable and if so what those are.

[17] The argument is then that the words *discuss and agree* contemplate agreement will be reached and that, along with other factors supports a conclusion I may make the orders sought. Those other factors are:

- a. QLDC is bound by a statute to be a good employer;⁴
- b. Being a good employer requires a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment;⁵
- c. QLDC should, as a good employer, have asked *what redundancy entitlements would be generally accepted as necessary for the fair and proper treatment of its employees;*
- d. The answer was one in line with industry standards which is what the applicants originally sought;
- e. By failing to ask the correct question and instead relying on internal relativities QLDC failed in its duty to act as a good employer.

[18] The response is that the argument is flawed in that it neglects the fact *Vaughan* is distinguishable. In particular it is noted the clause being considered therein provided a legally enforceable process which would produce an amount of redundancy compensation which Canterbury Spinners was then obliged to pay. The clause specifically said compensation would be paid and the employer therefore had to make an offer. The current provision contains no such promise.

[19] Given events to date and the way this has been argued I conclude an order QLDC participate in further negotiations would imply its present position (paying

³ *Vaughan v Canterbury Spinners Ltd* [2001] ERNZ 399

⁴ Section 39 of the Local Government Act 2002

⁵ Both clause 36 of schedule 7 to the Local Government Act and each applicants IEA

nothing) is untenable and something should be paid. It would, I conclude, be a strained interpretation implying an outcome not required by the clause and that would appear to be precluded by the comments at paragraph 47 of the Court of Appeals decision in *Vaughan*.

[20] There is then s.164 of the Act. To interfere I have to identify a problem with the agreement. It is difficult to identify one as, on the face of it, it appears the clause has been complied with. There was a discussion which led to the inclusion of *other terms of the redundancy*.

[21] Accepted there was no agreement but as Mr Quigg submitted *Vaughan* precludes a determination on a provision that is simply an agreement to agree.⁶

[22] Similarly, and finally, I conclude the argument outlined in [17] above does not change the outcome. The parties agreed the extent to which they would provide for recompense in a redundancy situation. That is limited to paid notice and does not include compensation. There is no evidence they reached their agreement in other than good faith and by acting in good faith I conclude QLDC has discharged its obligations in respect to being a good employer.

[23] The agreement reached did not contain a provision which requires the payment of redundancy compensation and for reasons already outlined I am precluded from altering that.

Conclusion and costs

[24] For the above reasons the application is declined.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

⁶ *Vaughan* at [44].