IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Determination Number:
WA 60/08
File Number: 5045235

	BETWEEN	VICTORIA UNIVERSITY OF WELLINGTON Applicant
	AND	DAVID GEORGE PEARSON Respondent

Member of Authority:	G J Wood
Representatives:	Derek Broadmore for Applicant Peter Cullen and Richard Roil for Respondent
Investigation Meeting:	30 April 2008
Determination:	9 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem, which has a long and tangled history, was first referred to me on 17 December 2007. A conference call was held with the parties at the earliest available opportunity for all involved, being 23 January 2008, in order to have the matter set down for an investigation meeting. The investigation meeting was set for 30 April. A timetable was set at a subsequent conference call on 28 February, following the provision of draft compliance orders sought. While the University is the applicant in this matter the draft compliance orders were actually sought by Dr Pearson, a current employee of the University. The University has withdrawn its claims for compliance against Dr Pearson.

[2] It is necessary to troll through some of the history of the matter in order to explain how this unusual situation has come about. Dr Pearson originally filed an employment relationship problem

with the Authority relating to his superannuation. This was resolved by way of a consent determination in May 2004 (the 2004 settlement). As the settlement was a confidential one there was an order prohibiting publication of the terms of settlement and that it and any other associated papers be sealed on the Authority's file.

[3] The University subsequently raised a compliance order because of alleged non-compliance with the settlement agreement by Dr Pearson. In response, Dr Pearson stated that he had complied with the settlement agreement, but Victoria University itself had failed to comply. The parties then undertook mediation on the problem on 1 February 2007, which resulted in a confidential settlement between the parties through a Department of Labour mediator under section 149 of the Act (the 2007 settlement). In effect this was an amendment to the 2004 settlement, which had been in full and final settlement of all claims the parties had against each other.

[4] Dr Pearson considered that the University had not met its obligations in many areas and therefore sought the eleven draft orders alluded to earlier.

Discussion and Findings

[5] I will only refer to the terms of the confidential agreement as necessary, so as to maintain confidentiality as much as possible. The terms of the agreement are otherwise to remain confidential, as is now accepted by both parties, hence Dr Pearson's withdrawal of his claims to remove such orders (claims 10 & 11), during the course of the investigation meeting.

[6] The Federated Superannuation System for Universities in New Zealand Staff Superannuation Fund (the FSSU) administers superannuation policies on behalf of New Zealand university staff members who had such policies when previously employed overseas. Dr Pearson is one of only three staff in the country (and the only one at Victoria) still covered by the Fund. The University is represented on the trust that operates the fund by a trustee it nominates. The ownership of the policies administered by the Trust (both beneficial and legal) form part of the dispute between the parties and potentially others. That issue is not necessary to determine here, because the parties have agreed on a general way forward, although not on a timeframe.

[7] The first claim is for the University to take all reasonable steps to have Dr Pearson's policies assigned to him. The policies in question involve four policies with Legal & General which have matured, and one policy with Scottish Widows which is yet to mature, but which the FSSU will not have to make any payments on Dr Pearson's behalf after 1 October 2008.

[8] It was agreed that Victoria University will instruct the Trustee that the FSSU is to assign Dr Pearson's Scottish Widows' policy to him with effect from 1 October 2008, on the same terms as the Legal & General policies.

[9] On 10 April 2008 the FSSU Trustees agreed to assign ownership of the Legal & General policies to Dr Pearson. This has not yet occurred, although Legal & General have been written to on 17 April 2008 in an attempt to do so. The issue of the recording of the assignment is something that is beyond the University's control and therefore should not be the subject of a compliance order, but the University should pursue the matter as quickly as it can. Dr Pearson may be able to assist in that process and to the degree he can, he should do so. It is clear that the same process will be adopted with the Scottish Widows' policy, and that particular approach is acceptable, although not ideal, to Dr Pearson. Should the University itself be required to take any particular action it has undertaken to do so promptly. Given these voluntary actions by the University, no compliance order is required.

[10] It was accepted that the second claim has been met by the University. The third claim has now been withdrawn.

[11] The fourth claim relates to a clause in the 2004 agreement where the parties agreed that the University *will procure and supply to Dr Pearson full details of asset allocations with respect to Dr Pearson for the years ended 31 December 1997, 1998, 1999, 2000 and the years ended 31 March 2001 (15 months) and 2002, 2003 and 2004 (as soon as available).* This appears to relate to a policy Dr Pearson has with Tower through the FSSU.

[12] In essence Dr Pearson wants to know how and when moneys collected from him (and the University on his behalf) have been invested in and by Tower, given that he is one of only three members of the FSSU. For some reason, no claim has been made for the year ended 31 December 1999 and the 15 month period ended 31 March 2001.

[13] These investment vehicles are all pooled ones. First, the FSSU is in effect a method of pooling investments (albeit only a pool of three), and then the Tower scheme invests funds on a pooled basis into different asset classes (i.e. it makes asset allocations). Dr Pearson has already been provided with a full list of what contributions there have been through the FSSU on Dr Pearson's behalf between 1 January 1997 and 31 December 2006. Dr Pearson was also provided at the investigation meeting with a copy of the annual investment report for the year ended March 2008 for the FSSU superannuation scheme administered by Tower Asset Management. The University is prepared to provide copies of such reports for all the years in question.

[14] I conclude that a combination of these annual reports, covering as they do assets held, their asset allocation and their performance, together with the record of contributions made on Dr Pearson's behalf, would constitute full details of asset allocations with respect to Dr Pearson for the relevant periods under the record of settlement.

[15] Since Dr Pearson has already had the contributions list, what remains is for the University to provide to Dr Pearson the investment reports for each of the relevant years under the record of settlement. That is consistent with the record of settlement, which can not have intended that Dr Pearson be made aware of what Tower did with every cent of the money FSSU put into it over 10 years, particularly as those sums were likely to have been pooled with many other investments managed by Tower. Victoria University is to have 28 days in which to provide those investment reports.

[16] In relation to the fifth claim, no compliance order is required as the parties have agreed that Victoria University will provide Dr Pearson with an allocation summary for his contributions to the Sovereign Superannuation Scheme in the same form as those provided to him in the agreed bundle of documents for Tower.

[17] The sixth claim was withdrawn at the investigation meeting.

[18] The seventh claim relates to an obligation on Victoria under the 2007 settlement to *obtain from the actuaries for the FSSU NZ Staff Superannuation Scheme a statement of the amount of the FIF tax liability for Dr Pearson calculated annually since 1993*. Dr Pearson wants this to be calculated for him personally for each of the years mentioned, although the agreement does not explicitly refer to liability for Dr Pearson on a personal or individual basis. The FSSU's advisers have indicated that the information has never been kept in this form and that to procure it would cost in excess of $25,000 plus GST. FSSU's advisers state that FIF tax liability is always calculated on an averaged basis for the members of the scheme, not on an individual basis.

[19] According to the Collins English Dictionary, to *obtain* is *to gain possession of: acquire; get*. The word "procure" means to *obtain or acquire; secure*. It is clearly possible for the University to obtain the information in the form sought from its actuary, albeit that it will be costly. The issue is whether the University is required to obtain something new, or whether the statement referred to in the agreement already exists and has been provided to him, as the University considers.

[20] Clearly Dr Pearson wants to know what liabilities, if any, he has under the FIF scheme. Only the Inland Revenue can determine this finally. The actuaries have made an assessment on

behalf of the FSSU consistent with their normal practice in other similar schemes. Thus the FSSU's actuaries have done so by a pro rata rather than individual assessment of the scheme's FIF obligations or credits amongst members. Those assessments constitute, I find, statements of the amounts of FIF tax liability for Dr Pearson. They have been provided for him for each year and therefore the University has met its obligations, even though Dr Pearson may not agree with the pro rata assessment made by the actuary. That was the amount the actuaries calculated for Dr Pearson, and it is that statement that has been supplied. Therefore no compliance order is required.

[21] The eighth claim is in effect covered by the actions of the University to be undertaken in relation to the first claim and thus no compliance order is required. In respect of the ninth claim I find that the University has already met its obligations to authorise Tower Superannuation to disclose all information it holds regarding Dr Pearson's contributions invested in Tower. Therefore no compliance order is required.

[22] As indicated above, the 10th and 11th claims were withdrawn at the investigation meeting.

Determination

[23] I order the applicant, Victoria University of Wellington, to provide the respondent, Dr David Pearson, with copies of the annual investment reports for the Federated Superannuation System for Universities in New Zealand Staff Superannuation Fund policies administered by Tower Asset Management for the years ended 31 December 1997 and 1998 and the years ended 31 March 2000, 2002, 2003 and 2004, within 28 days of this determination.

[24] All other claims have either been resolved by agreement, withdrawn or dismissed.

Costs

[25] Costs are reserved. Any application should focus on costs incurred since my involvement and the need for an economical approach to costs, taking into account in particular the level of remedies that could ever have been attained and the relative success of both parties (*PBO Ltd v Da Cruz* [2005] ERNZ 808).

G J Wood
Member of the Employment Relations Authority