IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 398/09
5161783

	BETWEEN	TAINOINO AH CHING & OTHERS Applicants
	AND	WESTPAC NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Peter Cranney, counsel for Applicants John Rooney, counsel for Respondent
Investigation Meeting:	4 November 2009
Determination:	11 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants are employed by the respondent Westpac New Zealand Limited in its banking business.

[2] Until about the end of 2008, or early 2009, they worked in Albert Street in the Auckland CBD. Then the bank shifted them to new offices in Takutai Square, or Westpac Square as it has become known, which is also in the CBD.

[3] The distance between the old and new places of work is about 1km, give or take 100 metres.

[4] The applicants are in dispute with Westpac over their entitlement under their terms of employment to a compensatory payment for the relocation to the new place of work.

[5] Mediation has not resolved this employment relationship problem.

[6] The applicants are covered by a collective employment agreement which was concluded between their union, FINSEC, and Westpac in August 2008. That agreement, called the Westpac Pre-Management Collective Employment Agreement (the CEA), makes no provision for a relocation payment, whether made to the applicants or other employees who also moved to the new site but from locations outside the CBD. The silence of the CEA is deliberate because the payment that was agreed upon was one-off.

[7] The dispute in this case is over the construction to be given to two written agreements entered into by FINSEC and Westpac before the CEA was concluded. Those agreements are one that was reached during negotiations for the CEA containing terms of settlement of it, and which was recorded and signed by a mediator on 21 July 2008, and another that also contains terms of settlement, and which was signed by Westpac and FINSEC representatives on 28 July, and was presented to FINSEC members for ratification. The contents of the latter agreement as presented for ratification were ratified on or about the same date, 28 July.

[8] I will refer to the former agreement as the 21/7 TOS and the latter as the 28/7 TOS.

[9] In relation to payment for relocation to the new place of work, referred to in the agreement as *"Project Unity,"* the 28/7 TOS provided:

> ***12) Project Unity***
>
> *Total monetary compensation for staff moving to the new Project Unity site in the Auckland CBD will be at the following gross amounts:*
>
> | | | |
> |---|---|---|
> | *Level 1* | *Up to 10kms additional travelling distance* | *$1000.00* |
> | *Level 2* | *10.1-15kms additional travelling distance* | *$1500.00* |
> | *Level 3* | *15.1+ kms additional travelling distance* | *$2000.00* |

[10] The applicants claim that they travel further to the Project Unity site than they did to the Albert Street offices in the CBD when working there. They have claimed from Westpac the relocation compensation under clause 12 of the 28/7 TOS, at the level corresponding to the distance of additional travel to work in the case of each individual.

[11] Westpac has rejected their claim. It maintains that clause 12 was intended to apply only to employees who relocated to the new offices from places of work that

were outside the CBD, being the bank's offices at Manukau, Royal Oak and Onehunga.

[12] On the face of clause 12 of the 28/7 TOS the entitlement to monetary compensation for staff who shifted offices is dependent only on whether employees travel any additional distance to the new premises in the CBD. No limitation according to the location of the offices they moved from has been expressed in the provision. In this regard the applicants met the sole qualification expressed in clause 12, by virtue of being *"staff moving to the new Project Unity site."*

[13] Westpac contends that in arriving at the terms of settlement for ratification the mutual intention of Westpac and FINSEC had been that employees relocating from offices already within the CBD to the new offices would not be eligible for a payment under clause 12.

[14] Westpac seeks from the Authority a declaration that clause 12 is to be construed consistently with that intention. Alternatively the bank seeks an order for rectification of clause 12, changing it so that it expresses what Westpac contends was the parties' common intention that the compensation was payable only to staff who relocated from offices outside the CBD.

[15] The 21/7 TOS, as recorded and signed by a mediator, also made provision for a relocation allowance for Project Unity, as follows:

> *That steps in the Unity offer be as per follows:*
>
> - *Up to 10kms additional* *$1,000.00*
> - *10.1-15kms additional* *$1,500.00*
> - *15.1+ kms additional* *$2,000.00*

[16] After the 21/7 settlement FINSEC members employed by Westpac were advised of it and invited by the 28/7 TOS to ratify the terms.

[17] Clause 12 of the 28/7 TOS does not include the introductory words *"Unity offer"* found in the 21/7 TOS that the parties had asked the mediator to record and sign.

[18] In the 28/7 TOS with which all the settlement terms including clause 12 were presented to employees for ratification, the following endorsement of them was given

in writing signed by the representatives of FINSEC and Westpac, Mr Michael Wood and Mr Paul Louis;

> *Signed as a true and correct record of the Terms of Settlement reached by Westpac NZ Ltd and Finsec through Collective Bargaining concluding on 21 July 2008.*

[19] This representation made jointly by the parties to FINSEC members who were Westapac employees, should be given effect to in determining how clause 12 operates or applies to them.

[20] In giving their endorsement or warranty there is nothing to suggest that Mr Wood and Mr Louis did anything other than act in good faith; they meant what they said and had no intention to mislead or deceive the applicants or any others.

[21] For their representation to be true clause 12 has to be read with reference back to the *"Unity offer"* which became the subject of the 21/7 TOS as recorded and signed by the mediator. Although *"Unity offer"* is not an expression used in clause 12 that point of reference must be implied, so that the provision is consistent with and gives effect to the representation made at the end of the 28/7 TOS. The parties through their representatives signed a warranty that the terms of settlement *"reached through Collective Bargaining concluding on 21 July"* were correctly recorded in the terms submitted for ratification.

What was the Unity offer?

[22] I find from the evidence presented by the parties that *"Unity offer"* refers to an offer made by Westpac to pay a transport allowance to employees relocating to the new project Unity site in the CBD.

[23] The offer was made in June 2008 when it was presented in a Property Focus newsletter circulated to Westpac employees. Three levels of allowance were proposed by Westpac, depending on the additional distance to be travelled to Westpac Square in the CBD.

[24] I find that the *"Unity offer"* originated prior to or outside of the bargaining that later took place with FINSEC for the CEA. FINSEC then drew it into the bargaining by making a claim for greater amounts to be paid, at each of the three levels, on a one-off basis.

[25] The final amounts were agreed on 21 July. They were higher than had been proposed to begin with by Westpac but lower than claimed by FINSEC. Thus the 21/7 TOS signed by the mediator states *"That steps in the Unity offer be as per follows,"* and the amounts agreed for the three steps or levels were set out.

[26] Mr Wood attempted to resile from his written evidence which had been cast in a way that shows he clearly regarded the offeror of the *"Unity offer"* as having been Westpac. When questioned he sought to claim that FINSEC had been the maker of the *"Unity offer."* He said this was through the claim made in bargaining as a response to Westpac's original compensation proposal. That may in effect have been a counter-offer but was not the initial offer as made by Westpac and which I find was referred to in the 21/7 TOS by the expression *"Unity offer."*

[27] FINSEC's Update newsletter of 22 July to members shows that the union regarded the *"Unity offer"* as Westpac's. It advises members of *"the bank's offer"* of an overall 5% pay increase and refers to other key points of *"the offer"* as including *"Increases to the Project Unity payments originally proposed by the bank."*

[28] If the agreed term of settlement had been based on FINSEC's formal claim (which expressly extended to Albert Street employees) it is likely the 21/7 TOS would have used the expression *"FINSEC claim"* rather *"Unity offer."*

Was Westpac's Unity offer limited?

[29] In communications and representations from Westpac prior to presentation of the 28/7 TOS for ratification, those to benefit from that offer had been consistently limited by Westpac to those employees required to relocate from outside the CBD. The bank I find had shown no intention of having the offer apply to employees relocating from inside the CBD. Its post contractual communications on the subject to employees also strongly bear that out.

[30] The June 2008 Property Focus was, I accept, not addressed or given to the applicants, who were then located at Albert Street. It is therefore a reasonable inference that Westpac had not intended the allowance to apply to them. But even within the contents of that newsletter there are pointers that the Travel Allowance was offered to employees relocating from outside to inside the CBD. Page 2 refers to *"one of the big advantages of moving to the CBD."* This was expressed to be access to public transport options, which were available to the applicants because they

already worked in the CBD. The reference to free public car parking outside the office staff would be leaving obviously did not relate to Albert Street where the applicants were then working.

[31] Also, the newsletter was distributed only to those affected by the advice in it. A presentation about its contents was made to those staff working outside the CBD, but not to the staff located at Albert Street. One of the overheads used in the presentation makes it clear that the travel allowance was for staff having to travel to work further *"to"* the CBD.

[32] I find it unlikely that FINSEC did not know either directly from Westpac or indirectly from its members, of the qualification or limitation the bank had consistently placed and maintained on its *"Unity offer."*

[33] Mr Wood accepted that the 28/7 TOS had to reflect the 21/7 TOS recorded and signed by the mediator on 21 July. He said that if the 28/7 TOS did not then it was probably wrong.

[34] I accept the submissions of Mr Rooney counsel for Westpac and find from the evidence that the bank and the union had a common intention with regard to the application of the Unity offer as being limited to staff relocating from outside the CBD.

[35] While there is therefore a basis on which the remedy of rectification could in principle be ordered, in this case I consider there is no need for that. I find as a matter of construction that clause 12 must be read in conjunction with the parties' warranty or endorsement that clause 12 truly and correctly recorded the particular 21/7 term of settlement with regard to Project Unity. By express reference made to them in the 28/7 TOS, the 21/7 TOS have been incorporated into the former. I find that the limited scope of the Unity offer so incorporated, excludes the applicants from the compensatory relocation payment.

Determination

[36] The Authority resolves the dispute in this case by determining the meaning of clause 12 of the 28/7 TOS is that only employees relocating from outside of the CBD are entitled to the compensatory payment provided.

Costs

[37] Costs are reserved. Counsel should try to resolve any issue about costs themselves, on behalf of the parties. If that cannot be done, Westpac may file a memorandum in the Authority and serve a copy on counsel for the applicants who will have 14 days within which to reply from the date of service.

[38] Counsel should also consider whether there are features of this case that may make it an appropriate one for costs to lie where they fall.

A Dumbleton
Member of the Employment Relations Authority