



## **Employment relationship problem**

[1] This determination is about the interpretation of the terms of an employment agreement. The specific issue was whether two workers whose individual employment agreements each had an appendix containing what were described as “standard conditions” should get paid higher rates referred to in later versions of the appendix issued to other staff. The later versions of that appendix contained the same reference to “standard conditions”.

[2] Vicki Vercoe worked for NZ Document Exchange Limited (DX) from 17 January 2005 until 10 August 2010. Lesley Campbell worked for DX from 22 May 2006 to 6 December 2010. Both were employed as casual mail sorters although both did some work for DX as courier drivers.

[3] Ms Vercoe’s agreement with DX, signed in January 2005, had the following relevant clauses:

### **8. Remuneration**

*The hourly rate applying to this agreement is \$11.50 per hour as described in Conditions of Employment, Appendix 2. This rate may be varied from time to time in terms of the Code of Employment.*

### **9. Code of Employment**

*The Code of Employment, attached as Appendix 3, sets out the conditions of employment relevant to the Position Description and forms part of the individual agreement of employment. The Code of Employment may be varied from time to time as set out in clause 2 of the Code.*

### **11. Statutory Employment Requirements**

*The Company and Employee acknowledge that sections of the various Acts of Parliament apply. They include parts of the:*

...

*Minimum Wage Act*

...

***Appendix 3: Code of Employment***

#### **1. Status of Code**

*This Code sets out the standard conditions of employment for mailroom staff employed by New Zealand Document Exchange*

*Limited. The Code is incorporated into the individual agreement of employment of each worker.*

### **2. Change of Code**

*The parties agree that changes to the Code may be necessary from time to time. If any alteration to the Code is to be made, this will be by way of agreement between the parties. If agreement cannot be reached an independent arbitrator mutually acceptable to both parties will arbitrate and decide the dispute. Such arbitration shall be binding on both parties.*

### **3. Grading of Mail Sorting Staff**

*The following grades and hourly rates apply to mailroom staff: [a table follows with rates of pay at grades described as Novice, Competent, Very Competent and Expert].*

*Grading will be reviewed during six monthly performance reviews, which will be undertaken in the company's customary format.*

[4] The wording of Ms Campbell's employment agreement was substantially the same but four differences should be noted:

- (i) Her starting rate was \$10.50 (which was the pay rate given under the Competent grade).
- (ii) The Remuneration clause did not include the wording about varying the rate from time to time in accordance with the code.
- (iii) Instead the second sentence of the Code of Employment provision read: "The Code of Employment may be varied from time to time at the Company's discretion".
- (iv) The table of grades and pay rates in the Appendix 3 attached to her agreement did not include a Novice rate but the actual pay rates for the other three grades were the same as those in the table in Ms Vercoe's agreement.

[5] During 2007 DX increased Ms Campbell's pay rate three times – once in April, once in September and once in October – so that by the latter month she was getting \$12.50 an hour. She received two further pay rises in the next two years so that by September 2009 her hourly rate was \$13.20.

[6] Ms Vercoe worked for \$11.50 an hour from January 2005 until her pay was increased to \$12.50 an hour in March 2008. She received two further pay rises in the next two years so that by the end of March 2010 her hourly rate was \$12.85.

[7] The evidence of both women was that they understood they were both graded at the “expert” mail sorter level – in Ms Vercoe’s case from January 2005 and in Ms Campbell’s case from October 2007 – and would be paid the hourly rate applicable for that grading.

[8] In November 2009 Ms Vercoe obtained an “updated” version of the third appendix to her employment agreement. That version showed the rate for mail room staff graded ‘expert’ was \$13.50 an hour, some 65 cents an hour more than she was being paid.

[9] And in June 2010 Ms Campbell asked for an updated copy of her employment agreement. The copy provided to her also showed the expert rate as \$13.50 an hour, which was 30 cents an hour more than she was paid at the time.

[10] Both women sought payment at the higher rate but the issue was not resolved before each ended their employment with DX. The matter was then pursued as a wage arrears claim which required determination of the dispute regarding the interpretation of the agreement.

[11] DX denied the versions of Appendix 3 included in the employment agreements of other staff employed after Ms Vercoe and Ms Campbell had any application to the two women’s pay rates. Rather it argued both women had received regular reviews of their pay which were consistent with their contractual entitlements and were a matter of negotiation between them and DX.

### **The investigation**

[12] Written witness statements were lodged by Ms Campbell, Ms Vercoe, DX’s Waikato and Bay of Plenty regional manager George Jennings and Hamilton operations manager Elaine Magill. These four witnesses, under oath or affirmation, confirmed the content of their statements. DX Hamilton team leader Flo Tamati, under oath, gave oral evidence. Each witness answered questions from the Authority member and any additional questions from the parties’ representatives. The

representatives also provided careful and thorough oral closing arguments, each speaking to a written synopsis.

[13] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states the Authority's findings of facts and law and expresses conclusions on the matters requiring determination. The Authority's findings are made on the civil standard of the balance of probabilities, assessing the evidence to determine what is more likely than not to have happened.

[14] In preparing this determination I had regard to the witnesses' written and oral statements and relevant documents provided by the parties. Particularly important were the versions of Appendix 3 used by DX between 2005 and 2010 – one attached to Ms Vercoe's employment agreement in 2005, one attached to Ms Campbell's employment agreement in 2006, one Ms Vercoe got in 2009, one Ms Campbell got in 2010, and a further five provided by Mr Jennings at the Authority's direction.

[15] Those latter five versions each bore a handwritten date in the top right hand corner, one reading August 2006, one August 2007, one August 2008, one August 2009 and one August 2010. In the bottom right hand corner of each of these one-page documents was the name of a different person. In each case Mr Jennings confirmed the person named in the document was a DX employee, although only one of the five worked in Hamilton.

[16] The wording of each version of Appendix 3 was the same except for the pay rates in the table of grades and the name of the employee identified. It was clear from the version provided to Ms Vercoe in November 2009 that DX had an electronic template of the appendix which could be individualised by adding the name of an employee in the bottom right hand corner.

### **The application of the grading system**

[17] DX's arguments for opposing the claims of Ms Vercoe and Ms Campbell may be paraphrased, broadly, as follows:

- (i) Pay rates were not decided on the basis of the grading system referred to in Appendix 3 and the grades referred to in it were not used in DX's Hamilton branch; and
- (ii) While DX's head office in Auckland provided standard employment agreements for new employees that included the Appendix 3 code of employment, the grading system referred to in it did not apply to Hamilton staff; and
- (iii) The employment agreements of Ms Vercoe and Ms Campbell could be varied by agreement and if the pay rises given to them were different from the terms of their initial written employment agreements, they had either actively or passively been offered and accepted a variation to their terms on that basis; and
- (iv) There was no evidence that the rates in the versions of Appendix 3 dated between 2006 and 2010 were actually paid to any employee and what the grades meant was uncertain because there was no definition or criteria stated in the employment agreements; and
- (v) The terms of the code which applied to Ms Vercoe and Ms Campbell were only those in the copy which they were given, not those in subsequent versions prepared by DX and given to other staff.

[18] For the following reasons I found each of these arguments or submissions inadequate or incorrect.

**(i) the grading system was used in Hamilton**

[19] Mr Jennings' evidence was that performance reviews were "usually" held for mail sorters on a six-monthly basis, including throughout the employment of Ms Vercoe and Ms Campbell, but that the grades referred to in Appendix 3 were not mentioned in these reviews and pay rises were not linked to grading.

[20] Ms Magill's evidence was to the same effect, particularly in respect of performance reviews she conducted from 2009 onwards after having taken up the role of operations manager from the previous manager, Josephine Tangiora. In late 2009

Ms Magill developed a performance review form to record various factors considered and the form did not include any reference to the grading system set out in Appendix 3. However that omission is not surprising because Ms Magill's oral evidence revealed she had never read the employment agreements of Ms Campbell and Ms Vercoe and had no regard to the terms of those agreements in developing the performance review system she implemented.

[21] I found the evidence of Mr Jennings and Ms Magill on this point to be unsatisfactory, both as a matter of fact and a matter of law. I preferred the evidence of Ms Vercoe and Ms Campbell as, more likely than not, to be correct and based on what DX was contractually required to do in considering and setting the appropriate level of pay for each woman.

[22] Ms Vercoe started her employment on the pay rate that, according to the terms of the employment agreement she signed at the time, applied to the expert grading referred to in that agreement. While Ms Vercoe may have only assumed that was the grading that applied to her, it was, I find, an assumption she was entitled to make on a reasonable reading of the terms of her employment agreement. At no time during her employment was a formal performance review conducted with her – either by Ms Tangiora prior to February 2009 or Ms Magill subsequently – at which her skills were assessed to be at a level which would require demotion from that grade. Ms Tamati did conduct a performance review of Ms Vercoe in September 2009 but this was based on the form developed and introduced by Ms Magill and, for the reasons already explained, made no reference to the grading system stated in Ms Vercoe's employment agreement.

[23] Ms Campbell did participate in at least two assessments of her performance conducted by Ms Tangiora in 2007. I find Ms Tangiora did talk with Ms Campbell about those grades in relation to her work and did assess her work against the expectations for work at those levels. I accept Mrs Campbell's evidence that this resulted in her moving to the expert grade by October 2007, a grading which was confirmed by Ms Tangiora in April 2008. No other review of Ms Campbell's work was conducted with her and there was no indication to her that her skills were less than those on which Ms Tangiora had decided her grading.

[24] Both Mr Jennings and Ms Magill insisted Ms Tangiora had not referred to the grading system in discussions with them or, to their knowledge, DX employees. Mr Jennings said Ms Tangiora only ever referred to pay rises without reference to an associated grade. In his written evidence he referred to a letter said to have been written by Ms Tangiora in September 2010 as not supporting Ms Campbell's claim of having been promoted to an expert grade. It would be a strong point if the same letter – on which he was prepared to rely for one point – did not refer, in the very next paragraph after the one he mentioned, to Ms Campbell having gained a pay rise “thus taking her up a level in the grading system” (my emphasis).

**(ii) the terms of the agreement prevail over local practice**

[25] Even if the evidence of Ms Campbell and Ms Vercoe was wrong about whether Ms Tangiora had expressly referred to grades in discussions with them about pay rises in 2007 and 2008, I would still accept – as a matter of law – that they were entitled to rely on the express written terms of their agreements to insist on being paid at no less than the expert rate stated in each version of Appendix 3.

[26] There was no location-specific exclusion of those terms for DX's Hamilton branch. Its code of employment – attached to their employment agreement as Appendix 3 – was incorporated as a contractual term and the code was stated to “set out the standard conditions of employment for mailroom staff employed by [DX]” with no geographical exceptions stated. That Mr Jennings and Ms Magill appeared to have acted without regard to the import of those provisions does not alter the obligation into which DX had entered, unless there was some variation agreed in a way that was itself consistent with its provisions.

[27] In her oral evidence, in answer to the Authority's questions, Ms Magill confirmed that since the dispute with Ms Campbell and Ms Vercoe arose about their entitlements, she had new staff members delete these provisions when signing individual employment agreements and write the words “not applicable”. She did not produce any example of an employment agreement executed in such a way but

assuming that had become her practice, it confirmed rather than negated the force of Ms Campbell and Ms Vercoe's case.

**(iii) there was no legitimate variation of the agreement**

[28] DX submitted the parties had agreed to the various changes to the rates of pay during the employment of Ms Campbell and Ms Vercoe. Those agreements were said to be recorded in an "Employee Change/Transfer Form" then sent by a Hamilton manager to be actioned by payroll personnel at DX's head office in Auckland. The forms were said to be evidence of the agreed variation.

[29] In Ms Campbell's case those forms had the following dates and changes to her hourly rates of pay:

- (i) 10 Sept 2007 - \$11.50 to \$12.00 (signed by Ms Tangiora); and
- (ii) 29 October 2007 - \$12.00 to \$12.50 (signed by Ms Tangiora); and
- (iii) 28 April 2008 - \$12.50 to \$13.00 (signed by Ms Tangiora); and
- (iv) 13 September 2009 - \$13.00 to \$13.20 (signed by Ms Tamati and Ms Campbell).

[30] In Ms Vercoe's case the forms had the following dates and changes to her pay rate:

- (i) 31 March 2008 - \$11.50 to \$12.50 (signed by Ms Tangiora); and
- (ii) 1 April 2009 - \$12.50 to \$12.60 (signed by Mr Jennings); and
- (iii) 29 March 2010 - \$12.60 to \$12.85 (signed by Mr Jennings and Ms Magill).

[31] There is a space on each form labelled "Employee's Signature". Only one of the seven forms in evidence had such a signature – the one from Ms Campbell dated 13 September 2009. The absence of signatures on the others, I find, confirmed there was no agreement by either worker to a new pay rate that was lower than they might otherwise have received if DX was paying the 'expert' rate stated in versions of Appendix 3 that were issued to other staff. Ms Campbell's signature on the 13 September form is to the same effect – it is not an agreement or waiver of any right to such a rate because she did not know about it at the time. At most those forms, even

if either worker knew they were being sent to the payroll office in Auckland, represented no more than evidence of a unilateral action by the employer, not an agreed variation. They do not confirm agreement by the worker to that change being at that particular level. In fact, I understood the evidence of Ms Campbell and Ms Vercoe to be that they mostly found out about such changes to their hourly rate when they saw an increased amount in their next pay.

**(iv) sufficient evidence on rates and application of grades**

[32] For several years Ms Campbell and Ms Vercoe did not know DX prepared new versions of the Appendix 3 Code each year. This changed for Ms Vercoe when, in November 2009, she asked for and was given an 'updated' copy of the Code. That version included a table showing an 'expert' hourly rate of \$13.50. She was being paid \$12.60 an hour at the time. When her pay was increased in March 2010, the hourly rate went up to \$12.85, not the \$13.50 to which she (by then) believed she was entitled.

[33] The updated copy of her employment agreement Ms Campbell got in June 2010 included a copy of Appendix 3 that was the same as the one Ms Vercoe got in November 2009. At the time Ms Campbell was being paid \$13 an hour but the expert rate in the updated Appendix 3 given to her was \$13.50.

[34] Ms Campbell asked for and was refused copies of all revisions of Appendix 3. DX refused to provide those until a direction regarding documents was made during preparation for the Authority's investigation.

[35] At paragraphs [14] and [15] of this determination I described the versions of Appendix 3 lodged by DX. I reject DX's submission that those versions do not prove any different rates were actually paid to any other staff. There was clearly a template which was updated by around August each year and included in the standard employment agreement prepared by DX's head office human resources staff for use by local branch managers who then used those documents to carry out the employment formalities with each new staff member. The evidence of Mr Jennings and Ms Magill confirmed this practice. The five examples lodged by DX showed a

different staff members' name for each year's version of Appendix 3. If it was not an actual example of the appendix as issued in that year, DX would most likely (I find) have simply provided the blank template which was the format used in the version given to Ms Vercoe in 2009.

[36] I am satisfied that the rates set out in the versions of appendix 3 labelled with the years 2006, 2007, 2008, 2009 and 2010 were the rates which DX had contracted with each staff member employed in those various years would be the rates that applied to mail sorting staff.

**(v) Plain meaning prevails: standard means standard**

[37] DX submitted that, in interpreting the employment agreement, the Authority should be careful not to introduce or impose a bargain not present in the actual contractual terms. I agree because, as stated by the Court of Appeal, the law does not allow the Authority to introduce terms which it might consider fairer than those agreed earlier by the parties.<sup>1</sup> However this was not what Ms Campbell and Ms Vercoe sought here. They did not ask the Authority to change their agreement with their employer. They asked for the employer to be made to keep its side of the deal.

[38] DX submitted, again correctly, that the agreement provided no automatic increase in pay. Ms Campbell and Ms Vercoe accepted in their evidence that DX was not obliged to increase their pay rates during their years of employment, except to keep it above the relevant statutory minimum wage. However their argument was that, having increased the rate, DX was obliged to pay the increase to all mailroom staff because that was what the wording of Appendix 3 indicated would be done.

[39] I find DX did change the hourly rates it contracted with its employees to pay mail room staff through the period from 2006 and 2010. The use of the term "standard conditions" means those rates as increased were the rate which then applied to mail room staff working under an employment agreement containing that term, even if the Appendix 3 attached to the version of the employment agreement any

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<sup>1</sup> *Coutts Cars v Baguley* [2001] ERNZ 660, 672 (CA).

individual employee had signed earlier included lower rates. That is the plain meaning I find must be given on an objective assessment of the words used in this particular factual matrix and context. It is the conclusion a reasonable person would reach and accords with business common sense.

[40] It was confirmed by Mr Jennings' own answer to a question from the Authority when he said he understood the word 'standard' to mean "applicable across the board". Applying that to the particular circumstances it meant Ms Vercoe, for example, was employed when the "standard condition" provided an 'expert' rate of \$11.50 in 2006 but by August 2009 she was entitled to be paid \$13.50 because that was what the Appendix 3 Code issued then stated the "standard condition" to be.

[41] There was no precise evidence as to when in August the revised pay rates applied. For the purposes of the orders made in this determination I find that date to be from 1 August in each year.

### **Orders**

[42] Ms Vercoe and Ms Campbell have established a default in payment to them by DX. Under s137 of the Act I order DX to comply with their employment agreements with Ms Campbell and Ms Vercoe and to remedy that default within 28 days of the date of this determination by:

- (i) Paying to Ms Vercoe, for each hour of her work as a mail sorter between her first and last days of employment, the difference between what she was actually paid and the 'expert' rate applicable in each year; and
- (ii) Paying to Ms Campbell, for each hour of her work as a mail sorter between 29 October 2007 and her last day of employment, the difference between what she was actually paid and the 'expert' rate applicable in each year.

[43] In calculating the amounts due, DX need not take account of any hours worked by either woman as a courier driver, only those hours she worked as a mailroom sorter.

[44] In calculating the amounts due to Ms Campbell, DX may not offset payments made to her in the period during 2008 and 2009 when she was paid above the applicable expert rate. That payment was within its discretion to pay more than the minimum rates set in Appendix 3.

[45] Ms Campbell and Ms Vercoe sought interest on the wage arrears due to them. Under clause 11 of Schedule 2 of the Act I think it fit to make such an order. On the whole of the money due to each of them, DX is to pay interest at the rate of five per cent for the period from their last day of employment until the day that the amount due to each of them is paid in full.

### **Costs**

[46] DX is to pay Ms Campbell and Ms Vercoe the sum of \$3000 in costs.

[47] Some issues originally raised in their claims were dropped late in the piece. They were to do with whether they were paid above the Minimum Wage and should have been paid for meal breaks. That late change increased preparation costs for DX. However the costs of preparing the cases of Ms Campbell and Ms Vercoe were also increased by DX's delay in providing copies of Appendix 3 for each relevant year. On balance I did not consider it necessary to adjust upwards or downwards the usual daily rate for costs. That rate is awarded to Ms Campbell and Ms Vercoe on the basis that costs follow the event of success in their wage arrears claim.

[48] DX must also reimburse Ms Campbell and Ms Vercoe for the filing fee of \$71.56 each paid to lodge their application in the Authority.

Robin Arthur  
Member of the Employment Relations Authority