New Zealand Employment Relations Authority Decisions

Jackson v Sealord Group Limited (Christchurch) [2011] NZERA 429; [2011] NZERA Christchurch 59 (3 May 2011)

Last Updated: 7 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 59
5331267

BETWEEN ODETTE JACKSON

Applicant

A N D SEALORD GROUP LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Date of Determination:

James Crichton

Tim Oldfield, Counsel for Applicant Peter McRae, Advocate for Respondent

28 April 2011 at Nelson

3 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Jackson) through her union, the Service and Food Workers' Union (the Union), seeks orders from the Authority which would require the respondent employer (Sealord) to count her previous service from 24 June 1996 down to 4 November 2004 as relevant for the purposes of determining long service leave and service allowances together with appropriate arrears.

[2] Sealord resists Ms Jackson's claim on the basis that nothing in her terms and conditions of employment entitle her to her previous service with Sealord being taken into account. In addition, Sealord maintains that Ms Jackson's claim is *out of time* because it presents as if it were a personal grievance and is thus is well outside the 90 day time limit required by the Employment Relations Act 2000 (the Act).

[3] Ms Jackson was employed by Sealord at its Nelson factory and for most of her service she has been a member of the Union. Her first period of employment commenced on 24 June 1996 and she resigned her position with Sealord on 14 November 2004. The reason that she did this was to access the company's superannuation scheme of which she was a member. A provision of that scheme was that members of it were unable to access contributions in their name while still in Sealord's employment. Ms Jackson gave evidence before the Authority that she was in a difficult circumstance at the time and the only source of funds available to her to deal with her personal difficulties was the Sealord superannuation scheme fund in her name which she could only access by resigning her long term employment.

[4] Ms Jackson did in fact resign effective 14 November 2004 but was re-employed again very soon afterwards on 5 January 2005. It follows that the break in Ms Jackson's employment was barely more than six weeks.

[5] Sealord says that Ms Jackson was treated in exactly the same way as other permanent employees who resign from its service and then seek to re-engage later on. The Union, on the other hand, draws a distinction between *service* and *continuous service*, arguing that while the applicant, Ms Jackson, was not able to claim continuous service, she could claim service simplicita and she was entitled to the benefit of her previous extensive period of service for the purposes of calculating service allowance and long service leave.

Issues

[6] The first issue the Authority needs to determine is the question of whether the proceedings are *out of time* as Sealord argues. Next, assuming the Authority's determination is that the proceedings are still alive, it will be necessary for the Authority to determine the meaning of the relevant contractual provisions in order that they can be correctly applied to the present factual matrix.

Are the proceedings out of time?

[7] I am satisfied the proceedings are not out of time. I do not accept Sealord's submission that the proceedings are proceedings in the nature of a personal grievance disadvantage claim. It is true that the statement of problem nowhere refers to s.129 of the Act, which would identify the nature of the problem plainly as a dispute, but it is apparent on the face of the statement of problem that the claim is a claim about *the interpretation, application, or operation of an employment agreement.*

[8] Having satisfied itself that the employment relationship problem is a dispute and not a personal grievance claim, the Authority is able to reject the Sealord submission that the 90 day statutory timeframe applies. But of course, there is still a timeframe for other matters, that is to say employment relationship problems which are not personal grievances. The timeframe for those other matters is contained in s.142 of the Act. That section simply provides that no action may be commenced more than six years *after the date on which the cause of action arose* for employment relationship problems that are not personal grievances.

[9] Sealord claims that Ms Jackson is also outside the six years time limit allowed for non-personal grievance employment relationship problems, but I do not agree. As I understand the factual position, the statement of problem was filed in the Authority on 24 December 2010 and that is within six years (just) of the date on which the cause of action arose, which was 6 January 2005. That is the date on which Ms Jackson commenced her second period of employment according to the records maintained by Sealord. Ms Jackson maintains that she started her second period of employment on 5 January 2005, but nothing turns on that difference.

[10] The Union's evidence, which I accept, is that it only became aware of Ms Jackson's concern about the matter in the middle of 2010 and it was not until that concern was brought to the Union's attention that it was able to progress the matter to the Authority.

[11] For the sake of completeness, I note that I do not accept Sealord's submission that Ms Jackson's cause of action would actually have arisen at the earlier date of 14 November 2004 which was the date that she resigned her first period of employment. It cannot be right that that is the operative date; this is because Ms Jackson would not have known until the commencement of her second period of employment that Sealord was not going to take cognisance of her earlier period of service. It is not fair to impose on Ms Jackson the conclusion that she ought to have assumed that would be Sealord's position; I hold that she is entitled to wait until Sealord has, as it were, declared its hand and that time must run from that point. Of course, if I were mistaken as to that conclusion, then Ms Jackson's claim would be out of time because the earlier date of 14 November 2004 is more than six years before 24 December 2010 when the proceedings were initiated.

Is Ms Jackson entitled to the orders she seeks?

[12] It is common ground that at the time Ms Jackson was re-employed by Sealord, there was no straightforward clause in the employment agreement directly on point. In order to ground its case, the Union relies on drawing a distinction between the phrase *continuous service* and the word *service* simplicita. It then invites the Authority to look at various clauses and provisions in the applicable collective agreement to conclude that by reason of the proven earlier service of the applicant, (albeit not continuous service), Ms Jackson is entitled to have that earlier period of service taken into account in respect of the calculation of her service allowance and long service leave.

[13] Conversely, Sealord says that there is no provision in the applicable collective employment agreement of the time because there was no intention on the part of the parties for such a consequence. Sealord advanced that proposition, at least in part, by drawing my attention to a provision which was inserted into the operative collective employment agreement on and from 8 May 2006 which deals explicitly with the circumstances that Ms Jackson was in at the time she was re-hired. It is common ground that if the provision I have just referred to, which for simplicity's sake I will refer to as the amending provision, had been a part of the collective employment agreement that was operative at the time that Ms Jackson was re-employed, then she would have benefited in precisely the way that she seeks to have the Authority provide for her, by way of orders.

[14] The Union says that *service* must be distinguished from *continuous service.* In particular, it says that if the parties had intended service allowances and long service leave to be based only on continuous service, then it would have said so. Conversely, Sealord argues that the absence of clear words binding the parties to apportion benefits in the situation described means that the parties did not intend to draw a distinction between service and continuous service.

[15] The Union relies on a number of provisions in the operative collective employment agreement which refer just to *service* and not to *continuous service.* The Union also draws to my attention that the various service-based payments in the operative collective employment agreement reward affected employees for their experience by way of the enhanced benefits, but that that experience does not, of itself, equate to a reward *for* ***unbroken service.***

[16] The Union then goes on to draw the Authority's attention to various other provisions in the operative collective employment agreement which refer not to *service* but to *continuous service.* In effect then, the Union claims for Ms Jackson entitlements which are referred to in the operative collective employment agreement as service-related but not entitlements which are referred to in the operative collective employment agreement as *continuous service* related. It is said that this interpretation follows the ordinary and natural meaning of the words, produces a normal businesslike approach to the interpretation of the document and, in particular, gives force to the bargain that the parties negotiated.

[17] Moreover, the Union says that the reason that the amending provision was inserted with effect from 8 May 2006 was *for the avoidance of doubt and to clarify ... an inconsistent practice.* Sealord, on the other hand, has an entirely different view of the amending provision. It says that the very reason that the amending provision was agreed to was to provide a new benefit, a benefit which would deal with precisely the situation that Ms Jackson was in and it was not to clarify an inconsistent process at all but to genuinely provide for a new benefit. Mr McRae for Sealord argued persuasively that collective employment agreements grew incrementally and that new provisions tended to be added to the document over time, typically to enhance the benefits available to one or other of the contracted parties. He says that the introduction of the amending provision was precisely that sort of situation and was not to remove uncertainty or deal with inconsistent practice at all, but to enunciate a change in the policy and procedure of the employer.

[18] Sealord's argument is essentially based on the premise that it applied the operative collective employment agreement to the letter in respect of Ms Jackson's re-employment and that it treated her in exactly the same way as it treated everybody else in the same situation. While Sealord properly conceded that there may have been examples where it exercised its discretion in particular circumstances, its view was that that was an exercise of management prerogative based on the fact that the operative collective employment agreement was a minimum rate document and in consequence there was nothing to preclude Sealord from enhancing the circumstances of particular employees, if it chose.

[19] The concession that I have just referred to was made as a consequence of evidence introduced by Mr Donaldson, a senior and experienced official of the Union, about the circumstances of individual employees who, in his recollection, were treated differently from the way in which Ms Jackson was treated notwithstanding that the circumstances were the same or similar. The difficulty with this evidence, which was freely and openly discussed in a helpful way across the table by the witnesses for both sides, is that neither side could produce an actual example of anybody who had been in the same situation as Ms Jackson but had been treated differently by Sealord. Had such an example been available to the Authority, it might well have influenced me to consider whether a disparate treatment argument might lie. As it is, all that I was offered by way of evidence was Mr Donaldson's recollection, from his extensive experience as a union official, and a concession by Sealord that there may well have been examples but the details of those examples were simply not available. Furthermore, Sealord advanced the proposition that if there had been employees who were better treated than Ms Jackson, it was simply an example of management prerogative.

[20] Sealord says that the wage mechanism in the operative collective employment agreement is straightforward and universally applied and that the distinction which the Union draws between ordinary service and continuous service is, in effect, a distinction without a difference. There is, Sealord says, simply no legal basis on which Ms Jackson can become entitled to the payments that she seeks for herself. Furthermore, Sealord says that the introduction of the amending provision which took effect on 8 May 2006 *underlines that no such provision existed previously.*

[21] Perhaps the most telling submission made by Sealord is its observation about the lack of specificity implicit in an acceptance of the Union's argument. In commenting on how the wage matrix is to work, Sealord has this to say in its final submissions:

There is no provision for recognising any previous employment or service and therefore no explanation about how that might happen -whether it could be done on a discretionary basis, or on the application of the employee, after a gap of no more than a certain amount of time, and so on. A fair, ordinary reading of the matrix is that no such crediting is anticipated or provided for. ... And the logical and natural reading of the structure is that "service" is service after appointment and is to be recognised and rewarded accordingly.

[22] The Authority thinks it relevant to observe that one of the apparent consequences of the Union's position is the difficulty in being specific about just what the terms of the previous service need to be in order to qualify and in particular how long or

short an absence can trigger the entitlement and what sort of previous service is relevant. In the latter case, is previous service with Sealord the only relevant factor or could it be previous service in the industry or could it be any relevant service that might equip a person better as an employee of Sealord? The absence of any guidance about how those questions are to be addressed seems to me to start to tip the balance in favour of Sealord.

[23] A further logical difficulty with the Union's position seems to the Authority to be that *service* pure and simple is, in the Union's submission, to be distinguished from *continuous service* but as Sealord makes clear in its submissions, service itself, without the continuous aspect, is also capable of different meanings. For instance, Searlord says that the *service* in contemplation in the operative collective employment agreement is service *after appointment.* It says that class or kind of *service* is what the operative collective employment agreement is talking about when it uses just the word *service* without also referring to the qualification of *continuous.*

[24] Certainly it is true that it does less violence to the plain words in the agreement to imply the additional words *after appointment* as a qualification of *service* than the Union's alternative proposal. This is because it is plain in examining the matrix in the wage provision in the collective employment agreement that what is being provided for is a series of wage rates for people who commence their employment with Sealord. This view of matters is borne out by the use, in the matrix, of the acronym *OA,* which, by common consent, means *on appointment.* It seems to the Authority to follow that if the wage matrix on which the Union relies includes a reference to *on appointment* as a particular rate of pay then it is reasonable to conclude that the use of the word *service* in the same wage matrix must, logically, refer to *service after appointment* as Sealord contends.

[25] Put shortly, this then is a particular kind of service looking forward from the point at which the particular engagement starts, **not** looking back to include service in a previous period of employment.

[26] A further telling submission from Sealord is its reference to the clear provision in the operative collective employment agreement providing for temporary workers to be given the right to *retain their previous grading* provided they rejoin within six months of the previous period of employment. So looking at the context and relevant background of the parties' bargain, it seems difficult to explain why, at the relevant time that Ms Jackson returned to Sealord service, the operative collective employment agreement contained a specific provision relating to temporary workers retaining their service entitlements when, in respect of permanent employees such as Ms Jackson, the Union is asking the Authority to *write in* or imply a meaning to words in the agreement in order to achieve a similar result to the plain words provided for in the agreement in respect of temporary workers. When that point is set alongside the subsequent amending provision taking effect from 8 May 2006 for permanent employees as well, the argument seems difficult to escape that the parties first turn their attention to the position in respect of temporary workers and dealt with the matter by a particular provision, and subsequently considered the question in relation to permanent employees, agreeing then to a similar provision for permanent staff. However, that second amending provision I have just referred to was not in place when Ms Jackson was re-employed and therefore could not apply to her.

[27] I conclude then, on the balance of probabilities, that the plain and natural meaning of the various relevant words in the operative collective employment agreement can be given their ordinary and commonsense meanings without leading to absurdity and that while I hesitate to categorise the Union's submissions as creating that absurdity, I think it is fair to assess the Union's claim as creating a less plausible interpretation than that advanced by Sealord. In reaching this conclusion, I rely first on the absence of specificity in relation to the proposed meaning of the word *service* where it seems to me that the Union's interpretation does in truth allow of a completely unfettered entitlement which is not in accord with the parties' careful provisions elsewhere in the document nor is it in keeping with the parties' very clear provision in respect of temporary employees.

[28] Furthermore, the fact that there is a specific provision relating to temporary employees in the operative collective employment agreement and that a subsequent agreement contained a provision directly on point for permanent staff, seems to me to compel the conclusion that the parties did not turn their minds to the particular issue that the Union's claim seeks to advance, until after Ms Jackson was re-employed. I agree with the Union that that may seem unfair and I also agree with the Union that it seems unjust that temporary employees got a benefit at the relevant time which was not then available to permanent staff. But I am satisfied that that is what the parties decided and it is not the Authority's role to rewrite agreements so as to avoid apparent unfairness.

Determination

[29] I am not satisfied that Ms Jackson's claim has been made out in any respect and accordingly I decline to issue the orders that she seeks.

Costs

[30] Costs are reserved but the Authority does observe that if the matter is not capable of resolution by agreement, it is unlikely that a costs award would be made against the Union. The Union is entitled to bring disputes about the interpretation of collective agreements before the Authority for decisions to be made; that is part of the fabric of our employment law. In

the present case, Sealord dealt with the advocacy in-house and if I may say so, did so very ably indeed. Because it did not engage outside counsel (as Mr Oldfield correctly pointed out at the investigation meeting) it does not seem to me that a costs award could lie in any event.

James Crichton
Member of the Employment Relations Authority
