

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 16
5423702

BETWEEN ANDREW MILLS
 Applicant

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Nathan Santesso, Representative for the Applicant
 Stephen Fraser, Representative for the Respondent

Investigation Meeting: On the papers

Submissions Received: 3 December 2013 for the Applicant
 13 December 2013 for the Respondent

Determination: 10 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Andrew Mills, with assistance from his union, Postal Workers Union of Aotearoa, claims his employer New Zealand Post Ltd (NZ Post) has withheld a contractual benefit¹ known as a 'roster make-up allowance' (RMA), which he says he is entitled to.

[2] In the alternative Mr Mills says NZ Post has not acted in good faith with respect to its communication with him about the RMA and is in breach of its obligation to treat him fairly.

[3] NZ Post rejects Mr Mills' claims.

¹ Collective Employment Agreement 1 April 2011 – 30 June 2013 between NZ Post Ltd and PWUA

[4] Following a telephone conference on 25 October 2013 the representatives each asserted that the contractual provisions in dispute between the parties were unambiguous and the parties agreed the matter could be determined on the papers together with information previously provided. Arrangements were made for the exchange of submissions.

Summary of relevant information

[5] In the course of bargaining for a collective agreement in 2000, NZ Post and the union agreed to terms contained in a document titled '2000-2002 Letter of Settlement' (the letter of settlement).

[6] The letter of settlement provided for significant changes to the ways employees would be paid, and has continued to be incorporated into subsequent collective agreements between the parties including the 2011-2013 collective agreement.

[7] The letter of settlement included provisions which state that existing full time employees covered by the collective agreement and employed by NZ Post as at 5 July 2000² would have their previous full time earnings protected by way of an allowance (an RMA). I refer to these as the RMA provisions.

[8] There is no dispute that Mr Mills was a full time employee on 5 July 2000. Although no direct evidence was given on the matter, it appears Mr Mills was in receipt of the RMA until 2006.

[9] On 12 March 2006 Mr Mills notified NZ Post by letter that he wished to resign from his position as a full time Mail Delivery Officer and change to a part time Delivery Officer. He said he would still be available to do temporary Team Leader work if sufficient notice was given to obtain alternative child care arrangements.

[10] On 1 May 2006 NZ Post responded to Mr Mills' request in writing and stated that his application to change his rostered hours was accepted. The correspondence confirmed his hours of work would be 26 per week and set out a new roster pattern. Mr Mills was asked to sign a copy of the letter to indicate his acceptance of the

² I note that the clause 11 does not expressly refer to the year date on which full time employees must be employed but it is common ground that the date referred to is 5 July 2000.

variation to terms and conditions of employment. The letter concluded by advising “*Your other terms and conditions remain unchanged.*”

[11] Mr Mills signed the variation on 3 May 2006.

[12] In or around November 2010 Mr Mills sought to return to full time working hours.

[13] On 8 November 2010 NZ Post accepted Mr Mills’ request and documented his increased rostered hours and new work pattern. Mr Mills was again asked to indicate his acceptance of “*this variation to the terms and conditions of your employment*” by signing the letter which also advised “*your other terms and conditions remain unchanged*”. Mr Mills signed this variation letter on 9 November 2010.

[14] In 2013 Mr Mills became aware that since returning to full time hours of work the RMA had not been reinstated.

[15] The parties dispute whether Mr Mills is eligible for the RMA. NZ Post says that when Mr Mills voluntarily reduced his hours of work he was no longer in the category of employees the RMA provisions apply to. Mr Mills disagrees with the interpretation NZ Post ascribes to the RMA provisions. He says that NZ Post’s approach is inconsistent with other aspects of the collective agreement, notably provisions which allow employees, following a prior resignation for child care purposes, to return to previous terms and conditions of employment if re-employed.

[16] Mr Mills seeks a declaration that that he is entitled to the RMA. He requests the Authority to order NZ Post to back-pay his RMA entitlement to the date on which he resumed full time work.

The issues

[17] The Authority needs to determine whether NZ Post is contractually obliged to reinstate the RMA entitlement now that Mr Mills works full time hours. In order to do so I need to ascertain whether or not Mr Mills’ entitlement to the RMA was permanently extinguished and if so when and on what basis. The following matters need to be considered:

- what was agreed between the parties; in particular is there an express or implied term contained in the 2000-2001 letter of settlement that entitlement to the RMA requires continuous full time employment;
- if there is no express or implied term that the RMA entitlement to the RMA requires continuous full time employment, what was the effect of one or both of the signed letters of variation.

Discussion

[18] The RMA provisions provide:

10 *The negotiations have centred around hours of work issues and the new Contract makes comprehensive changes to hours of work terms and conditions.*

11 *In terms of implementing these changes, New Zealand Post confirms that all existing full time employees as at Wednesday, 5 July will have their rounding to 40 hours weekly wages protected. The company agrees that the intention of the roster allowance is to ensure that existing full time employee core earnings are not reduced as a consequence of this change. New Zealand Post confirms that the roster allowance will be applied for all purposes including six shift allowances, parental leave payments and redundancy entitlements.*

12 *As advised, this means that existing full time employees will be paid a roster allowance for the period between the full time hours that are rostered to be worked as defined by their individual occupational groups and 40 hours. ...*

...

[19] The leading case on the interpretation of commercial contracts is the decision of the Supreme Court in *Vector Gas v Bay of Plenty Energy Ltd*³. The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*⁴ held that the principles enunciated in *Vector* are relevant also to the interpretation of employment agreements. In summary the Supreme Court held:

- (i) the words used should be given their ordinary meaning in the context of the contract;

³ [2010] NZSC 5; [2010] NZLR 444

⁴ [2010] NZCA 317

- (ii) the ordinary or plain meaning of the words and text should be the primary focus for interpretation however extrinsic material may be relevant in objectively demonstrating what the parties intended even if the words are not ambiguous;
- (iii) the context in which a contract is made is an important consideration⁵; a contract should be interpreted in accordance with commercial or business commonsense;
- (iv) the ultimate objective in a contract interpretation dispute is to determine the intention of the parties from the words used in the contract;

[20] To establish what has been agreed between the parties in this matter, the starting point is to examine the words in the RMA provisions as well as the subsequent letters of variation.

Is it an express or implied term of the RMA provisions that entitlement to the RMA requires continuous full time employment?

[21] NZ Post's position is that when Mr Mills reduced his hours of work his entitlement to the RMA ceased. I understand NZ Post's view is that once the entitlement is removed, the term and condition is permanently extinguished.

[22] There is no dispute that the RMA provisions provide a protection to a category of employees who worked full time hours at the time stipulated within those provisions. I agree also that by the words contained at clause 12: "*existing full time employees will be paid a roster allowance...*" that when an employee ceased working full time the RMA would not be paid.

[23] NZ Post says it clear from the totality of the language used in the RMA provisions that it was always agreed between the parties that an employee eligible for the RMA at 5 July 2000 needs to maintain continuous full time employment to remain eligible for the RMA.

[24] Secondly, NZ Post further submits that the purpose of the provisions was to protect existing full time employee core earnings "*as a consequence of this change*".

⁵ In *Silver Fern Farms* this aspect was noted as being particularly relevant to interpretation of industrial agreements

I understand the phrase “*this change*” to refer to the bargained and agreed alteration of NZ Post’s remuneration system. NZ Post says the reduction in Mr Mills’ hours of work and therefore earnings was not a consequence of the bargaining in 2000 but, rather, a voluntary choice of his own making. It says in these circumstances Mr Mills ceased to be in the category of employees to which the protection expressed in clause 11 applied.⁶

[25] I am unable to adopt NZ Post’s submissions in this respect. There are no words used within the RMA provisions that specify the RMA entitlement is dependent on continuous full time employment. Nor is there an express statement that an interruption or hiatus to full time employment will abolish the entitlement. I am not persuaded that the meaning of the words used can be extended to assert that a term of employment is conditional where there are no words to indicate that requirement, or that future eligibility is precluded without reference to the circumstances or grounds on which that would occur .

[26] Next, NZ Post submits that conditions of ‘continuity’ and/or “reduction of hours” are terms that should be implied into the RMA provisions.

[27] I am not satisfied, as suggested by NZ Post, that either proposition is necessary to give business efficacy to the RMA provisions, or that it is so obvious it goes without saying.⁷ I note that in *Attorney General v NZ Post Primary Teachers Association*⁸ the Court of Appeal stated:

There is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding conditions of engagement for the reason simply that it would be reasonable to do so.

[28] NZ Post submits if the contents of the RMA provisions are insufficiently stated, the Authority should take a purposive approach to interpreting the RMA provisions and consider the intentions of the parties evident by the words used. It says it is apparent by reference to the parties’ expressly stated intentions at clause 11 that the RMA was an agreed mechanism to protect the core earnings of existing full time employees to ensure they were not disadvantaged by the change to the way remuneration was paid. NZ Post submits it can be reasonably inferred that full time

⁶ Amended Statement in Reply; para’s 1.5 and 1.6

⁷ *Attorney General v NZ Post Primary Teachers Association* [1992] 1 ERNZ 1163 at 1168

⁸ *Ibid*

employment would remain continuous and that once an employee ceased to work full time the protection ceased⁹.

[29] The tenor of NZ Post's submissions is that the RMA provisions were agreed in the context of bargaining in 2000 so as to preserve terms and conditions for a particular group of employees. It appears NZ Post has assumed those terms and conditions would automatically expire when an eligible employee opted to change his or her hours of work.

[30] I have no direct or extrinsic evidence to support NZ Post's view. I am unable to find that its assumption was shared by the union or that its interpretation and application of the RMA was agreed by the parties. To do so would, in effect, create a new term and condition of employment in circumstances where I am not satisfied, on the information available, that was intended by the parties.

What is the effect of the letters of variation?

[31] There can be no doubt that the RMA provisions provided a protection to wages for all full time NZ Post employees covered by the letter of settlement and employed full time on 5 July 2000. On that date the RMA entitlement crystallised as a term and condition of Mr Mills' employment.

[32] NZ Post submits that Mr Mills relinquished the RMA when he signed the letter of variation on 3 May 2006.

[33] I am unwilling to accept NZ Post's view that the letter of variation evidences an acceptance by Mr Mills that he was prevented from accessing the RMA provisions in the future. I note no specific reference to the RMA is made at all in the letter of variation. In the absence of an overt agreement between the parties and recorded in the letter of variation that the RMA was permanently withdrawn I am able to conclude that Mr Mills consented to its withdrawal in the future and I am reinforced in my view by the words used in conclusion of that letter which advised "*your other terms and conditions of employment remain unchanged*".

[34] Having established that the letter of variation of 3 May 2006 did not alter Mr Mills' entitlement to the RMA should he return to full time employment, I am not persuaded that the letter of variation signed by Mr Mills on 9 November 2010

⁹ Amended Statement in Reply; para 1.1

changed that position. Again there is no mention of the RMA in the November 2010 correspondence and my reasoning with respect to the first letter of variation is equally relevant to the latter document.

Determination

[35] Mr Mills' entitlement to the RMA did not permanently extinguish, either by express or implied terms within the RMA provisions, or by one or both of the subsequent letters of variation. I find NZ Post's interpretation is erroneous in this way. Between 2006 and 2010 Mr Mills ceased to be entitled to the RMA because his hours of work were reduced to part time. In November 2010 Mr Mills became entitled to payment of the RMA because he was an existing full time employee on 5 July 2000 and he worked full time hours. In this respect he satisfied the relevant contractual qualifying criteria required by the plain words contained in the RMA provisions, and is therefore entitled to the benefit of those provisions.

Remedies

[36] For the reasons given this dispute is resolved by declaring that the RMA is a term and condition of Mr Mills' employment with NZ Post.

[37] I order NZ Post to reimburse a sum equivalent to the total sum of RMA payments Mr Mills would have received from the date he returned to full time employment in November 2010.

[38] Having found that NZ Post is in breach of its obligations contained within the RMA provision it is unnecessary to determine Mr Mills' alternative claims.

Costs

[39] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority