

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Patricia Mary Morgan (Applicant)
AND Auckland City Council (Respondent)
REPRESENTATIVES Patricia Mary Morgan In person
Carl Blake, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 14 June 2005
DATE OF DETERMINATION 27 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Patricia Morgan (“Ms Morgan”) asks the Authority to assist her to resolve a problem she has with her employer the Auckland City Council (“the Council”). Ms Morgan says the Council is not entitled to take away her car park, a written term of her employment agreement, and pay her an allowance instead.

[2] In her statement of problem, Ms Morgan says that she wishes to have the terms of her employment contract honoured. She wants her entitlement to her car park and not an allowance “*ie I wish to retain the status quo*” she says. In the technical terms of the Employment Relations Act 2000, that is an application for a compliance order. She wants the Authority to order compliance with her terms of employment.

[3] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[4] Ms Morgan commenced employment with the Council as Manager Business Support at the Council’s Auckland City Art Gallery in September 2001.

[5] The letter of offer of employment dated 7 September 2001 stated:-

You will also be able to have full business use of a Gallery provided car park adjacent to the Civic Building off Aotea Square.

[6] A final version offer of employment letter dated 10 September 2001 further stated:-

The Schedule of benefits attached does not, please note, include details of the car park that is currently provided as a direct benefit to you as it is to other similar level positions at the Gallery.

That car park is provided adjacent to the Civic Building and details of how to access it can be arranged prior to you(sic) start day.

[7] Ms Morgan's employment agreement makes no reference to the carpark.

[8] The Council's Human Resources Manager Mr Mike Richardson ("Mr Richardson") wrote a Memo to Ms Morgan dated 29 September 2004. After specifying Council's criteria for allocation of car parks, the Memo stated:-

Our records indicate that you are in receipt of a carpark and do not meet the above criteria.

In order to resolve this issue, it is proposed that you retain your present car park but that the organisation pay you an allowance and invoice you directly for the car park. This will have the effect of transferring responsibility for the car park from Auckland City to yourself.

Details:

- *Three months notice of change - change becomes effective 1 January 2005*
- *Effective 1 January 2005, you will receive a net payment of \$84.00 each fortnight*
- *Effective from this date you can enter into a lease arrangement with Parking Facilities who will require payment one month in advance by automatic credit. The cost at that date will be \$168per month (\$84.00 x 2)*
- *No inflation adjustment will be applied to the allowance*
- *You will continue to receive this payment as long as you remain with Council whether or not you choose to retain the car park*
- *If you move to a position which is eligible for a car park the allowance will cease*

I shall refer to this situation as "the proposal".

[9] Ms Morgan has been using her allocated carpark since her employment commenced in 2001. She understandably communicated her objection to the proposal to Mr Richardson.

[10] The Council has not yet proceeded with the proposal. As the Council has only given notice of the proposal, it is not correct to say that it has taken any action or that Ms Morgan has yet suffered any disadvantage or that Council has failed to comply. The question is an academic one at this point in time but it would be wrong to ignore the reality of the situation. In this problem-solving jurisdiction, I assist the parties to deal with the very real employment relationship problem that now exists between them.

Discussion

[11] It is not disputed that Ms Morgan is contractually entitled to the use of a carpark.

[12] Ms Morgan says that Council cannot pay her an allowance in substitution of that arrangement. She says her entitlement is to the carpark itself and not an allowance instead. It is this statement that captures the essence of up her opposition:-

The alternative offered by my employer to my current employment condition is, in my view, both disadvantageous and contrary to the terms of my employment. Auckland City Council proposes that I now take responsibility for a personal lease between myself and Auckland City Council (through Parking Services, an Auckland City Council group). While described as an "allowance" Council actually proposes to increase my salary by a gross amount, which after tax is deemed to be equal to the current cost of the car park I use. Council has advised that this amount will not be inflation adjusted in the future. Should the

cost of the car park increase, I would be expected to meet the increase from my own salary. Nor will Council guarantee an alternative car park in the event that the car park I use is no longer available, for whatever reason. Should this car park not be available in the future, the onus would be on me to find an alternative, under this new arrangement proposed by Council.

[13] The Council says Ms Morgan was given the carpark in error. It now seeks to correct that situation. Mr Richardson says that in February 2004 he discovered that approximately 60 employees including Ms Morgan had been “incorrectly” provided with a carpark from 1997 because their positions fell outside the criteria under the carpark policy for qualification.

[14] Mr Richardson says that he set about rectifying this “discrepancy” to ensure consistency within the organisation, to realign costs, to ensure that Council was correctly following its carparking policy and to remove inequity in the provision of carparking benefits.

[15] He developed the proposal set out in the Memo of 29 September 2004 to pay the 60 or so employees a carparking allowance to be incorporated into the employees’ salary to cover the full costs of the leases of their existing carparks and for the said employees to enter into lease agreements directly with the carparking providers.

[16] He says in his witness statement that the only real difference between the current and proposed situations is that the lease arrangements between the Council and the carparking operators would be transferred to the employees. The employees (including Ms Morgan) would still be able to retain their existing carparks and use them in the same manner as before, at no additional personal cost whatsoever.

[17] In my view, the Council’s proposal is about its own administrative convenience. I do not consider that Ms Morgan should suffer any detriment because of Council’s error in providing her a carpark in 1997. That is its own error. Ms Morgan should not suffer any detriment because of her employer’s mistake.

[18] Standing back from the detail, the point of Mr Richardson’s evidence of Council’s actions is that Council no longer wishes to be seen to be providing Ms Morgan with a carpark itself. It has devised an arrangement that ultimately still provides her with a carpark in effect but does so via the provision of a payment or allowance to her. That conclusion reached, Ms Morgan is quite right to object and her concern is legitimate.

[19] The Council is contractually bound to provide Ms Morgan with a carpark. It cannot release itself from that obligation because it is no longer convenient to perform.

[20] I note a number of points from the lease agreement submitted to Ms Morgan for her execution. Firstly, the Lessor is stated to be her employer the Council. That point is significant because it demonstrates her employer Council itself will continue to provide the carpark and not some other third party provider.

[21] Secondly, I do not consider the recital “B” is entirely correct that Ms Morgan “has requested” the use of car parking space. It is more factually correct to recite that the Council is obliged to provide her with one.

[22] Thirdly, the precise amount for the total monthly fees for the carpark is not shown on the lease. That would not have instilled any confidence with Ms Morgan.

[23] Finally, the lease makes clear that Ms Morgan is granted a specific car parking space to use at her liberty subject to the terms of the said lease.

[24] I have reached the view that the proposal by Council will in effect still provide Ms Morgan with a carpark. I also consider that the wording of the relevant contractual provision is sufficiently broad to lawfully permit Council to proceed in terms of the proposal. Council will still be providing Ms Morgan with a carpark for her full business use.

[25] As for Ms Morgan's concern for the future guarantee of her particular car park, Council is obliged to provide her with a carpark. That could be any carpark. Its obligation to do so however, is a continuing one pursuant to the terms of her employment. I do not agree then, that there will ever be an onus on Ms Morgan to find an alternative herself if that need ever arises.

Determination

[26] For the reasons set out above, **I decline to make any formal orders**. It is appropriate to indicate to the parties my considered views of the proposal which I intend to be of assistance to the parties in terms of dealing with this employment relationship problem.

[27] I consider the proposal by Council is permissible pursuant to Ms Morgan's terms of employment. I say too, that in the event that the allowance paid to Ms Morgan does not cover the actual continuing cost of the carpark, I would consider she would then suffer a disadvantage that may give rise to a personal grievance.

Costs

[28] I encourage the parties to resolve any costs issues between them, but failing such agreement, Mr Blake is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Morgan is to lodge a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority