



# New Zealand Employment Relations Authority Decisions

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## O'Connor v Southland District Council (Christchurch) [2017] NZERA 1068; [2017] NZERA Christchurch 68 (3 May 2017)

Last Updated: 20 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 68  
3000059

BETWEEN KEVIN O'CONNOR Applicant

A N D SOUTHLAND DISTRICT COUNCIL

Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person

Janet Copeland, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 20 March 2017, from the Applicant

13 March and 6 April 2017, from the Respondent

Date of Determination: 3 May 2017

**DETERMINATION OF THE AUTHORITY**

**A The dispute is resolved in favour of the Southland District Council. B There are no issues as to costs.**

### **Employment relationship problem**

[1] Kevin O'Connor and Southland District Council (SDC) are in dispute over an entitlement in his individual employment agreement (the employment agreement). The parties have attempted between themselves to resolve the issue but it remains unresolved. They have asked the Authority to determine the matter.

[2] Mr O'Connor commenced employment with the SDC on 15 October 1985. In

2001, Mr O'Connor was successful in his application to the role of Manager, Building Control. That position was not covered by a collective employment agreement and the parties negotiated the individual employment agreement which was signed on 27

September 2001 and operated from 7 May 2001.

[3] Mr O'Connor resigned from SDC as from 11 November 2016 to take up a new role with another District Council having at that stage been employed continuously with SDC and its predecessor, the Southland County Council, for 32 years. He says that he is entitled to payment of a gratuity upon leaving his employment under clause 7.8 of his employment agreement. SDC say that Mr O'Connor is not entitled to receive payment of the gratuity because it is a retirement gratuity and Mr O'Connor has not retired.

[4] There is agreement that the Authority can consider this matter on the papers. In determining the matter I have had regard

to the statement of problem, statement in reply and attached documents together with submissions supplied by both parties.

### **Clause 7.8 of the individual employment agreement**

[5] Clause 7.8 of the employment agreement provides as follows:

#### **Gratuity Entitlement**

7.8 The employee shall retain his existing gratuity entitlement of ten years qualifying service (ten weeks salary) with Southland District Council, based on continuous service with the Southland District Council and Southland County Council.

#### **Interpretation of the employment agreement**

[6] The objective in undertaking an exercise to interpret a contract is to establish the meaning that the parties intended the words in dispute to bear.<sup>1</sup> The starting point is to consider the natural and ordinary meaning of the words in clause 7.8. The contractual context, sometimes called a cross-check, is a necessary ingredient in

<sup>1</sup> *New Zealand Airlines Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33] with reference to *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]

ascertaining meaning.<sup>2</sup> Interpretation should be approached on an objective basis and the necessary inquiry concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.<sup>3</sup> What a party subjectively intended or understood their words to mean is irrelevant.<sup>4</sup>

[7] Mr O'Connor submits that the gratuity in the employment agreement is a standalone clause from that in the collective contract that covered his employment before he signed the employment agreement. He submits this is reinforced by clause 1.2 of his employment agreement which provides:

1.2 This agreement constitutes the entire agreement between the parties and supersedes all previous representations and agreements (whether oral or in writing).

[8] Mr O'Connor said in his statement of problem that the payment under the previous gratuity clause in the collective employment contract was downgraded in the individual employment agreement from 26 weeks to 10 weeks and he believes that simply referring to a gratuity payment with no reference to it being payable on retirement was to compensate for this.

[9] An issue arose in the Court of Appeal judgment in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*<sup>5</sup> about whether it was appropriate where a question about interpretation arose to take into account undisputed evidence as to the terms of the prior awards and agreements. It was held that it was.

[10] I am satisfied that the Authority can have regard to the context in which the parties agreed clause 7.8. That may include consideration of the gratuity provision in the collective employment contract that covered Mr O'Connor's work before he entered into the individual employment agreement and consideration of earlier documents that could provide context. Ms Copeland has attached these documents to

her submissions.

<sup>2</sup> *Vector Gas Ltd* above n 1 at [24]

<sup>3</sup> At [19]

<sup>4</sup> At [14]

<sup>5</sup> *Silver Fern Farms Ltd v New Zealand Meat Workers etc Trade Unions* [2010] NZSC 5; [2010] ERNZ 317 at [43], [2010] NZCA 317.

#### **Natural and ordinary meaning of the words in clause 7.8**

[11] Clause 7.8 provides that Mr O'Connor shall retain his existing gratuity entitlement of ten years qualifying service which is ten weeks salary based on continuous service with SDC and Southland County Council.

[12] I accept Ms Copeland's submission that the ordinary meaning of the words "retain" and "existing" is that Mr O'Connor continued on signing his 2001 employment agreement to have his existing gratuity entitlement.

[13] Mr O'Connor submits that the gratuity is payable on leaving employment and there is nothing to support, as maintained by SDC, that it is only payable on retirement. Clause 7.8 is indeed completely silent as to when the gratuity is payable. The issue for the Authority is what meaning the parties intended in clause 7.8 about payment of the gratuity.

[14] Mr O'Connor submits that clause 1.2 of the employment agreement means that the gratuity entitlement in previous awards and contracts and in particular in the collective employment contract that covered his employment at or about the time he entered into the employment agreement is superseded and replaced.

[15] I do not find that clause 1.2 prevents consideration of the various awards and contracts that governed the terms of Mr O'Connor's employment over the years because clause 7.8 expressly retains an existing entitlement. The context and circumstances of the entitlement can clarify and provide objective assistance about what the parties intended the words in clause 7.8 to mean.

### **The gratuity entitlement in previous awards, contracts and collective agreements**

[16] Ms Copeland attached to her submissions previous awards and contracts that covered Mr O'Connor in his employment before the individual employment agreement came into operation in May 2001.

[17] It is helpful to start with the award that covered Mr O'Connor when he was first employed and progress from there.

[18] At the time that Mr O'Connor commenced his employment he was covered by the Otago Southland Local Authority Officers' Award. The award contained a retirement gratuity clause at clause 25 as follows:

#### Retirement gratuity

(a) On the retirement of an officer who has at least ten years' current continuous service with the same employer they shall be granted a gratuity of the rate of one week's pay at ordinary rates for each year of service to a maximum of 26 weeks.

(b) In the event of a worker dying while in the service of the employer and after having completed ten years' current continuous service a sum equal to the gratuity shall be paid to the spouse, nominated beneficiary or the estate of the deceased.

(c) Normal retirement is defined as retirement which would qualify for a pension under the National Provident Fund standard scheme for local authorities' superannuation.

[19] The SDC was formed in 1989 and Mr O'Connor was then covered in his employment by the Southland District Council Officers agreement which was registered on 19 September 1989. An addendum headed "statement of the parties" provided in clause 2 under the heading "retirement gratuity":

The Southland District Council undertakes to honour all existing contracts relating to the payment of retirement gratuities.

The parties hereto agree that the matter will be addressed at the renegotiation of this agreement and to this end a working party consisting of equal representation of the parties hereto will be established to further consider this matter and will report its findings to the parties prior to renegotiation of this agreement.

[20] In 1991, a voluntary agreement was entered into under the [Labour Relations Act 1987](#) that came into force on 1 March 1991 and continued until 29 February 1992. Clause 6.7 of the agreement was headed Gratuity and provided:

Staff who have completed at least 10 years' service with the Southland District Council, or the preceding amalgamating Councils, shall be paid a gratuity upon retirement for their qualifying time up to

28 February, 1995. This shall be paid at the rate of one week's salary for each completed year of service up to maximum of 26 weeks as per the [Finance Act \(No 2\) 1941](#). This clause shall not apply to staff employed on or after 1 March 1991.

[21] The 1991 agreement also contained a long service clause. The entitlement to a gratuity was preserved for staff employed prior to 1 March 1991 who met the requirements of service up to 28 February 1995 upon their retirement.

[22] I have also been provided with the 1992, 1993, 1995, 1996 and 1997

Southland District Council Officers' collective employment contracts and they contain a gratuity clause with identical wording to that in the 1991 agreement.

[23] In 1998, the collective employment contract with staff contained a clause that provided as follows:

#### **Subclause 4.7 Gratuity.**

Staff who have completed at least 10 years service with the Southland District Council, or the preceding amalgamating councils, shall be paid a gratuity upon retirement (**RETIREMENT AS DEFINED IN SUBCLAUSE 4.8**) for their qualifying time up to 28 February, 1995. This shall be paid at the rate of one weeks salary for each completed year of service up to a maximum of 26 weeks as per the [Finance Act \(No 2\) 1941](#).

**This clause shall not apply to staff employed on or after**

**1 March 1991.**

[24] Sub clause 4.8 provided about retirement:

The age of retirement shall be the age of eligibility for the government funded retirement pension.

[25] In 1999, the collective employment contract with the Public Service Association contained the same gratuity clause as that in the 1998 collective employment contract but the definition of retirement was not carried forward in that employment contract.

[26] On 30 June 2000, a collective employment contract between the Public Service Association and the SDC was settled. The collective employment contract was known as the Southland District Council PSA Officers' Collective Employment Contract from 1 July 1999 to 30 June 2000. It expired on 30 June 2000. Mr O'Connor was at that time a member of the PSA and covered by the collective employment contract. Clause 4.7 stated in relation to gratuity:

Staff who have completed at least 10 years service with the Southland District Council, or the preceding amalgamating councils, shall be paid a gratuity upon retirement for their qualifying time up to 28

February 1995. This shall be paid at the rate of one weeks salary for each completed year of service up to a maximum 26 weeks as per the [Finance Act \(No. 2\) 1941](#).

**This clause shall not apply to staff employed on or after 1 March**

**1991**

[27] The relevant section in [Finance Act \(No 2\) 1941](#) is s 6 which I have set out below as at 30 June 2003. I have considered the historic version from April 1978 to

30 June 2003 and subsection 2 of s 6 which is the most relevant part to the current matter is exactly the same.

**Local authorities may make grants to employees on their retirement**

[(1) For the purposes of this section, local authority means a local authority within the meaning of the [Local Government Act 2002](#).]

(2) On the retirement from the service of any local authority of any employee

whose total length of service with the local authority has been not less than

10 years the local authority may pay to him by way of gratuity an amount not exceeding an amount equal to 6 months' pay at the rate payable to him at the

time of his retirement.

[(2A) On the death of any such employee (whether before or after his retirement, [but before he has received a gratuity under subsection \(2\) hereof](#)) the local

authority may pay to his dependants or any of them by way of gratuity an

amount not exceeding an amount equal to 6 months' pay at the rate payable to him at the time of his retirement or (if he died before retirement) at the time

of his death.]

(3) For the purposes of this section service with a local authority shall be deemed to include service with any other local authority being the predecessor of the first-mentioned local authority; and a local authority shall be deemed to be

the predecessor of another local authority in any case where, on its dissolution or in any other circumstances, its functions or any of its functions

have been transferred to such other local authority.

(4) The power conferred by this section shall be deemed to include power to

make a payment as aforesaid to any such employee who has retired before the passing of this Act, but not earlier than the 1st day of January 1938.

[28] I find on its plain words clause 7.8 preserved the existing right that Mr O'Connor had to a gratuity entitlement. It is then a matter of establishing what that entitlement was. As the provisions in awards and contracts that covered Mr O'Connor's

employment show, the qualifying time for service recognition from 1991 was limited to the period to 28 February 1995 for service with the SDC or the preceding amalgamating councils. That remained unchanged. That meant for Mr O'Connor who began his employment with the former Southland County Council on

15 October 1984 that he was entitled to ten weeks salary in accordance with his ten years' completed service between 15 October 1984 and 28 February 1995. I am not satisfied that it was intended by the parties that the absence of the reference to retirement in clause 7.8 was to compensate for limiting any qualification to ten years. Mr O'Connor's actual entitlement as at 28 February 1995 was based on ten years qualifying service and it was that actual entitlement that was reflected in clause 7.8 of the individual employment agreement.

[29] The nub of the issue between the parties is when the gratuity was payable. The various clauses in all the awards and contracts and section 6 of the [Finance Act \(No 2\) 1941](#) refer to the gratuity being payable on retirement.

[30] I do not find that the parties by their plain words intended the gratuity in clause 7.8 of the employment agreement to be a new entitlement in which a gratuity was to be paid on resignation or simply because the qualifying time had been served. Rather it was intended that Mr O'Connor retain his existing gratuity entitlement. That was, when considered with the earlier awards and contracts but particularly the collective employment contract that expired on 30 June 2000, a gratuity payable upon retirement and based on at least 10 years qualifying service up to 28 February 1995. There was specific reference in the collective employment contract to the [Finance Act \(no 2\) 1941](#). Section 6 of that Act refers to a payment on retirement.

[31] Mr O'Connor has suggested there may be a moral obligation to make such a payment because of his years of dedicated service and high performance over the years. Ms Copeland acknowledges that Mr O'Connor was a dedicated employee and referred to some other ways in which the SDC had recognised this. Whilst Mr O'Connor has a different perspective about one of these payments it is clear he was an employee held in very high regard. The Authority is confined though to the nature of the agreement the parties had about a gratuity.

[32] For the above reasons Mr O'Connor does not satisfy the requirements for a gratuity payment. That is because he resigned from his employment and did not retire. The dispute is resolved in favour of the Southland District Council.

[33] By agreement there are no issues as to costs.

Helen Doyle

Member of the Employment Relations Authority