IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 128
5446244

	BETWEEN	SHIRLIE PATRICIA PARKINSON Applicant
	A N D	OPOTIKI ROSE GARDEN PRESCHOOL COMMUNITY TRUST INC Respondent

Member of Authority:	James Crichton
Representatives:	Stephen Clews, Counsel for the Applicant Heather Tucker, Counsel for the Respondent
Investigation Meeting:	10 December 2014 at Opotiki
Submissions Received:	24 April 2015 from Applicant and Respondent
Date of Determination:	8 May 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Parkinson) alleges that she is owed wages by the respondent (the Preschool). The Preschool denies that there are any wage arrears outstanding.

[2] Ms Parkinson was initially employed by the IHC but in 1991 the Preschool was established and it is common cause that Ms Parkinson had a significant role in that establishment. She was the first manager/supervisor of the Preschool and remained in that capacity until her resignation took effect on 10 March 2012. Indeed she held the licence for the Preschool as well.

[3] Ms Parkinson says that at the time of her resignation, she was owed the sum of $40,608.88 in wage arrears, that that sum was agreed to be paid to her by the

Preschool, that the intention was that the Preschool pay that amount by instalments but that, having made the commitment to pay, the Preschool then resiled from the agreement and no attempt was made to repay the arrears.

[4] For its part, the Preschool acknowledges that Ms Parkinson was its employee for the period stated but denies that Ms Parkinson is owed any arrears of wages. Indeed, the Preschool contends that far from it owing Ms Parkinson money, in fact she has been grossly overpaid over the period of the employment principally as a consequence of her own negligence or incompetence.

[5] Moreover, while acknowledging that at the time Ms Parkinson resigned her employment there was an agreement to pay the arrears by instalments, that agreement was activated by mistake because the trust board which committed to making the repayments was unaware that there had never been an authorisation for the increase in wages which created the arrears situation. That being the position, the Preschool declined to make any repayments as in effect, the increase on which the arrears are based was never approved by the Preschool.

[6] The employment relationship problem turned on what happened in 2008. The operative collective employment agreement styled *Opotiki Rose Garden Preschool Early Childhood Educators' Collective Employment Contract 1 July 2008 to 30 June 2009* was clearly received in the Preschool around the time it came into effect.

[7] On 1 August 2008, the Preschool's Board met and amongst other things dealt with a report from Ms Parkinson as manager referring to the increases in remuneration for affected staff.

[8] It is common ground that that collective employment agreement resulted in significant increases in remuneration for affected staff and it is the application of that document which drives Ms Parkinson's claim for arrears of wages.

Issues

[9] I need to consider the following questions:

(a) What application does the collective employment agreement have; and

(b) Was Ms Parkinson's increased remuneration ever approved?

What is the application of the collective employment agreement?

[10] It is common cause that Ms Parkinson's claim for arrears of wages is based on her contention that the Opotiki Rose Garden Preschool Early Childhood Educators' Collective Employment Contract 1 July 2008 to 30 June 2009 (the collective agreement) applied to her and in consequence, she derived entitlement to increased remuneration over the balance of the employment from the operative date of the collective agreement (1 July 2008) down to the operative date of her resignation.

[11] But I am satisfied on the evidence before me that Ms Parkinson's contention in that regard is entirely misconceived and that in fact the collective agreement did not provide her with either a rate of remuneration or a mechanism for deriving it.

[12] It is true that when the collective agreement was received in the Preschool, it resulted in increases for teaching staff but in applying the same percentage increase to her own position, Ms Parkinson was clearly in error and taking money by way of salary that she had absolutely no entitlement to. When the investigation meeting proceeded in Opotiki on 10 December 2014, the collective agreement was not before me although it was referred to by a number of witnesses who gave evidence. As a consequence of all of that, I conducted further inquiries. I wrote to the Ministry of Education which helpfully responded promptly to my inquiries and by agreement with counsel, I scheduled another visit to Opotiki so that I could personally examine the files held by the Preschool and hopefully seek and obtain further and better particulars.

[13] In the result, principally as a consequence of my workload, my return visit to Opotiki was delayed and I can only apologise to the parties for the further delay in getting this matter determined by the Authority as a consequence.

[14] However, the second visit to Opotiki was successful in that, as part of my review of the Preschool's files, I was able to find not only a copy of the collective agreement but also a copy of Schedule A to that collective agreement which lists the employee parties to the collective agreement. I have before me now as I write this determination a copy of Schedule A which lists Ms Parkinson as an employee party and appears to have her signature appended against her name.

[15] The collective agreement is not as artfully worded as it might be and contains a number of basic errors like the perpetuation of a reference to the Employment

Contracts Act 1991 when that statute had been repealed and replaced with the Employment Relations Act 2000. However, of more moment for present purposes is the definition of parties to the collective agreement.

[16] Clause 1.1 of the agreement is in the following terms:

> *This collective employment contract is made pursuant to s.20 of the Employment Contracts Act 1991, and is made between, and is binding on, the following parties: Opotiki Rose Garden Preschool who shall be referred to in this contract as the "employer" and "employees" as listed in Schedule A.*
>
> *Employees who make an agreement with the employer to become parties to this contract during the currency of its term.*

[17] While the reference to the Employment Contracts Act is otiose and the syntax leaves something to be desired, the thrust of this provision appears to be to create the Preschool as employer and employees who sign up to be parties with the agreement of the employer are both covered by the document. For the avoidance of doubt, it is apparent that Ms Parkinson did append her name to Schedule A as an employee party to the contract.

[18] Clause 1.2 of the collective agreement is equally short on syntax and is in the following terms:

> *All early childhood employees who become employed by the employer during the currency of its term and who agree to become party to it:*

[19] I apprehend that the intention of the drafter was to create a clause which had the agreement cover the employment of new staff who agreed to be covered by the agreement.

[20] Finally, clause 1.3, also bereft of syntax, says:

> *... who shall be referred to as educators or employees.*

[21] Taking the whole parties clause or set of subclauses as a totality, I discern that the intention of the drafter and of the negotiating parties was to create a provision where the employer was the Preschool, employees who agreed with the employer to become parties would become so and new employees could be covered by the document if they agreed to.

[22] Of course, none of those provisions, at face value, deal with the definition of an employee and were that the only relevant provision, it would be easy to see how Ms Parkinson might have easily formed the view that the document covered her. The only false note relative to such a conclusion might have been the provision in clause 1.3 which seems to contemplate that employees are to be referred to as either *"educators or employees"*.

[23] Ms Parkinson is not an educator in the sense that she is not in any sense involved in the *"supervision, care and education of children"*. She is a manager of the Preschool (originally the licensee) and as such is not in any sense an educator.

[24] The next clause of the collective agreement is entitled *"Definitions"* and contains a number of definitions relating to teaching staff but concludes with a final definition in the following terms:

> *2.7 Manager/administrator: Any employee employed to undertake management and/or administrative duties.*

[25] Then, clause 3 relates to wages and clause 3.1 repeats the provision relating to manager/administrator that was contained in clause 2.

[26] Finally, clause 20 of the collective agreement again styled manager/ administrator is in the following terms:

> *The wages and conditions for any administrator who is party to this contract shall be a salary position negotiated with the trustees and reviewed annually.*

[27] It is apparent to me on the evidence I heard that what Ms Parkinson did was simply apply the percentage increase prescribed in the collective agreement for teaching staff to her own salary and conditions rather than do as the collective agreement requires and negotiate a salary rate with the Preschool.

[28] As a matter of fact, the evidence for Ms Parkinson was that on and from the 2008 increase in remuneration for teaching staff, she increased her own remuneration by a factor of 65% moving from a fortnightly payment of $1,492.52 to a fortnightly payment of $2,476.52, both figures being expressed as gross payments.

[29] I am satisfied that these increases were not contemplated by the terms of the collective agreement because all that has happened is that Ms Parkinson has applied

the percentage increase from the collective agreement, that percentage increase being relevant to teaching staff but not to non-teaching staff as she was.

Was any increase ever agreed to by the Preschool?

[30] As I have just noted, I am satisfied that Ms Parkinson did not correctly apply the provisions of the collective agreement which, in relation to her position, required that she negotiate with the Preschool for a salary and renegotiate that annually.

[31] Put shortly, there is no evidence before the Authority, even on Ms Parkinson's own evidence, of any resolution for an increase in her remuneration, either in 2008 or subsequently.

[32] The best that Ms Parkinson could offer was that, in relation to the meeting of the board of trustees on 1 August 2008 which discussed the new collective agreement increases, was her observation that *"I assumed they* [the trustees] *had taken it* [her increase] *on board"*.

[33] Nowhere in the documents before the Authority is there any evidence of any such *"taking on board"*. The minutes of the meeting of 1 August 2008, which appears to be informal anyway because there was no quorum present, simply records *"Shirlie will speak to Julie re salary, new contract effective from 01.07.08. All staff pay is affected. Action after discussion with accountant"*.

[34] The following meeting of the trustees held on 22 August 2008 simply records relevantly:

> *Wages checked out with Julie and Mel Cole at Cookson Forbes (Chartered Accountants).*

[35] I am satisfied that neither of those provisions, nor indeed any of the other like minute entries that have been drawn to my attention, constitute anything like authority from the Preschool for Ms Parkinson to pay herself the increase that she in fact paid on and from August 2008.

[36] In the absence of such a resolution, I am satisfied that Ms Parkinson has not complied with the requirements of the operative collective employment agreement and as a consequence, she is not entitled to the arrears of wages that she is currently claiming.

[37] There is no basis on which she has any entitlement to simply apply the same percentage increase that applies to teaching staff to her position as the operative collective employment agreement makes a separate provision for her position requiring her to negotiate with her employer and the evidence before me does not suggest that she ever did that.

[38] Indeed, on the face of it, Ms Parkinson has been grossly overpaid since August 2008 and if it chose to, the Preschool could seek recovery of the overpayment from Ms Parkinson.

[39] Worse than that, it is apparent that Ms Parkinson incorrectly paid holiday pay to herself on the basis of a calculation which was simply wrong. Her practice was to pay herself 10% of her gross annual earnings on top of her annualised salary. The effect of this practice was to give her a total annual income equivalent to 57 weeks' salary per year. Ms Parkinson's evidence on the point clearly confirms this was her practice, that all staff were treated similarly, and that she had always done it this way. This evidence rather overlooks that the practice was wrong in law, that Ms Parkinson ought to have known that, or if unsure checked with the able accounting advice available to her, and most importantly, that the Preschool was reliant on her to get such matters right.

Determination

[40] For the reasons that I have already enunciated, I am satisfied that Ms Parkinson has no entitlement to arrears of wages and has in fact been grossly overpaid as a consequence of her unilateral decision to apply the percentage increase that applied only to teaching staff to her remuneration when she should in fact have negotiated with her employer in respect to a salary increase and she did not. The addition to this overpayment of the unearned holiday pay exacerbates the extent of the problem.

Costs

[41] Costs are reserved.

James Crichton
Member of the Employment Relations Authority