

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 134
5459925

BETWEEN PAMELA SHEATH
Applicant

A N D THE SELWYN
FOUNDATION
First Respondent

A N D SELWYN CARE LIMITED
Second Respondent

Member of Authority: T G Tetitaha

Representatives: T Drake, Counsel for the Applicant
S Langton/C Hogg, Counsel for the Respondents

Investigation Meeting: 26 and 27 February 2015 at Auckland

Submissions Received: 27 February 2015 from the Applicant
27 February 2015 from the Respondent

Date of Determination: 11 May 2015

DETERMINATION OF THE AUTHORITY

- A. The application for payment of wage arrears pursuant to 131 and 161(1)(b) and (g) of the Employment Relations Act 2000 is dismissed.**
- B. The personal grievance of unjustified disadvantage is dismissed.**
- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Reverend Pamela Sheath (the applicant) alleges her employment agreement was breached by the respondent's failure to pay insurance and pension fund contributions. She seeks to recover those payments as wages arrears and/or damages. She also alleges an unjustified disadvantage by the respondents' refusal to increase her salary.

Facts leading to dispute

[2] Rev Sheath was employed from 2001 to 2005 as a part time vicar by the Waimate North Parish, which is part of the Auckland Anglican Diocese. As part of her employment she was eligible to join the New Zealand Anglican Church Pension Fund (Pension Fund). The Parish became aware she had not joined the Pension Fund and was not making any personal contributions. Rev Sheath was told she was not a member of the Pension Fund, had not been making the required salary contributions of 6 percent per annum and the Parish had stopped making employer contributions as a result.

[3] On 19 May 2006 she obtained fulltime employment with the Selwyn Foundation and from March 2012 Selwyn Care Limited (the respondents) as a chaplain at the Selwyn Village, Pt Chevalier, Auckland.

[4] The Selwyn Foundation is a charitable trust that owns or manages nine retirement villages located between Whangarei and Cambridge. Selwyn Care Limited is a company that employed the applicant and others working within the retirement villages.

[5] Her employment agreement provided for remuneration as follows:

6. Remuneration

6.1 You will receive a total remuneration package made up as follows:

- *Stipend of \$39,469 per annum;*
- *Payroll life insurance being 1.26% of the gross annual stipend;*
- *Stipend Continuance Insurance being .69% of the gross annual stipend;*
- *Pension Board contribution at 9%.*

Insurance payments above are made directly to the Anglican Diocese of Auckland.

...

- 6.2 *Salary payments will be paid net of income tax (and any agreed deductions), in monthly instalments, by the 15th of the month, and will be direct credited to your nominated bank account.*
- 6.3 *Your remuneration package is reviewed at the end of each financial year, following advice from the Anglican Diocese of Auckland and in conjunction with a performance review. If there is likely to be a change to this review date it would be agreed with you. Reviews do not automatically result in increases in salary.*
- 6.4 *The Foundation is committed to the reward of good performance, ensuring that individuals are recognised for skill and effort and that they have satisfying careers with the Foundation.*

Insurances and Pension Board Contribution

[6] It is common ground the insurances were not paid to the Auckland Anglican Diocese and the Pension Board contribution was not paid to the New Zealand Anglican Church Pension Fund. During all material times, Rev Sheath did not join or make any personal contributions to the New Zealand Anglican Church Pension Fund.

[7] On 30 June 2008, Rev Sheath joined the KiwiSaver compulsory superannuation scheme. It is accepted both parties made the required contributions to her qualifying superannuation scheme.

[8] On 26 December 2011, Rev Sheath turned 65 and ceased to be covered by the payroll life insurance and stipend continuance insurance. She also ceased to be eligible to become a member of the New Zealand Anglican Church Pension Fund.

[9] On 5 December 2013, Rev Sheath raised with the respondents non-payment of the insurances and pension board contribution.

Salary Increase

[10] At all material times the respondents provided Rev Sheath with a housing benefit in the form of rent free accommodation in the Point Chevalier area.

[11] On 1 May 2014, the Anglican Diocese of Auckland published its new salary rates.

[12] On 24 June 2014, Rev Sheath was advised that she would not be receiving a salary increase.

[13] On 1 July 2014, following an unsuccessful mediation, Rev Sheath filed a Statement of Problem. It alleged breaches of her employment agreement, the Employment Relations Act 2000, Kiwisaver Act 2006 and an application for compliance order.

[14] On 5 August 2014, Rev Sheath raised a personal grievance of unjustified disadvantage due to the respondents' refusal to grant her a salary increase.

[15] On 1 September 2014 the matter came before me for teleconference. Issues about the causes of action, time limitations and remedies were discussed. The matter could not be set down for hearing until 26 and 27 February 2015 due to the unavailability of parties and Counsel.

[16] On 29 September 2014, an amended Statement of Problem was filed. It added a cause of action of unjustified disadvantage.

[17] On 5 January 2015, the applicant filed a second amended Statement of Problem. This added a further alternative cause of action seeking wage arrears.

[18] On 25 February 2015 (one day prior to hearing), a third amended Statement of Problem was filed deleting reference to any cause of action for breaches of the KiwiSaver Act 2006.

[19] The matter is now before me for determination.

Issues

[20] The issues for hearing were originally set down at the teleconference held on 1 September 2014. However they have expanded and contracted with the filing of the various amended statements of problem. They are now:

- (a) Whether this application is barred by the time limitation in s.142 of the Employment Relations Act 2000 (Act)?
- (b) Whether the non-payment of the insurance and pension contributions was a breach of the applicant's employment agreement?

- (c) What remedies should be awarded including quantification of damages?
- (d) Whether the applicant was unjustifiably disadvantaged by the employers' failure to raise her salary in accordance with the published Anglican Diocese salary rates?

Whether this application is barred by the time limitation in s.142 of the Employment Relations Act 2000 (Act)?

[21] The applicant submits her cause of action alleging breaches of her employment agreement is not statute barred by s142 of the Act because there have been continuing breaches every month the payments were due to be made and the respondents failed to make them. The parties agreed the period they attempted mediation (45 days 23 April to 9 June 2014) would be excluded from the calculation of the six year period. Given the Statement of Problem was filed on 1 July 2014 and taking out the 45 day period, the monthly breaches of contract from May 2008 are within the six year time limitation. It is accepted the application for personal grievance alleging unjustified disadvantage is unaffected by s142.

[22] Section 142 of the Act prevents the commencement of actions in relation to an employment relationship problem that is not a personal grievance more than 6 years "*after the date on which the cause of action arose.*" There is no express power to extend the time limitation period.

[23] Irrespective of the knowledge or imputed knowledge of the applicant the cause of action accrues "*when the elements necessary for prosecuting them came into existence.*"¹

[24] An agreement to 'suspend' 45 days during mediation does not allow me to extend the time limitation period. The Authority was created by statute. As such, it "*... can only do what the statute creating it has authorised it to do*"². Section 142 of the Act does not provide for the extension of time by parties' consent.

[25] The elements required for a cause of action in breach of contract were present when the first date for payment of the insurances and pension board contribution fell

¹ *Haig v Edgewater Developers Ltd (No 5)* [2012] NZEmpC 189 at [17]

² *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228 at 238

due. Rev Sheath's evidence was the due date for the first payment occurred one month after she started work (19 June 2006). As at 19 June 2006 the cause of action for breach of contract accrued because all of the elements necessary for prosecuting it existed. The continual non-payment of the insurances and pension board contribution is relevant to the duration of the period for the assessment of loss or damages. It does not give rise to new causes of action.

[26] Therefore the last date for filing an application in the Authority was six years later or 19 June 2012. No action for breach of contract can therefore be brought after that date by operation of s142 of the Act.

[27] In the circumstances I determine the applicant's cause of action for breach of contract in respect of issues (b) and (c) are statute-barred by operation of s.142 of the Act.

Whether the non-payment of the insurance and pension contributions was a breach of the applicant's employment agreement?

[28] In the event I am wrong about the operation of s.142, I have considered the merits of the application. The applicant submits the respondent breached the employment agreement by non-payment of her insurances and pension fund. She alleges it was compulsory for clergy to join the pension fund and the respondents failed to facilitate this. She further alleges there was a breach of the duty of good faith during a conversation in 2006 between Rev Sheath and the then respondent Chief Executive, Duncan Macdonald. She alleges Mr MacDonald told her she was "*too old*" to join the Pension Fund.

[29] The respondent submits that a term that the applicant must be a member of the Pension Fund can be implied into the employment agreement. It can be deduced by implication or interpretation from the express terms of the contract. As the applicant did not join the Pension Fund and remained covered by the respondent's group insurance scheme, no breach occurred.

[30] There are three broad classes of implied terms in employment contracts:³

³ *Attorney-General v New Zealand Post-Primary Teachers' Assoc* [1992] 2 NZLR 209, [1992] 1 ERNZ 1163 (CA) at 1167 citing with approval the dicta of Cooke P in *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58 at p 64.

“... terms implied by rules of law in certain kinds of contract (eg sale of goods), terms deduced by implication or interpretation from the express terms of the contract, and terms held to be implied to give business efficacy to the contract.”

[31] Michael Buckley, Pension Fund administrator, confirmed full time clergy employed by the Church were compulsorily required to join the Pension Fund. Part time clergy were not required to join. This evidence accords with the evidence her previous employer, Waimate North Parish that she was not a member of the Pension Fund given she was employed as a part time clergy.

[32] The respondents are a charitable trust and company. They are separate entities from the Anglican Church, although they may have aims and objects which closely align with its philosophies. The applicant was not a clergy employed by the Church at the relevant times. Policies of compulsory joinder for Church employed clergy do not apply here.

[33] Mr Buckley gave further evidence that an employee was legally required to fill in an application form to join the Pension Fund attesting to various matters. An employer could not sign up an individual to the Pension Fund. Once they were signed up, the Pension Fund would send out a schedule listing the payments required from the employer and employee.

[34] Rev Sheath's evidence was she knew she was not a member and needed to take steps to become one. She also knew she needed to make her own contributions and her eligibility to join the Pension Fund and insurance coverage ended at 65 years.

[35] The evidence supports the implication of terms about the Pension Fund remuneration in clause 6. There must be an implied term Rev Sheath join the Pension Fund prior to age 65 years and make her own contributions prior to receiving the express remuneration contribution from the respondent.

[36] Rev Sheath turned 65 in 2011. She would have known she was not *“too old”* to join in 2006 when her conversation with Mr MacDonald allegedly occurred. She admitted under cross examination it was *“a frivolous conversation when he said I was too old. I didn't take it any further.”* She did not appear to rely upon his alleged comment to her detriment.

[37] There is evidence Rev Sheath was in financial difficulty in 2006. When she started her employment in 2006 she had lost her home, business and was coping with an ill husband and his subsequent death. Duncan MacDonald, Chief Executive, confirmed the reason he allowed Rev Sheath to have free accommodation as opposed to a housing allowance was because she was in dire financial and personal need at the time. In the circumstances it is more probable she could not have afforded the 6 percent contributions required for the Pension Fund in 2006.

[38] I do not accept Duncan MacDonald knowingly or recklessly made the statement Rev Sheath was “*too old*” to join the Pension Fund. The first time this conversation is raised was in Rev Sheath’s brief of evidence. There is no detail about the date (other than it occurred in 2006) and time and no corroborating evidence. This makes it difficult if not impossible for Mr MacDonald to answer other than with a blanket denial.

[39] There also appears little reason for Mr MacDonald to make this comment. He was not required to offer her the Pension Fund benefit. He could have deleted all reference to the Pension Fund in the employment agreement he instructed Lorraine Sobotka to draft.⁴ He did not.

[40] Lorraine Sobotka, HR Manager gave payroll instructions about the pension including filling in a Personnel Data record dated 15 February 2006.⁵ The Personnel Data includes within the pay rate “*\$38,043.20 stipend plus insurances, pension & [allowances] as in Employment Agreement.*” It did not appear that Mr Macdonald had instructed Ms Sobotka or payroll to stop Pension Fund payments even if he had made the statement as alleged.

[41] I accept as Chief Executive, Mr MacDonald would not concern himself about Rev Sheath joining the Pension Fund. I accept he knew very little about the Pension Fund. It was administered by a combination of the Auckland Anglican Diocese and Michael Buckley, the Fund’s Administrator. There seems little reason for him to be discussing her Pension Fund eligibility at all.

[42] There is evidence Rev Sheath was covered by the group insurance policy irrespective of payment of premiums. Phillip Puttick, a group and personal risk

⁴ Affidavit LV Sobotka para 2

⁵ Document 1 Agreed Bundle of Documents

specialist for Aon Life, gave evidence she was covered by the respondent's group insurance cover irrespective of whether the payments were made or not. If the applicant made a claim the respondents would be required to pay all outstanding premiums before it was accepted. The respondent submitted if the insurer refused to make payment, it was prepared to pay the equivalent sum to the applicant if a claim was made. No claims were made prior to Rev Sheath turning 65 years. No payment is required.

[43] Given the above, I determine there was no breach of the employment agreement by non-payment of insurance premium and Pension Fund contribution.

What remedies should be awarded including quantification of damages?

[44] Even if I found there was merit in the causes of action, there are problems with the remedies sought. The applicant seeks recovery of remuneration under clause 6 of the employment agreement from 2006 to 2015 totalling \$43,130.17⁶ pursuant to s.131(1)(a) and s.161(1)(b) and (g) of the Act.

Wage arrears

[45] Section 131 of the Act allows recovery of wage arrears where “*there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement*” [Emphasis added]. The alleged payments in default are not payments made to the applicant employee. They were to be made to a third party insurer, AON Life, and the New Zealand Anglican Church Pension Fund. The defaulting payments are not wages or money payable to the applicant employee under s131(1)(a) of the Act.

Damages

[46] Rev Sheath seeks various damages. The starting point for an assessment of damages must be to restore the applicant to the position she would have been in had the breach of contract not occurred. The issue of causation is determined by asking whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.⁷

⁶ Schedule Remuneration not paid Applicants Submissions 27 February 2015

⁷ *Rooney Earthmoving Ltd v McTague* [2012] NZEmpC 63, (2012) 9 NZELR 694 at [19] – [20] and [52]

[47] Given Rev Sheath remained covered by the respondent's group insurance policy despite non-payment of premiums and made no claim, she cannot have suffered any loss in the circumstances.

[48] Given Rev Sheath's knowledge about the Pension Fund, failure to join and financial situation at the time, she cannot have or reasonably been expected to have suffered loss as a consequence.

Compliance Order

[49] Rev Sheath seeks a compliance order. I have no draft order before me. I assume the order sought is for payment to the third parties of the amounts allegedly owed under the employment agreement. The respondent cannot possibly comply. The terms of the respondent's insurance limit coverage to 65 years. The terms of the Pension Fund prohibit joining the scheme after 65 years. Rev Sheath passed the age of eligibility in 2011. The making of a compliance order would be futile in the circumstances. Given the serious consequences for breach, I would not be inclined to order compliance.

[50] The application for payment of wage arrears pursuant to 131 and 161(1)(b) and (g) of the Employment Relations Act 2000 is dismissed.

Was the applicant unjustifiably disadvantaged by the employers' failure to raise her salary in accordance with the published Anglican Diocese salary rates?

[51] Rev Sheath submits she was unjustifiably disadvantaged by the failure to raise her salary in 2014. This is because the Anglican published salary rates increased the clergy salaries and no performance review had been conducted until five months after the decision not to increase her salary had been made. She submits the wording in clause 6.3 that "*reviews do not automatically result in increases in salary*" does not give the respondent an unfettered discretion to take into account other considerations that the contract does not provide. The applicant further submits that the respondents have engaged in a course of conduct where her stipend has been increased every year since her employment. She submitted the respondent introduced an irrelevant factor about the cost of employee housing as the basis for withholding the salary increase thereby causing disadvantage to her.

[52] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[53] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[54] I do not consider the failure to raise Rev Sheath's salary caused unjustifiable disadvantage to her. This is because clause 6.3 of the employment agreement provides for a remuneration review only. It does not guarantee a salary increase. This is expressed in the last sentence of clause 6.3 which states "*reviews do not automatically result in increases in salary.*" The exercise of the discretion about salary increases cannot be fettered by the outcome of the review.

[55] It is common ground Rev Sheath had made bullying allegations against her then manager resulting in the delay in her performance review. By 24 June 2014 when Rev Sheath had been advised of the decision not to increase her stipend, she was aware no performance review had been undertaken because of her allegations. The six month performance appraisal was completed on 15 October 2014. The previous 12 month performance appraisal appears positive scoring Rev Sheath 6 out of 7 on all areas. Neither review showed any performance issues for Rev Sheath. This does not fetter the decision about salary increases. It must be balanced against any other relevant factors pertaining to remuneration.

[56] Leanne Pickering, General Manager People and Performance, made the decision to refuse the salary increase. This was because Rev Sheath was receiving a more beneficial housing arrangement than other employees worth approximately \$31,200. All other employee chaplains were receiving a housing allowance of approximately \$19,000. In early 2014 Ms Pickering became aware that a significant tax liability had been incurred in respect of Rev Sheath's occupation of the respondent's housing property in Point Chevalier. PAYE should have been paid to

the Inland Revenue Department based upon the full market rental for the property. No PAYE had been historically deducted or accounted for. Despite attempts to discuss remuneration with Rev Sheath this remained unresolved. Under cross-examination Ms Pickering denied any bad motive in declining to increase the salary.

[57] Rev Sheath's housing arrangement was part of her remuneration. There is substantial disparity between Rev Sheath and the other chaplain employees' remuneration in terms of housing. The issues of taxation and disparity were directly relevant to the decision about her salary increase.

[58] I see nothing disadvantageous in the decision not to increase salary being made in advance of a performance review. It was not the reason for declining the salary increase. The late performance review would not have affected the decision, was a minor defect and did not cause unfairness. The refusal of a salary increase in these circumstances was not unfair or unreasonable.

[59] The personal grievance of unjustified disadvantage is dismissed.

[60] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority