

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 80  
3024900

BETWEEN            WARREN    MANU    KIRK  
                          WARBRICK  
                          Applicant

AND                    TE MANAWA MUSEUMS  
                          TRUST  
                          Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Caroline Mayston, counsel for Applicant  
                                  Alastair Espie, counsel for Respondent

Investigation Meeting:    On the papers

Submissions and  
Information  
Received:                5 and 26 October 2018 from the Applicant  
                                  19 October and 1 November 2018 from the Respondent

Date of Determination:    15 February 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Warren Warbrick commenced work as a trainee Exhibitions Officer with a predecessor of the respondent, Te Manawa Museums Trust, on 25 November 1985. I shall refer to the respondent and its predecessors as "Te Manawa" for the purposes of this determination.

[2] Mr Warbrick resigned from his employment on four weeks' written notice effective from 10 February 2006. He was paid out accrued annual and long service leave entitlements

at that time. In July the same year he was offered, and accepted, employment with Te Manawa as a Preparator. He recommenced work at Te Manawa on 11 September 2006.

[3] Mr Warbrick's position, which by this time was described as Technician, was disestablished by Te Manawa effective from 22 December 2017 and he was paid redundancy compensation. He claims Te Manawa calculated the amount of this incorrectly with regard to his length of service. He believes his service should have been calculated from November 1985 rather than September 2006 which Te Manawa used as the commencement of his employment.

[4] Mr Warbrick contends his claim is in line with both the collective agreement that determined the terms and conditions of his employment in September 2006 and with an understanding he had with the then Executive Director of Te Manawa when he left in February 2006 to take up a teaching position.

[5] Te Manawa rejects Mr Warbrick's claim and says his redundancy compensation was calculated correctly.

### **The Authority's investigation**

[6] When Mr Warbrick's proceedings were lodged in the Authority he had several claims relating to the termination of his employment. All matters were subsequently resolved other than that relating to the length of his service for the calculation of his redundancy compensation. It was agreed with the parties this remaining issue would be determined on the papers following affidavits and submissions from the parties.

[7] I have not set out a record of all the evidence received nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of Mr Warbrick's claims in accordance with s 174E of the Employment Relations Act 2000 (the Act).

[8] This determination has been issued outside the timeframe set out at s 174D (2) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174D (3) to do, are exceptional.

## Issue

[9] The issue for determination is whether:

- a. Te Manawa was correct in calculating Mr Warbrick's service, for the purpose of redundancy compensation, as having commenced on 11 September 2006; or
- b. Te Manawa should have used Mr Warbrick's initial commencement date of 25 November 1985 for the redundancy compensation calculation.

## The Employment Agreement

[10] Mr Warbrick evidence was that he had rejoined the New Zealand Public Service Association Inc. (the PSA) on his return to Te Manawa in September 2006. His terms and conditions of employment were those of the Collective Agreement (CA) negotiated between the PSA and Te Manawa, in force at the time.<sup>1</sup>

[11] That CA contained the following terms and conditions of employment that are relevant to this determination:

1.5 **Term**

The Agreement shall commence on 1 July 2006 and remain in force for 12 Months, terminating 30 June 2007.

1.7 **Definitions**

...

***Recognised Service***

For the purpose of establishing employee service related entitlements the following applies:

- (a) For all existing employees their currently recognised previous service is retained, being employment with the Manawatu Art Gallery Trust Board, the Manawatu Museum Society Inc., The Science Centre (Inc.), the Palmerston North City Council as employees of The Science Centre & Manawatu Museum and Manawatu Art Gallery, and The Science Centre, Manawatu Museum and Manawatu Art Gallery Trust.
- (b) For staff employed after the enforcement of this Agreement no previous service will be recognised for the purpose of:

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<sup>1</sup> Te Manawa Museums Trust Collective Employment Agreement, 1 July 2006 to 30 June 2007.

- i. Annual Leave
- ii. Sick Leave
- iii. Severance

(c) Continuous service means that any break in service did not exceed one year

## 17.2 Staff Surplus

17.2.1 ...

### 17.2.2 (a): For employees identified in schedule 1 of this agreement they will be entitled to the following redundancy compensation:

Compensation payments shall be paid to employees ... whose employment is terminated due to redundancy according to the following formulae:

- 6 weeks salary for the first year of continuous service with the Employer,
- 2 weeks salary for each subsequent year of continuous service,
- A pro-rata payment for the part year of service.

[12] Mr Warbrick was one of the employees identified in schedule 1 of the Agreement as referred to in clause 17.2.2 (a). The full Staff Surplus clause has not been reproduced, but only those parts relevant to Mr Warbrick's situation.

[13] A number of collective agreements were subsequently negotiated between the PSA and Te Manawa. The latest such CA produced by the parties commenced on 1 July 2016 and was due to terminate on 30 June 2017. As neither party produced a later version I assume that CA continued in force beyond its expiry date in accordance with s 53 of the Act and was in force at the time of Mr Warbrick's departure from Te Manawa in December 2017.

[14] The *Recognised Service* provision is not included in any collective agreement between the parties after the 2006/2007 CA. It was, however, part of the 2005/2006 CA in force at the time Mr Warbrick resigned from his employment effective from February 2006. He was named as a member of the PSA in the first schedule to that CA and his employment terms and conditions were those of the CA.

**Evidence and submissions of the parties**

[15] In an affidavit Mr Warbrick said that he had left Te Manawa in February 2006 to take up a teaching role at a local secondary school. He said the Museum Director at the time, Susan Miller-Thevenard, encouraged him to consider returning to Te Manawa if things did not "work out" at the school.

[16] Things did not work out and Mr Warbrick accepted an offer of employment from Te Manawa, rejoining the organisation and the PSA in September 2006. In his evidence Mr Warbrick referred to the "continuous service" provision of the CA in force at the time, as reproduced above at [11] 1.7 (c). He said the PSA was in negotiations on the CA at the time and it is his evidence that a PSA Organiser and a local PSA delegate both told him his service date of 1985 would still apply and his service would be continuous as his absence had been less than one year. Mr Warbrick said they told him, however, he would lose his long service leave as that had been paid out when he left in February 2006.

[17] Mr Warbrick also noted, and provided photographic evidence, that he was awarded a trophy in 2010 by the Acting Director of Te Manawa, recognising 20 years of service.

[18] He was disappointed to discover from the current Director of Te Manawa, Armando Lowe, his redundancy compensation was to be calculated from 11 September 2006, the date he recommenced employment after his seven months' absence. Mr Warbrick believes this is neither fair nor correct, and his service should be regarded as continuous from 25 November 1985.

[19] A solicitor for the PSA, Caroline Mayston, made submissions on behalf of Mr Warbrick. She submits that, when Mr Warbrick returned to work for Te Manawa on 11 September 2006, his service was deemed to be continuous by virtue of clause (c) of the Recognised Service provision of the 2006/2007 CA. This was because his break in service was for seven months, and therefore fell within the "continuous service" criterion of that provision. In Ms Mayston's submission, that position was reinforced by the awarding of a trophy to Mr Warbrick in 2010, recognising his twenty years' service.

[20] Evidence for Te Manawa was given by affidavit by its Director, Mr Lowe, its Human Resources Manager, Wayne Wilson, and by an Employment Consultant, Scott Doolan.

[21] Mr Lowe's evidence is that Mr Warbrick's severance calculation was properly made on the basis of his 11 September 2006 commencement date. He had talked with Mr Warbrick during the restructuring process about redundancy compensation and recalled Mr Warbrick referring to it as being calculated from the 1980's. He understood from Mr Warbrick that there was some agreement his service prior to his resignation in 2006 would be taken into account in that calculation, despite the 2016/2017 CA containing no provision for continuous service to include breaks in service.

[22] Mr Lowe deposed he had never been made aware of any such agreement and he has still not seen any evidence the Trust agreed to that arrangement. He said he had thoroughly searched through the Trust's records without success. He had, however, discovered a letter written to Mr Warbrick on 18 September 2009 regarding the 2009 -2011 CA and the impact on Mr Warbrick of changes in that document to sick leave and annual leave entitlements.

[23] The letter confirmed Mr Warbrick would "reach five years continuous service with Te Manawa on 11<sup>th</sup> September 2011". It also noted his start date, for purposes of sick leave entitlement, as 11 September 2006. Only the first page of the letter was produced, and as there is no indication of the contents of the second page or of a signature, I will not consider that document further.

[24] Mr Lowe also observed in his evidence that the letter of offer to Mr Warbrick of 7 July 2006 made no reference to his prior service being taken into account in any calculation of redundancy entitlement. He said he had not been working at Te Manawa at the time Mr Warbrick had received a trophy recognising "...20 years of loyal and dedicated service with Te Manawa". Mr Lowe expressed the view it was right that the trophy paid tribute to a total of 20 years with the organisation but he distinguished that from any agreement over the calculation of severance.

[25] Mr Wilson provided a short affidavit noting he had not been involved in assisting Te Manawa when Mr Warbrick was employed in 2006 and could not "speak to any discussions that occurred at the time". He said his view was that, if Mr Warbrick had been told his earlier service would be recognised as continuous, Te Manawa should stand by this. He had checked with the person who had looked after payroll at the time of Mr Warbrick's return to

the museum in 2006 and she had confirmed to him that Mr Warbrick's starting date for service was 11 September 2006.

[26] Mr Doolan deposed he had, on numerous occasions, been involved in collective bargaining with the PSA on behalf of Te Manawa. He said he had a clear recollection of the bargaining in 2007, in which one of Te Manawa's claims was the removal of the definition of "recognised service" that had been included in the 2006/2007 CA. This is the wording reproduced at paragraph [11] 1.7 above. Te Manawa was successful in its claim and that definition was absent from the 2007/2009 CA and all subsequent CAs.

[27] Mr Doolan also referred to a later bargaining round with the PSA in which a cap of 20 weeks' salary for redundancy compensation was agreed, with uncapped compensation remaining for existing employees who were PSA members. The preservation of their entitlement was achieved by way of creating a new schedule to the CA listing the employees to whom the uncapped redundancy compensation applied. Mr Warbrick was one of the named employees.

[28] Mr Doolan stated that there was no discussion at this bargaining round, or any other bargaining round he was involved in, about bringing back the continuous service definition from the 2006/2007 CA. Nor was there any agreement that the new schedule would reintroduce that definition for the named employees.

[29] Counsel for Te Manawa, Alastair Espie, submits Mr Warbrick's redundancy compensation was calculated correctly using 11 September 2006 as the date employment commenced. He refers to several factors in support, including that the 2016/2017 CA, which was in force when Mr Warbrick was made redundant, made no provision for continuous service to include breaks in service. In his submission Mr Warbrick's period of service prior to his resignation in February 2006 cannot form part of his "continuous service" because it was followed by an extended period when Mr Warbrick was not employed by Te Manawa.

[30] Mr Espie also refers to the lack of evidence of the existence of the agreement Mr Warbrick claimed to have had over the treatment of his previous service. In his submission the correspondence between the parties was consistent with continuous service having started on September 2006.

## **Discussion and conclusion**

[31] It is clear that Mr Warbrick's terms and conditions of employment at the time of his first departure from Te Manawa in February 2006 were determined by the 2005/2006 CA. This included the Recognised Service provision, which gave him the knowledge that, if things did not work out with the secondary school position, if he returned to Te Manawa within 12 months he could do so without any break in service.

[32] When Mr Warbrick returned to Te Manawa seven months later in September 2006 his terms and conditions of employment still included the Recognised Service provision. I accept Ms Mayston's submission that Mr Warbrick's service was deemed to be continuous at this point because it fell within the definition at clause 1.7 (c) of the CA.<sup>2</sup>

[33] I find this was not changed by the subsequent removal of the Recognised Service provision in bargaining for the 2007/2009 CA. Mr Warbrick's entitlement to unbroken service from 25 November 1985 had taken effect on 11 September 2006 and was not removed by a subsequent negotiated change to the collective agreement. His entitlement had in effect already crystallised and was not affected by the subsequent removal of the "continuous service" definition.

[34] This is consistent with the advice Mr Warbrick says he received from a PSA Organiser and a PSA delegate in 2006. I conclude that Te Manawa was wrong to calculate Mr Warbrick's redundancy compensation on the basis of a commencement of employment date of 11 September 2006. The correct date for purposes of his redundancy compensation entitlement was 25 November 1985.

## **Orders**

[35] Te Manawa is ordered to recalculate Mr Warbrick's redundancy compensation on the basis of a commencement date for his employment of 25 November 1985, and to pay him the difference between that amount and the compensation already paid to him.

[36] I note that in submissions on behalf of Mr Warbrick, an issue was raised over the salary rate on which Mr Warbrick's redundancy compensation was calculated. This had not

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<sup>2</sup> Both the 2005/2006 CA and the 2006/2007 CA.

been raised in the statement of problem and was objected to, but nonetheless answered, by counsel for Te Manawa on the basis of not prejudicing his objection to a new claim being raised in submissions.

[37] Counsel stated Te Manawa had instructed him that Mr Warbrick's redundancy compensation had been calculated at the increased rate of pay that had taken effect shortly before the end of Mr Warbrick's employment. As that is the rate of pay that should have been applied I assume that issue has been resolved. If not, leave is reserved for Mr Warbrick to return to the Authority for further assistance.

### **Costs**

[38] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority