New Zealand Employment Relations Authority Decisions

Watson v Ashburton District Council (Christchurch) [2016] NZERA 532; [2016] NZERA Christchurch 194 (28 October 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 194
5629105

BETWEEN JILLIAN WATSON Applicant

AND ASHBURTON DISTRICT COUNCIL

Respondent

Member of Authority: Eleanor Robinson

Representatives: Jeff Goldstein, Counsel for Applicant

Neil McPhail, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 12 September 2016 from Applicant

19 September 2016 from Respondent

Determination: 28 October 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Jillian Watson, claims that there is a dispute in regard to the interpretation of clause 5.2 of her individual employment agreement (the Employment Agreement) with the Respondent, Ashburton District Council (the Council).

[2] Specifically Ms Watson claims that the Council is not entitled to unilaterally alter the terms and conditions of her employment by requiring her to work 40 hours per week.

[3] The Council does not consider that this matter is a dispute in regard to clause

5.2 of the Employment Agreement; rather it considers itself in the process of bargaining for an individual employment agreement with Ms Watson.

[4] The Council claims that there is no jurisdiction for the Employment Relations Authority (the Authority) to adjudicate on a good faith individual employment agreement bargaining process.

Issues

[5] The issue for determination is whether or not the parties are engaged in a bargaining process such that the Authority does not have jurisdiction to intervene.

Background Facts

[6] Ms Watson commenced employment with the Council 41 years ago and is currently the Library Manager.

[7] Ms Watson was issued and signed an individual employment agreement on 20

May 2009 (the Employment Agreement). The Employment Agreement states at clauses:

1.2 This agreement sets out the terms of employment in full, no other arrangements or undertakings will be recognised as a term of this agreement unless they have been agreed in writing after the commencement of this agreement.

*5.1 Your fully effective (100%) salary was **$71,900** per annum as from 1 November 2008. In addition a 2% merit movement; increasing your total remuneration to $73,338 pa. Merit movements are performance based and are not automatically an ongoing commitment.*

5.2 The salary will be reviewed annually in July based on the market value for individual positions on a total remuneration basis. Total remuneration includes base salary plus all benefits including superannuation subsidy and vehicles. Should an alteration in rate arise from such a review it will be recorded in writing.

...

6.1 Your ordinary hours of work will be 37.5 per week. The majority of hours will be worked Monday to Friday, however based on the Library's operational demand you will be required to work some week day evenings (5.30 pm

– 8 pm), Saturdays (9.30am – 1.30pm) and Sundays (9am –

4pm). This clause is also subject to subclause 6.2 and 6.3.

[8] In each year after the Employment Agreement took effect in 2009, Ms Watson had been provided with salary increases based on Performance and Market value. Throughout this period Ms Watson's salary had been paid based on 103% of the range of salaries.

[9] Ms Watson worked a 37.5 hour week as set out in clause 6.1 of the

Employment Agreement.

[10] In every salary review from 29 January 2008 until the 2015 salary review the Annual Bench Marketing Benchmark report and the Pay Review report made no mention that Ms Watson's hours of work were taken into account in the pay review, referring to Ms Watson's pay level as being for a "full-time equivalent".

[11] In the 2015 report Ms Watson's hours of work became part of the methodology for setting her market rate. In the review report dated 25 August 2015 there was a new reference to Ms Watson's salary being assessed based on hours of work:

Your pay level before this review was $84,872 (fulltime equivalent,

103%of market).

The new midpoint for the 40 hour week is: $86,400

The new midpoint for the 37.5 hour week is: $81,000

[12] Ms Watson claims that prior to that time her remuneration review was not assessed on the basis of her work hours. This was in accordance with clause 5.2 of

the Employment Agreement which required the market value to be assessed for individual positions.

[13] On 26 August 2015 Ms Watson met with her manager, Mr Neil McCann. The Council states that during the meeting Mr McCann explained that the market data for Ms Watson's position had moved backwards but that, as with other employees, her salary would not be reduced.

[14] During the meeting, Mr McCann also provided Ms Watson with an opportunity to move to a 40 hours working week. He emailed Ms Watson on 27

August 2015 stating: "*I am currently finalising letters to Managers regarding their salaries, so would appreciate it if you could let me know what your decision is about our discussion yesterday. Ie considering the 40 hr/week option."*

[15] Ms Watson replied the same date stating: "*I am happy to go with the 40 hours, thanks. Apart from the extra money, it will ease some routines here, and make for a more cohesive team when the other library staff end up on 40 hours in due course".*

[16] In a letter to Ms Watson dated 28 August 2015; Mr McCann clarified that Ms

Watson's pay was reviewed in line with market data, and further stated:

This year's market movements are less than the previous year,

with a range from 0.19 to 4.02%, with an average of 2.03%.

...

... The Leadership Team also decided to implement advice from Strategic Pay to change the methodology relating to a number of organisation factors (ie size, turnover etc). This had had a positive impact on a few positions, including yours. However, due to the movement in salary, the Leadership Team wants to justify the extra expenditure by making this move conditional upon staff moving to a 40 hour week.

...

[17] In accordance with Ms Watson's email dated 27 August 2015; Mr McCann attached a copy of Ms Watson's market and merit review; a revised employment agreement, and advised that he would make the requisite changes to her salary.

[18] Ms Watson responded on 31 August 2015 stating: "*After reading the PDR and Market Remuneration letter, and the proposed revised Individual Employment Agreement, I will now require additional time to consider the situation and to seek advice.*"

[19] Mr Andrew Dalziel, CEO, wrote in response to the lawyer instructed to represent Ms Watson on 15 October 2015. In the letter Ms Dalziel stated:

...

Based on the current methodology used by the council, this year's market date has shown a relative decrease for Jill's position. The salary for the Library Manager role at 103% is now evaluated at a lower amount of $84,254 pa excluding Kiwisaver. Decreases like this happen with some positions from year to year.

...

... the Council has said it will maintain Jill's remuneration to

$84,872. If Jill chooses this option, while she will receive no salary increase this year she will be remunerated in excess of

103% of the latest market data, and continue to work 37.5 hours a week.

The Council's Leadership Team has accepted advice from Strategic Pay that we could make some changes to the methodology used to size positions. Essentially some of the factors evaluated for positions are given slightly different weightings. In doing so, for a limited number of positions, of which Jill's is one, there is a positive impact for remuneration.

...

The Leadership Team has made a decision to offer to apply that change in methodology to those employees who would benefit from it if they are prepared to work 40 hours a week.

...

The offer made to Jill under that option is still at 103% level and translates to a salary of $88,992 p.a. excluding Kiwisaver.

[20] Ms Sarah Moseley, Manager of the Council's People and Capability, confirmed the Council's view that it was engaged in a good faith bargaining process for variation of Ms Watson's Employment Agreement in a letter dated 18 February

2016 stating:

As we see it, and as part of good faith bargaining Jill can:

a) Continue to work 37.5 hour week and remain on her 2014-15 salary 103% x 82,400 = $84,872

b) Continue to work 37.5 hours week, remain using the previous remuneration methodology and receive 103% x

81,800 = $84,254

c) Move to a 40 hour week, benefit from the new remuneration methodology and receive 103% x 86,400 = $88,992

...

In summary, we stand by our offer (option C), however if Jill prefers option a) for the remainder of the 2015-16 year and the old methodology going forward, we are also agreeable to that.

[21] The Council confirmed the options being made available to Ms Watson in a further letter dated 24 May 2016, in which it stated:

Our client's position remains as stated in its correspondence ... dated 18 February 2016, i.e. as part of good faith bargaining, your client has one of 3 options available to her; she can:

a) Continue to work 37.5 hour week and remain on her 2014-15 salary 103% x 82,400 = $84,872

b) Continue to work 37.5 hours week, remain using the previous remuneration methodology and receive 103% x

81,800 = $84,254

c) Move to a 40 hour week, benefit from the new remuneration methodology and receive 103% x 86,400 = $88,992

...

Determination

[22] The Authority has jurisdiction pursuant to s 161 (1)(b) of the Employment Relations Act 2000 (the Act) to make determinations about matters relating to a breach of an employment agreement, but not, pursuant to s 161 (2) of the Act, to make a determination about any matter relating to: *"(a) bargaining; or (b) the fixing of new terms and conditions of employment".*

[23] The Court of Appeal judgment in *Canterbury Spinners v Vaughan1* said

[41] ... what s 161(2) prohibits the Authority .... from doing is being involved in the process of creating a new contractual term or terms – either when the parties are starting from scratch and constructing an entirely new agreement or when they are working towards supplementing or varying an existing contract. The Authority may not become involved in the bargaining which precedes the formation or variation of a contract. It may not, for example, intervene in the negotiations and order a party to conduct itself, perhaps by making an offer, in a certain way. Nor may it act as arbiter and, where the bargaining does not lead the parties to agreement, settle for them the outstanding issues and thus complete the new term or terms for them.

....

[44] The proper question for the Authority to ask itself ... is

whether, correctly interpreted, the provision already creates rights which are legally enforceable and, if so, what those rights

1 [2002] NZCA 284; [2003] 1 NZLR 176

which directs a certain procedure, but does not go so far as to indicate sufficiently an end result, so that, in either case, it is incapable of creating contractual rights? If so, any determination would in law create a new term or condition and the Authority may not intervene."

[24] Examining clause 5.2 of the Employment Agreement, the provision is that Ms Watson's salary would be reviewed annually in July each year: *"based on the market value for individual positions".* I find that the provision therefore creates a right to have the salary determined in accordance with the market rate for Ms Watson's position as Library Manager.

[25] There is no reference in the clause to the hours on which the market rate will be calculated, or that the Council will be bound to adhere to a form of methodology.

[26] Of more relevance to the issue before me, I find that the Council is not proposing to change the methodology used to determine Ms Watson's salary unilaterally. The Council makes it clear in the letters dated 15 October 2015, 18

February 2016 and 24 May 2016 that the existing methodology can continue to be

used and applied to an assessment of Ms Watson's salary for the 2015-2016 year.

[27] However the letters clarify that the Council is offering Ms Watson an opportunity to agree to a different methodology based on a different weighting of factors i.e. an increase in her weekly working hours.

[28] I find there is no unilateral alteration in Ms Watson's hours of work which can continue to be 37.5 per week. There is no end result indicated in the exchange of letters, rather I find that there has been a process of offer for consideration which may, if accepted, result in a variation in respect of hours of work in the Employment Agreement.

[29] I determine that there is no dispute between the parties pursuant to s.129(1) of the Act, rather the parties are engaged in

bargaining of which the Authority does not have jurisdiction to make a determination in accordance with S.161(2) of the Act.

Costs

[30] Costs are reserved.

Eleanor Robinson

Member of the Employment Relations Authority
