

**Note: An order prohibiting
publication of some evidence
applies to this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 342
3007271

BETWEEN ROSEMARY WILLIAMS
Applicant
AND WENDCO (NZ) LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: John Crocker, Advocate for the Applicant
Justine Foden, Advocate for the Respondent
Investigation Meeting: 18 August 2017
Determination: 6 November 2017

DETERMINATION OF THE AUTHORITY

- A. Rosemary Williams was unjustifiably disadvantaged by Wendco (NZ) Limited's failure to offer her additional hours of work.**
- B. In settlement of Ms Williams' grievance Wendco must pay her the following amounts within 28 days of the date of this determination:**
- (i) \$1,072.50 as lost wages; and**
 - (ii) \$2,000 as compensation for loss of dignity and injury to her feelings.**

Employment Relationship Problem

[1] Rosemary Williams works at the Wendy's store in Hornby, Christchurch. She raised a personal grievance over whether her employer, Wendco (NZ) Limited, should have offered her more hours of work during the last quarter of 2016. A clause in a collective agreement negotiated between Wendco and Unite Union said "when

additional hours become available, these hours will be offered to existing staff before new staff are employed". Ms Williams said she was unjustifiably disadvantaged because she was not offered extra hours that became available when some existing staff resigned. Instead new staff were employed and given those hours. Wendco disagreed with what Ms Williams and her union representatives said about how the clause should be interpreted. Resolving her grievance required, in part, a determination of what the clause meant and how it should be applied.

The Authority's investigation

[2] Five witnesses gave evidence for the Authority's investigation: Ms Williams, former Unite Union organiser Ben Peterson, Wendco operations manager Aaron Walls, Wendy's Hornby store manager Jatinder Singh, and Wendco chief executive officer Danielle Lendich. The representatives also made submissions on the issues for determination.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this written determination has not recorded all evidence and submissions received. It has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made.

Order to keep employee information confidential to the proceeding

[4] To protect the privacy of some employee information provided for this proceeding, publication is prohibited of the names of those employees (or other personal information provided about them), except for the name of Ms Williams. This order is made under clause 10 of Schedule 2 of the Act.

The issues

[5] The issues requiring investigation and determination were:

- (i) Had Wendco (NZ) Limited breached clause 7.7 of its collective agreement with Unite Union by not offering Ms Williams additional hours that became available?
- (ii) If so, was Ms Williams unjustifiably disadvantaged by Wendco's actions?
- (iii) If Ms Williams was unjustifiably disadvantaged, should she be awarded remedies of reimbursement for wages lost and/or compensation under s 123(1)(c)(i) of the Act?

- (iv) If any remedies are awarded, was a reduction required due to conduct by Ms Williams that contributed to the situation giving rise to her grievance?
- (v) Should either party contribute to the costs of representation of the other party?

The collective agreement

[6] The collective agreement's term ran from 21 May 2015 to 21 May 2017. Its provisions remained in effect past the expiry date as the parties had begun bargaining for a replacement collective agreement.¹

[7] The interpretation of the particular clause in dispute needed to be considered in the context of other clauses that set out the parties' agreed scheme for managing and changing duties and hours of work:

4. Employee's duties

...

4.3 From time to time perform other duties within their capabilities in addition to those set out in the Schedule B.

4.4 Job rotation enables employees to experience all aspects of his/her restaurant's operation and provides a well-trained and versatile person who can be assigned to any of the several work-stations. Normally during rush periods, employees should be assigned to their best station so that customers get the best service we can offer. During slow periods, you'll be asked to work other stations to gain greater familiarity and expertise. Employees are entitled to ask the management team to be trained on other positions, and for such requests to not be unreasonably withheld.

7. Hours of work and security of hours

7.1 Availability

Upon employment, the Employer and the Employee will agree on the day and hours of work availability, which shall only be changed by mutual agreement. Or in the case of current employees where a change of availability has already been approved via the Schedule B or H which is held by the Employer on the Employee's personnel file, this will be the agreed days and hours of availability.

...

7.4 Guaranteed minimum hours of work

(a) An Employee's hours of work may change from week to week.

¹ Employment Relations Act 2000, s 53.

- (b) The Employer commits to rostering employees for a minimum of ten hours per week.
- (c) From the 1 October 2015, all Wendy's employees will be offered 80% security of hours up to a 32 hour weekly cap, based on the average of the previous quarterly hours worked. The average hours from 1 October 2015 to 31 December 2015 will be based on average hours worked from 1 July 2015 to 30 September 2015.
- (d) All new employees will have their quarterly 80% hours calculated based on the minimum number of hours agreed at the time of hiring until they have worked a full quarter.

...

7.5 Availability changes

Availability change requests needs to be approved in writing by the Restaurant Manager and Support. A Schedule B or H Change of Availability Form needs to be completed in full and handed to the Restaurant Manager. If approved, confirmation in writing will be sent to the crew member.

...

7.6 Reduction or increase in hours

On occasion should there be a business need to reduce hours in store, this reduction as far as practicable will be uniformly applied. This includes but is not limited to the following:

- Where there is a significant variation in customer demand or where there is a downturn in sales this may include:
 - Competitor openings
 - An extraordinary marked and sustained downturn in sales
 - Where a pattern of trade has not yet been established
 - Extreme events, ie earthquakes, weather related events.

...

The process for reduction in hours of any employees shall not prevent Wendy's Hamburgers from declaring redundancies if in its sole opinion there is a need to reduce the number of employees employed in a particular restaurant.

7.7 Additional shifts

When additional hours become available, these hours will be offered to existing staff before new staff are employed. Subject to the needs of the business, minimum staffing requirements, skill level and job classification, longer serving staff will have first right of refusal of available hours. The company is not required to provide more than 40 hours in any one week.

Interpretation principles

[8] A collective agreement is interpreted by using contractual principles. Those principles aim to ascertain what the document would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation they were in at the time of making their agreement. This objective meaning

is taken to be what the parties intended. The ordinary and natural meaning of the language at issue, construed in the context of the agreement as a whole, is a powerful, albeit not conclusive, indicator of what the parties meant. Because parties to agreements sometimes use words with specialised meanings in their industry or with a particular meaning simply to them, wider context may point to some interpretation other than the most obvious one. If a particular interpretation produces a commercially absurd result, an agreement may need to be read in a different way than the language used in it might suggest. However, an agreement should not be interpreted as meaning something different from what it seems to say simply because, if interpreted in the obvious way, the agreement would be unduly favourable to one party. Only the most obvious and extreme cases of a commercially absurd result would justify an interpretation of contractual language, viewed in the context of the whole agreement, different from its ordinary and natural meaning.²

How Ms Williams' claim arose

[9] Ms Williams began working at the store in October 2013. On her initial employment form she indicated she was available for all hours, seven days a week. In December 2013 she submitted a change of availability form to work only between 6am and 11pm on any of the seven days of the week. This form was the Schedule H form referred to in clause 7.5 of the collective agreement, set out above. A copy of the form she submitted showed her change of availability was accepted by the general manager and was signed by the store manager at that time.

[10] Throughout her employment Ms Williams had worked as a sandwich maker. She had not worked in other roles carried out at other workstations in the store. Those other roles included working on the drive-through, front counter or as a griller. Prior to raising her personal grievance she had not been offered training in any of those roles. Ms Williams said she had asked a previous store manager about being trained as a griller but was told the work was too heavy. After raising her grievance Ms Williams has since had some training in the front counter and griller roles. In recent months she has worked some hours as a griller as well as a sandwich maker. Her present case, however, concerned what happened over hours of work before that further training was offered.

² *Firm PI 1 Limited v Zurich Australian Insurance Limited t/a Zurich New Zealand* [2014] NZSC 147 at [60] – [61], [63] – [64], [84], [89] and [93].

[11] In early 2016 Ms Williams' hours averaged around 36 a week. In April 2016 Wendco reduced the hours of work and the number of staff working in the store. Those reductions were made for commercial reasons. A competitor business had opened a new store nearby and a nearby mall expanded its food court area. Those developments resulted in reduced sales for Wendy's Hornby store. Staff numbers were dropped from 22 to 14. Ms Williams' hours of work were reduced to 30 or fewer a week. In the week of 5 September 2016, for example, she was rostered to work only 26 hours.

[12] During September, October and November the store manager recruited new employees. Nine new staff began working at the store during that period, although at least three only lasted a few weeks. Two staff from another store were also rostered to work some hours at the Hornby store but, as existing employees of Wendco, they were not strictly within the scope of the reference to "new staff" at clause 7.7 of the collective agreement.

[13] Ms Williams' claim concerned the hours of work given to the just nine new employees. Given her hours were reduced in April, Ms Williams saw those new workers recruited from September onwards as being taken on to work additional hours. She read clause 7.7 of the collective agreement as saying such hours would be offered to existing staff like her before new staff were employed. The second sentence of that clause referred to "longer serving staff" having first right of refusal of available hours and she was the longest serving crew member in the store.

[14] Wendco did not agree with that interpretation. It said new staff had to be recruited so the restaurant had enough people to meet its minimum staffing requirement of 14 for that store. Recruitment from September on was primarily of high school or tertiary students. Such recruits generally wanted fewer hours during term time but would be available for longer hours during the summer holiday months when business was expected to pick up and a larger pool of staff was needed to cover other employees who wanted to take leave. Wendco also pointed to the requirements of clause 7.4 of the collective agreement for employees to be rostered for a minimum of ten hours each week. In its statement in reply Wendco said limited "additional" hours provided to new staff were not offered to Ms Williams because there was a genuine business need to allocate those hours elsewhere. Those needs of the business included having enough crew available to roster across seven days, meeting the

minimum staffing requirement for the restaurant, and having people with the skills needed to work in the different crew positions.

Requirements of clause 7.7

[15] There were, therefore, two competing and different views of what the clause provided for or required.

[16] Ms Williams' view, supported by her union representatives, relied on the plain and ordinary meaning of the first sentence of clause 7.7. The reference to additional hours becoming available, on this view, meant any hours that were not within the total of the number of hours rostered for work in the store in the previous week. The clause said such hours would be offered to existing staff before any new worker was employed to do them. The reference in the second sentence to business needs and related matters was about such hours would be allocated between existing staff members. Longer serving staff would get "first right of refusal" although this requirement to offer them those hours was "subject to the needs of the business, minimum staffing requirements, skill level and job classification". The only other limit on allocation of such additional hours was found in the third sentence which said no more than 40 hours need be provided in any one week. Once all existing staff had 40 hours, or as much as they were available for and wanted below 40 hours, new staff could be employed to work any available additional hours. This was said to be consistent with the clear intention of those clauses to provide job security and better incomes for existing staff.

[17] The competing analysis of Wendco said the reference in the second sentence of clause 7.7 to business needs was meant to apply to the first sentence of the clause. On that analysis additional hours might not be offered to existing staff for two reasons: firstly, if new staff were needed to make up the store's minimum staffing number or, secondly, if existing staff did not have a particular skill level or job classification needed for the roles to be worked during those available hours. A simple example of that second scenario would be if a griller left and the remaining existing staff were not trained to work in that position. If its interpretation were correct, Wendco only had to offer additional hours to existing staff once the total number of employees reached the minimum staffing level it had set for that store and if those existing staff already had the right mix of skills to do all the crew roles required in the store.

[18] Ms Lendich, who negotiated the collective agreement on Wendco's behalf, said the clause was intended to be subject to those business needs rather than the interpretation advanced by Ms William and her union representatives. In answer to a question at the Authority investigation meeting, she said additional hours only became "available" once those needs were met. At that point longer serving staff among the existing staff would get the priority for those available hours.

[19] However Ms Lendich's evidence of what she said Wendco intended in agreeing to the clause could not be used to set aside what was apparent as the ordinary and natural meaning of the words agreed.

[20] Ms Williams, along with other staff, had her hours reduced in April 2016. By September 2016 Wendco was able to offer more hours of work in its weekly roster. Those hours, on a plain reading of the clause, had to be offered to existing staff members like Ms Williams before new staff were employed to work during those hours. However, even if Wendco's interpretation regarding minimum staffing requirements and business needs was accepted, its actions in respect of the hours of work offered to Ms Williams, failed to meet the requirements of that clause considered in the context of other clauses in the collective agreement.

[21] The minimum staffing level for each store was set by the company annually. If recruitment of new staff was required to meet that figure, clause 7.4 did not require Wendco to roster those new staff for more than ten hours a week. During the Authority investigation meeting there was a detailed questioning about the hours new staff had been rostered to work in the Hornby store from September 2016 onwards. The dates and details of their hours and rosters have not been set out in this determination but are well-known to the parties and the witnesses from the evidence given. There were many examples where a new staff member was rostered for more than ten hours in each week, including on shifts on days Ms Williams was not rostered to work but that were within the span of hours for which she was available.

[22] The short point from looking at those rosters was that Ms Williams could have been offered an extra shift for a sixth day of the week while new staff members could still have been left with at least the ten hour minimum required by the collective agreement. Wendco advanced three arguments against that conclusion. None stood scrutiny.

[23] Firstly, Wendco said Ms Williams was not trained to carry out the roles required at some workstations, using the example of front counter and grill person. This argument failed because clause 4.4 provided for workers such as Ms Williams to be “rotated” through other positions so they were trained to carry them out. During Ms Williams’ three years of service Wendco had not trained her for other positions. She had only worked as a sandwich maker.

[24] Wendco suggested it was not practical to assign her to work hours in a position for which she was not trained. However new staff were employed to work in those positions during those hours and other workers or managers trained them on the job as they worked. If it was practical to do that for the new people, it was practical to do it for Ms Williams.

[25] She had also asked sometime earlier to be trained as a griller. She said a previous store manager discouraged her from pursuing that option, describing the work as too heavy for her. Grill work at the store was typically done by men. If that reason ever had any validity, the heavy nature of the work was clearly no longer relevant. In more recent months Ms Williams has been trained as a griller and has worked in that role. The earlier reluctance to train her for that position, if that occurred as she said it had, was also inconsistent with the provision in clause 4.4 that employees were entitled to ask for such training and such requests were not to be unreasonably withheld.

[26] Secondly, Wendco said Ms Williams never asked for additional hours. Wendco said she had not written on a calendar which was available for staff to indicate a willingness to work more hours. But Mr Singh accepted he did know Ms Williams and other staff had wanted additional hours, if they were available, ever since their hours had been reduced in April 2016. More importantly, however, clause 7.7 did not require existing staff to ask for additional hours when they became available. The clause plainly stated that the hours would be offered to existing staff. The onus and obligation lay with Wendco to offer the hours, not wait to be asked.

[27] Thirdly, Wendco’s ability to offer Ms Williams additional hours was said to be limited by her unavailability to work “close” shifts. Those shifts ran beyond the store closing time each night. After closing time staff had to clean the store and set up workstations for the next day. However an analysis of the rosters and times worked by new staff showed there were some shifts given to them, which did not require

working to “close”, that could have been offered to Ms Williams and still have left sufficient hours for those new staff to get at least their required minimum hours.

[28] A purposive interpretation of clause 7.7, in the context of other clauses, showed Wendco and Unite had agreed provisions allowing the business to reduce hours when sales were down would be balanced by the quarterly “security of hours” provision and by a preference for existing staff when additional shifts became available. To provide the business with the flexibility needed to meet those obligations, clauses 4.3 and 4.4 required Ms Williams to undergo training in different workstations at times suitable for her employer. Even if the store’s minimum staffing level (set annually by Wendco) was a factor in allocating additional hours, then the number of those hours syphoned off for new staff need be only the amount required to meet the provisions of clause 7.4(b) for them to be rostered on for a minimum of ten hours a week. The remainder of additional hours, available because an existing staff member had resigned or because the business was expanding the number of hours rostered each week, had to be offered to existing staff members such as Ms Williams.

[29] No commercial absurdity resulted from that interpretation. Rather it was consistent with the clauses’ objectively assessed intention. Those clauses balanced Wendco’s need for the flexibility, through having employees trained across a range of positions, with the opportunity for existing staff to increase their hours and job security where circumstances allowed.

Breach of agreement

[30] Wendco’s employment of new staff in September and October of 2016, without first offering Ms Williams the opportunity of working additional hours (even if that had required additional training), had breached the requirements of its collective agreement. As a result Ms Williams was unjustifiably disadvantaged. Under clause 7.6, allowing for reduced hours, she lost income from April but was not given the benefit of the clause 7.7 provision that would have restored some of those hours in September or soon after. In part this was also due to Wendco not implementing the training requirements of clause 4.4. Ms Williams was entitled to an assessment of remedies for the effect of that disadvantage.

Remedies

Lost wages

[31] If Wendco had complied with the requirements of clause 7.7 in its collective agreement Ms Williams would have been offered additional hours of work. Given the reduction of her hours and income from April 2016 there was no reason to doubt she would have accepted and worked additional hours. The likely loss to her was at least five paid hours a week. It occurred over a period of around one quarter, that is 13 weeks. On that assessment, the total loss amounted to 65 hours. At her hourly rate of \$16.50, the total loss of wages to be awarded to Ms Williams under s 123(1)(b) of the Act was \$1,072.50.

Distress compensation

[32] Ms Williams was upset by Wendco's failure to offer her additional hours. She felt her service was not valued when new staff were employed and were allocated to work hours that she was entitled to be offered and work. As a result she experienced a loss of dignity and injury to her feelings that required an order for compensation under s 123(1)(c)(i) of the Act. A relatively modest award of \$2000 was the appropriate amount.

Any reduction for contributory conduct?

[33] Section 124 of the Act required an assessment of whether Ms Williams had contributed in any blameworthy way to the situation giving rise to her grievance. If she had the remedies could be reduced. However she was not at fault in any way for how Wendco chose to interpret and apply clause 7.7 of the agreement to her disadvantage. She had not made an express request for additional hours and, until recently, had not trained in any positions other than as a sandwich maker. But neither point was a blameworthy shortcoming in her conduct. They were the result of how her managers had dealt with matters as much as anything Ms Williams had or had not done. No reduction of remedies was required.

Costs

[34] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[35] If they are not able to do so and an Authority determination on costs is needed Ms Williams may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Wendco would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[36] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].