IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 63
WRC 47/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE CHIEF EXECUTIVE OF THE OPEN POLYTECHNIC OF NEW ZEALAND Plaintiff
AND	GORDON ROBERT HALSEY Defendant

Hearing: 26 April 2010
(Heard at Wellington)

Appearances: Bernard Banks, Counsel for Plaintiff
Peter Cranney and Anthea Connor, Counsel for Defendant and for the Tertiary Education Union Inc (appearing and heard by leave)

Judgment: 20 May 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This is a challenge by hearing de novo to a determination of the Employment Relations Authority delivered on 4 November 2009[1] interpreting a clause in a now expired collective agreement about weekly hours of work for staff at the Open Polytechnic of New Zealand (the Open Polytechnic). Although the collective agreement expired on 5 September 2009, it remains in force because the parties are in bargaining for a replacement collective agreement. The case is one about the interpretation and application of a collective agreement.

[2] Gordon Halsey is employed by the Open Polytechnic and joined the former Association of Staff in Tertiary Education Union Inc (ASTE) about two months after beginning employment in May 2007. Before beginning work Mr Halsey signed the

[1] WA177/09.

employer's standard terms of employment including that he would work a 36 hour week. ASTE has ceased to exist as an entity and has been, together with other tertiary education sector unions, amalgamated into the new Tertiary Education Union of which Mr Halsey is a member. The Tertiary Education Union has inherited the rights and obligations of ASTE.

[3] Clauses 5.1, 12.3 and 12.14 of the collective agreement are at issue and provide as follows:

> 5.1 **Weekly Duty Hours**
>
> > 5.1.1 No employee shall undertake more than thirty six (36) hours of duty in any one week, and, unless the employee consents or any conditions of employment agreed to at the time of their appointment otherwise specify, the employee shall not be required to be on duty for more than thirty four (34) hours in any one week.
>
> …
>
> 12.13 **Additional Terms and Conditions**
>
> > 12.13.1 Before any employee covered by this Collective Agreement becomes bound by any additional terms and conditions of employment pursuant to Section 61 of the **Employment Relations Act 2000**, the parties agree that any mutual agreement to such additional terms and conditions of employment shall be recorded in writing and signed by the employee and the Chief Executive of the Open Polytechnic of New Zealand.
>
> 12.14 **Complete Agreement**
>
> > 12.14.1 The terms and conditions of employment of an employee who becomes bound by this Collective Agreement shall not include any individual terms and conditions of employment previously agreed with the employer without the written agreement of the employer and employee. Any previously agreed terms and conditions of employment cease to apply on the day on which the employee becomes bound by this Agreement.
> >
> > This shall not prevent additional terms and conditions being agreed pursuant to clause 12.13 after the employee becomes bound by this Agreement.

[4] The standard letter of offer and acceptance of employment signed by Mr Halsey provided materially:

Hours of Duty

This offer is conditional upon you agreeing to a full-time 36 duty hour working week.

…

Other Terms and Conditions of Employment

The above position is covered by an applicable collective agreement, namely the "Academic Staff Collective Employment Agreement" …

If you are already a member of ASTE, you will be bound by the above collective agreement from the date on which you commence your employment with the Polytechnic.

The Employment Relations Act 2000 provides that if you are not a member of ASTE then for the first thirty (30) days of your employment, you will be covered by an individual employment agreement comprising the terms and conditions of the above collective agreement and any additional terms and conditions mutually agreed to by you and the employer that are not inconsistent with the terms and conditions in the collective agreement.

You can if you wish join the Union by contacting ASTE direct … Once you join the Union you will be bound by the collective agreement from the date of joining.

If after the first thirty (30) days of employment you have decided not to join ASTE we may by mutual agreement vary your individual employment agreement (comprising the terms and conditions in the applicable collective agreement and any additional terms and conditions mutually agreed with you as outlined above).

…

Acceptance Clause

I hereby accept your offer of employment on the terms and conditions described above including full-time duty week of 36 hours, or the proportion specified above if the position is part-time. …

[5] The relevant sections of the Employment Relations Act 2000 ("the Act") are 61 and 62 which provide as follows:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**
>
> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.

62 Employer's obligations in respect of new employee who is not member of union

(1) This section—

(a) applies to a new employee who—

(i) is not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and

(ii) enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee; but]

(b) does not apply to an employee who—

(i) resigns as a member of a union and enters into an individual employment agreement with the same employer; or

(ii) enters into a new individual employment agreement with the same employer.

(1A) For the purposes of subsection (1), a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).]

(2) At the time when the employee enters into the individual employment agreement with an employer, the employer must—

(a) inform the employee—

(i) that the collective agreement exists and covers work to be done by the employee; and

(ii) that the employee may join the union that is a party to the collective agreement; and

(iii) about how to contact the union; and

(iv) that, if the employee joins the union, the employee will be bound by the collective agreement; and

(v) that, during the first 30 days of the employee's employment, the employee's terms and conditions of employment comprise—

(A) the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union; and

(B) any additional terms and conditions mutually agreed to by the employee and employer that are not inconsistent with the terms and conditions in the collective agreement; and

(b) give the employee a copy of the collective agreement; and

(c) if the employee agrees, inform the union as soon as practicable that the employee has entered into the

individual employment agreement with the employer.

(3) If the work to be done by the employee is covered by more than 1 collective agreement, the employer must—

(a) comply with subsection (2) in relation to the collective agreement that binds more of the employer's employees [in relation to the work the new employee will be performing] than any of the other collective agreements; and

(b) inform the employee of the existence of the other agreement or agreements.

(4) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

[6] The Authority determined that cl 5.1.1 of the collective agreement provides, for those employees affected by being members of the union, that they will work either a 34 or a 36 hour week. It concluded that in the case of an employee such as Mr Halsey who joins the union some time after the start of employment, weekly hours either continue to be, or revert to, 34 because previous individual terms and conditions cease to operate unless and until there is written consent to work between 34 and 36 hours per week.

[7] The Authority determined that for new employees who are not members of the union from the outset of their employment, the statutory requirement that the collective agreement will apply for the first 30 days of employment means that, in any event, weekly hours cannot exceed 34 unless increased expressly up to 36.

[8] In the circumstances of this case, the Authority focused appropriately on the position of an employee such as Mr Halsey whose employment became subject to the collective agreement by his membership of the union which he joined some time after beginning employment on the express written term that he would work 36 hours per week. The Authority found, "… the employer is obliged to get written consent from the employee to work more than 34 hours after [he or she becomes] bound by the collective employment agreement."

[9] The starting point for consideration in all matters such as this is the legislative scheme. Section 62 of the Act (already set out) requires employers to inform new employees, who are not members of an appropriate union, of certain things that are to govern employment relationships at their start. In the first 30 days

of employment of such an employee, the terms and conditions of that new employment will comprise those of the relevant applicable collective agreement as if the employee was a member of the union, plus any additional individual terms and conditions which are not inconsistent with those of the collective agreement.

[10] The scheme of the legislation is to require an applicable collective agreement to govern the employment for a trial period in the sense that the new employee is given an opportunity to consider whether he or she wishes to continue on the same terms and conditions after the expiry of that period. If so, that is achieved by the employee joining the union so that, by law, the collective agreement is applicable to that employment relationship. If, at the expiry of that period, the employee does not join the union, individual terms and conditions of employment will then be settled. These may include some, many, or even all, of the terms of the relevant collective agreement but operable on an individual basis, and other individual terms and conditions negotiated and settled between the employer and the employee. They may also include individual terms and conditions of employment that bear little or no resemblance to those in the collective agreement as is permissible at law.

[11] The process is, in effect, a free trial of the collective agreement by the employee for up to 30 days at the end of which time the individual employee must make a choice, whether consciously or by default, to 'purchase' the collective agreement by joining the union or to negotiate other terms and conditions with the employer.

[12] So, in this case, the relevant collective agreement set the employee's maximum weekly hours of work for the first 30 days of Mr Halsey's employment. Clause 5.1 dealt specifically with hours of work. This clause, combined with the parties' written agreement at the start of employment, as contemplated by cl 5.1.1, meant that Mr Halsey's weekly hours of work were 36.

[13] The plaintiff's difficulty, however, is the express provision in the collective agreement (cl 12.14.1) that any previously agreed term or condition of employment ceases to apply upon an employee joining the union and, thereby, the collective

agreement. Mr Halsey joined the union more than one month after he began employment on 21 May 2007.

[14] Until he joined the union in July 2007 (before the 26th day of July when ASTE confirmed his membership), his weekly working hours were 36. But that position changed from the time of union membership. The plaintiff says that the 36 hour working week agreed from the outset continued to apply even after Mr Halsey joined the union.

[15] For the plaintiff's case to succeed, however, the Court must ignore completely cl 12.14.1 of the collective agreement and, in particular, the sentence: "Any previously agreed terms and conditions of employment cease to apply on the day on which the employee becomes bound by this Agreement." The Court cannot, for reasons of convenience, ignore clear and not otherwise explicable provisions of a collective agreement which became applicable to the parties' relationship. That cannot be saved, as the plaintiff attempts to do, by reference to longstanding practice within the Open Polytechnic and even by apparent acquiescence in that practice by the union and its predecessor that negotiated and settled the collective agreement.

[16] The second sentence of cl 12.14.1 is consistent with the first. This requires, in effect, a re-negotiation of any individual terms and conditions of employment that may have been settled (as they were in Mr Halsey's case) after an employee joins the union and his employment becomes subject to the collective agreement. Clause 12.14.1 provides for a logical sequence of arrangements between employer and employee which precludes the Open Polytechnic from relying upon a term or condition addressed by the collective agreement before the collective agreement is entered into. The Open Polytechnic is not entitled either to assume that an employee eligible to be covered by the collective agreement will elect not to do so or, alternatively, to attempt to set binding terms and conditions of employment that will be inconsistent with the collective agreement if, as the statute permits, the employee elects to join the union after commencing employment.

[17] There is no difficulty in the employer specifying for a 36 hour week by making this a condition of employment in respect of an employee who is not a

member of the union at the date of commencing employment and does not subsequently join the union. Where, however, such an employee elects to exercise his or her statutory right of union membership after employment commences, the Open Polytechnic is bound then to apply a 34 hour working week to such an employee and, if it wishes to increase this up to 36 hours, must re-negotiate that with the employee concerned, obtain his or her consent and record of this variation in writing signed by both parties.

[18] Although unusual, it is not illogical or improbable that the parties to the collective agreement have agreed that there may need to be renegotiation of hours of work after an employee joins the union as Mr Halsey did. That is so even if, as here, the employee has agreed on an individual basis to work the maximum weekly hours provided for under the collective agreement.

[19] If this is an unsatisfactory position from the Open Polytechnic's point of view, as clearly it finds, it must address that matter in collective negotiations with the union and, as a matter of practical reality, persuade the union to agree to a different provision in the new collective agreement.

[20] For the foregoing reasons, the plaintiff's challenge fails. Because of s 183(2) of the Act which, by default, sets aside the Authority's determination, irrespective of the outcome of the challenge, this judgment takes its place although the outcome is the same.

[21] The defendant is entitled to costs which, if they cannot be agreed between the parties, may be sought by memorandum within one calendar month from the date of this judgment with the plaintiff having the period of 21 days thereafter to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 3.45 pm on Thursday 20 May 2010