IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 83
ARC 113/09

IN THE MATTER OF	a challenge to the determination of the Employment Relations Authority
BETWEEN	TAINOINO AH CHING AND 40 OTHERS Plaintiffs
AND	WESTPAC NEW ZEALAND LIMITED Defendant

Hearing: Auckland
24 May 2010

Appearances: Peter Cranney, Counsel for Plaintiffs
John Rooney and Sarah Hogg, Counsel for Defendant

Judgment: 1 July 2010

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiffs are employees of the defendant bank (Westpac).

[2] In 2007 Westpac proposed a scheme for transferring staff from four of its locations to one location situated in the Auckland central business district (CBD). This was at a site called Takutai Square or Westpac on Takutai Square. This site is located at a distance of approximately 100 to 200 metres to the east of the Britomart Station in Queen Street, Auckland. The previous locations were in Onehunga, Royal Oak, Manukau and Albert Street in the city. The Albert Street location was the site for the bank's Collection Team.

[3] In view of the fact that some of the staff would be required to travel further to work and may have greater difficulty with parking and greater transport costs, the bank proposed a one-off reimbursement for such costs (the transport allowance). Following bargaining between Finsec, the financial sector union, and Westpac, a

collective agreement was ratified for those bank employees who were members of Finsec. That collective agreement was entitled "Collective Employment Agreement Terms of Settlement: 2008". It contained the following clause:

> (12) **Project Unity**
>
> Total monetary compensation for staff moving to the new Project Unity site in the Auckland CBD will be at the following gross amounts:
>
> | | | |
> |---|---|---|
> | Level 1 | Up to 10kms additional travelling distance | $1,000 |
> | Level 2 | 10.1 – 15kms additional travelling distance | $1,500 |
> | Level 3 | 15.1 + kms additional travelling distance | $2,000 |
>
> Payment will be by way of an allowance that will be paid over a total of 24 weeks upon transfer to the new site. Weekly payments will be on the following basis:
>
> | | First 8 weeks | Next 16 weeks |
> |---|---|---|
> | Level 1 | $62.50 | $31.25 |
> | Level 2 | $93.75 | $46.88 |
> | Level 3 | $125.00 | $62.50 |

[4] That collective agreement was a document negotiated and ratified separately from the main collective agreement between the bank and its employees.

[5] A dispute has arisen as to whether the monetary compensation provided in the agreement reached and ratified by union member employees of Westpac applies to those staff employed in the Collections Team formerly situated at the Albert Street premises. Those premises were approximately 800-900 metres to the southwest of the Britomart Station.

[6] The dispute was referred to the Employment Relations Authority (the Authority), which delivered a determination favourable to Westpac on 11 November 2009.[1] The employees affected have brought a challenge to that determination to the Court.

[1] AA 398/09.

Events leading to dispute

[7] In June 2008, by use of its newsletter "Property Focus", Westpac outlined its proposals to staff for the transport allowance and how it would be calculated. It was divided into three categories of extra distance: up to 10 kilometres, 10.1 to 15 kilometres, more than 15.1 kilometres. Those employees who had less distance to travel as a result of the move would receive no allowance. The newsletter had been preceded by discussions between Westpac and a group of delegates within Finsec, which included representation from the Collections Team as well as the other sites. During these discussions the issue of financial compensation was raised and Finsec indicated that it would be part of its claim for collective bargaining. It was agreed there would be an exchange of claims on 16 June 2008. The newsletter to employees dated 14 June 2008 pre-empted that step. Finsec responded by providing its claims for negotiation to Westpac on 16 June 2008 as previously agreed.

[8] The parties went into negotiations in respect of the claims (which included other matters in addition to the transport allowances). After an initial week of unsuccessful bargaining they engaged the service of a mediator. Agreement was reached on the transport allowance and incorporated into a mediated settlement agreement.

[9] That part of the mediated settlement relating to the transport allowance reads as follows:

> As expressed in bullet points, the terms of settlement are as follows:
>
> …
>
> - That steps in the Unity offer be as follows
>   - Up to 10km additional $1,000
>   - 10.1 – 15kms additional $1,500
>   - 15.1 + kms additional $2,000
> - That the terms of the agreement be for a 12 month period following the date of the expiry of the present agreement;
> - That at the "ratification" meetings (that is those union meetings that have been scheduled for next week), the union positively supports the terms of settlement for that ratification and the attendees at that

> meeting be restricted to Westpac New Zealand Limited staff (that is, not ANZ staff);
>
> - That all other matters be as per the first offer made today and as attached to this agreement.

[10] The Unity offer referred to in the mediated settlement is the proposal contained in the June 2008 newsletter "Property Focus". The document was signed on behalf of both Westpac and Finsec and endorsed by the mediator. The date of the document is 21 July 2008.

[11] The mediated settlement was then incorporated into the Collective Employment Agreement Terms of Settlement: 2008 which was subsequently ratified by Finsec members pursuant to s 51 of the Employment Relations Act 2000 (the Act). The agreement was executed by Westpac and Finsec on 28 July 2008 with the following endorsement:

> Signed as a true and correct record of the Terms of Settlement reached by Westpac NZ Limited and Finsec through Collective Bargaining concluding on 21 July 2008:

[12] That part of the collective agreement which relates to the transport allowance is cl 12, which I have previously set out. The clause does not exclude those employees of the Collection Team who have moved from premises in Albert Street to the Westpac Takutai Square site, a distance of approximately one kilometre within the parameters of the CBD. The applicants before the Authority and the plaintiffs in this proceeding are those employees.

The Authority's determination

[13] The employees formerly employed at the Albert Street site and who now have to travel further to work at the Westpac Takutai Square site made a claim for the transport allowance. Westpac rejected the claim and the employees referred the dispute to the Authority.

[14] The determination states that before the Authority, Westpac contended that in arriving at the terms of settlement for ratification there was a mutual intention that employees relocating from offices already within the CBD to the new offices would not be eligible for the payment. The Member of the Authority then went on to

reason why he upheld that contention. In summary, the reasoning is that the document recording the outcome of the mediation and to be incorporated in the collective agreement refers to the "Unity offer". That means the June 2008 "Property Focus". I have already referred to these documents. While the mediated settlement refers to the earlier document, if it was meant to exclude the plaintiffs from the transport allowance that was not followed through in the wording used in the ratified collective agreement. The determination deals with this point as follows:

> [21] … Although *"Unity offer"* is not an expression used in clause 12 that point of reference must be implied, so that the provision is consistent with and gives effect to the representation made at the end of the 28/7 TOS. The parties through their representatives signed a warranty that the terms of settlement *"reached through Collective Bargaining concluding on 21 July"* were correctly recorded in the terms submitted for ratification.

[15] The determination then dealt with the issue of whether the "Unity offer" excluded the employees already located in the CBD. The Authority Member drew a further inference that because the Property Focus was not addressed or delivered to the CBD employees the intention of Westpac was to exclude them. He further concluded there were pointers in the terminology of the newsletter from which that inference could also be taken.

[16] In finding from this that there was mutuality between the parties, he dealt with the union's denial as follows:

> [32] I find it unlikely that FINSEC did not know either directly from Westpac or indirectly from its members, of the qualification or limitation the bank had consistently placed and maintained on its *"Unity offer"*.

[17] The determination then went on to hold that as a matter of interpretation and construction the collective agreement incorporated the terms of settlement and therefore the "Unity offer" and there was mutuality as to exclusion of the CBD employees. On the basis of that finding there was no need, the Member held, to deal with the matter by way of rectification.

Submissions of counsel

[18] I was fortunate to have full written submissions from counsel and to have them carefully argued before me at the hearing. Mr Cranney, for the plaintiffs,

submitted that this is not a difficult case and can be dealt with on a clear interpretation and construction of the collective agreement, the mediated settlement and the Unity offer contained in the newsletter. The ambit of Mr Cranney's written and oral submissions is that in none of the documents are the Collections Team already situated in the Auckland CBD excluded on a clear and unambiguous reading of the wording. Further, he submitted that as a matter of evidence it is clear there was no mutuality between the parties on the point that those employees would be excluded and that is clear from the evidence of Mr Michael Wood who gave evidence on behalf of the plaintiffs and who is a national organiser for Finsec. Mr Cranney went on to submit that while the witnesses for the defendant indicated their understanding of the negotiations in what they say was a concluded outcome, there is no evidence that Mr Wood or the other union representatives in the negotiations agreed. So far as rectification is concerned, Mr Cranney submitted that again there must be established evidence of a mutually understood position, which is not reflected in the written document before the Court could intervene by way of rectification. Mr Cranney also referred in his written submissions to an earlier argument as to mutual mistake, which apparently was pursued before the Authority but not before the Court. He submitted, however, that even if that were to be pursued there would need to be an evidentiary basis for it.

[19] Mr Rooney in his submissions pursued the arguments, which were clearly adopted by the Authority. He submitted that the Unity offer must by inference be included in the collective agreement even though not specifically referred to. That is by virtue of the fact that the collective agreement in its final declaration refers to the terms of settlement. This is a reference to the mediated settlement, which in turn clearly includes the Unity offer contained in the newsletter. I did not understand Mr Cranney to be necessarily disputing that argument. However, what Mr Cranney does submit in reply as I have indicated is that even if the Unity offer is referred to, it does not specifically exclude the existing CBD employees.

[20] Mr Rooney, in his submissions, referred me to legal authoritites. The first related to the principles of contractual interpretation including those related to using pre-contractual negotiations and conduct and post-contractual conduct as a guide.

[21] He submitted that on the basis of those authorities in this case the contract can be interpreted in the same way that the determination before the Authority has done to infer that the CBD employees are excluded from coverage of the transport allowance clause. If that is not accepted then Mr Rooney submitted that there was mutuality between the parties on the point and that as the written document does not reflect the true agreement between the parties, the written document can be rectified. He ran a further argument of estoppel on the basis of *Vector Gas Limited v Bay of Plenty Energy Limited*[2] that the employees and their union are estopped from denying the true meaning of the collective agreement on the basis that it would be unconscionable in the circumstances relating to the pre-collective agreement settlement. Of course it could equally be argued that in circumstances where Westpac allowed the clear wording of the collective agreement to go to the employees for ratification that same principle of estoppel could operate against it. Finally, Mr Rooney ran an argument that if all else fails the Court could make an order pursuant to s 192(2) of the Act by suspending cl 12 of the collective agreement and direct the parties to reopen bargaining. That application of course raises another significant point raised by Mr Cranney that in dealing with this issue it has to be realised that once the written collective agreement was signed off by the parties it had to go through the ratification process. The employees affected would have been exercising their votes for ratification on the clear written wording of the collective agreement per se.

[22] I have not dealt at length with the authorities Mr Rooney has referred to in his submissions because in this matter I consider that the factual position does not give rise to the need for lengthy legal analysis.

Disposition

[23] I do not disagree with much of the reasoning of the Member's determination in the Authority. As I indicated I do not perceive Mr Cranney to be disputing that the terms of settlement reached at the mediation in turn contain the proposals in the Westpac newsletter. They are incorporated into the collective agreement and an interpretation of the coverage of cl 12 so far as the CBD employees are concerned

[2] 2010 NZSC 5.

has to be considered in that light. However, when all of the documents are considered nowhere is there a provision specifically excluding the CBD employees from coverage of the clause dealing with the transport allowance. Quite the contrary is the case. Under the heading "Eligibility" the following is stated:

> **Who will be eligible for the Transport Allowance?**
>
> All full-time and part-time staff who will have to travel further to Westpac Square in the CBD than they do to their current offices.

[24] Mr Rooney in para 32 of his submission concedes this by saying that it was not necessary to expressly state (although it would have been advisable to do so) in the Collective Agreement Terms of Settlement that the Unity offer (including the transport allowance) only applied to staff who were relocating to the CBD from Onehunga, Royal Oak and Manukau sites because this had been recorded in the mediated settlement agreement. However, that indeed had not been recorded specifically in the mediated settlement. That argument requires an inference being further drawn from the way the newsletter was handled and distributed to employees other than the CBD employees. Drawing such an inference was the way it was dealt with by the Authority Member. However, in the face of clear oral evidence as to what Finsec accepted was the basis of the concluded settlement such an inference cannot be drawn. It may well be that Westpac did not provide the proposal contained in the newsletter to the CBD employees. That is surprising of course because the newsletter covers matters other than the transport allowance. These would have been of assistance to the CBD employees as well. It may also be true that, throughout, Westpac never intended that those employees would receive the transport allowance when they moved to the new site. However, the matter was an issue for negotiation as part of the claims and counter-claims in the conciliation process. I am not satisfied on the evidence presented that agreement was reached so that the employees of the Collection Team were to be dealt with separately from other employees covered by the transport allowance. Of course, there may be employees formerly at the Albert Street site who have no greater distance to travel to the new site or in fact even less distance to travel. They like similar employees at the other sites would not get the allowance. But there is nothing on the clear wording of the documents in their entirety conveying the meaning that employees formerly

employed at the Albert Street site who do indeed have further to travel to work to the new site should not, along with other employees, receive the allowance.

[25] Further, I do not agree with the Authority Member that there are pointers within the terminology of the newsletter that the travel allowance was only being offered to employees relocating from outside to inside the CBD. The flaw in that argument is that, if some kind of mutuality is to be inferred from that, the employees affected would need to know about and understand the pointers so that they could either agree or disagree. At best the terminology to which the determination refers might obscurely corroborate Westpac's assertion as to its intention but overall that is not of much assistance to Westpac as to its arguments now.

[26] Factually, based on the evidence before me, there was no agreement that the collective agreement finally ratified was to exclude the CBD employees from coverage of the transport allowance provision. On the same basis, arguments as to rectification, estoppel, pre-contractual behaviour and post-contractual actions fail for the same reason.

[27] Mr Wood, in his evidence, was adamant that Finsec at the conclusion of the negotiations regarded Westpac as having agreed to the transport allowance covering all employees affected. He referred to the clear and unambiguous meaning of the words in the terms of settlement following the claim tabled by Finsec. He referred to the information contained in Westpac's newsletter which clearly stated the allowance would be available to "All full-time and part-time staff…". Significantly in para 13 of his evidence he stated:

> 13. Before the Employment Relations Authority, in its Statement in Reply, Westpac went further, stating that in mediation "the parties had reached the common understanding that staff who already worked within the CBD would not qualify for a Transport Allowance" (2.4). Finsec categorically rejects this assertion. If such an understanding was reached, it would have been reflected in the agreed terms of settlement. It was not.

[28] The Westpac witnesses, Paul Louis, Mairi Raby, Carolyn Gower and Bernadette Kelly all refer to their understanding of the position taken by Westpac and what they *told* employees was the position. Nowhere in their evidence did they

point to any statement by an employee or union representative "agreeing" to their position. Mr Louis stated at para 16 of his brief as follows:

> 16. I don't find it believable that Michael or FINSEC thought that the Unity Offer applied to the Collections Team, as they were aware that the reason why Westpac made the Unity Offer was to respond to concerns raised by staff at Onehunga, Royal Oak and Manukau about the additional travelling and parking costs they might incur when moving to the CBD.

[29] Other witnesses refer to the fact that when they raised the issue of the allowance no staff "asked for clarification", or "that it was made very clear to them" or "no one asked". It appears that management in Westpac simply assumed that the CBD staff accepted they were not entitled to the allowance.

[30] Silence by the employees of course does not equate to agreement, particularly where they had delegated responsibility for negotiating the position on their behalf to their union. I am quite sure that despite the original "Property Focus" newsletter not being delivered to the CBD employees, they became aware of Westpac's attitude. That, however, is not sufficient to constitute an agreement. Their silence, in the face of statements apparently being made by management as to the bank's stand while negotiations took place via their union, is completely understandable.

[31] The post-ratification conduct, which Westpac relies upon as an aid to interpretation and construction, does not assist either. That conduct on Westpac's part is simply consistent with the attitude it had taken prior to and during negotiations. The attempts by Westpac in subsequent newsletters to clarify what it considered the negotiated agreement to mean are unilateral actions and do not point to a mutually understood position at that time. That is also the case with the concession it made to give CBD employees the allowance in cases of hardship. If anything, that concession weakens its position.

[32] There is simply no evidence that during negotiations a mutually agreed position was reached that CBD employees would not get the allowance. There is therefore no basis upon which the clear and unambiguous language of the collective agreement should be read in a way favourable to Westpac.

[33] So far as the argument relating to s 192(2) of the Act is concerned the Court has a very limited ability to intervene under that statutory provision. Section 192(1) of the Act makes it clear that even if the Court is prepared to exercise remedies under the statutes referred to in s 162, the Court may not make any order cancelling or varying the agreement or any term of the agreement. There would need to be very clear grounds for an intervention under s 192(2) and in view of my findings such intervention in this case under that section would clearly be unwarranted. As I have indicated, I accept Mr Cranney's submission that there are special features in this case in view of the fact that the transport allowance provision is contained in a negotiated collective agreement ratified by the parties pursuant to the provisions of the Act. It may well be that, as part of the overall bargaining process, stands were taken and bargaining positions adopted in respect of the other clauses negotiated by virtue of an understood position on the transport allowance or vice versa. To intervene pursuant to s 192 to force the parties to endeavour to re-negotiate that particular clause and indeed reopen entitlements to strike or lock-out for bargaining purposes would be quite unjustified interference on the facts of this case.

[34] For these reasons the challenge succeeds. On the clear and unambiguous terms of the collective agreement and the prior documents, those employees formerly employed at the Albert Street site and who have further to travel to work as a result of the change of location, are entitled to the transport allowance.

[35] So far as costs are concerned, I have no information as to whether there was a determination as to costs by the Authority or whether the parties accepted the invitation of the Authority Member to consider whether the costs should lie where they fall. However, in respect of costs arising from the determination (if they are to be pursued) and costs in this Court, the issue of costs in its entirety is reserved. Mr Cranney has 14 days in which to file a memorandum as to any costs sought and Mr Rooney shall have a further 14 days thereafter to file a memorandum in reply. I shall then make any costs ruling sought on the basis of that documentation filed.

M E Perkins
JUDGE

Judgment signed at 4.30pm on 1 July 2010