IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 61
ARC 97/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INC Plaintiff
AND	OCS LIMITED Defendant

Hearing: 5 February 2010
And by supplementary submissions on 16 February 2010
(Heard at Auckland)

Appearances: Simon Mitchell, Counsel for Plaintiff
Paul McBride, Counsel for Defendant

Judgment: 17 May 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question for decision on this challenge from a determination of the Employment Relations Authority is whether an employer is entitled to change unilaterally the frequency of wage payments from weekly to fortnightly. The decision turns on the interpretation of a collective agreement.

[2] OCS Limited (OCS) employs service workers in public hospitals. As OCS has taken over this work from the hospitals themselves or other providers, it has inherited different employee pay systems including weekly and fortnightly pay days. Employees who have continued in their roles, but with OCS as their employer, have, until now, continued to be paid on the same day and with the same frequency as previously. Now OCS wishes to standardise its pay arrangements so that all

employees are paid fortnightly. This is for reasons of efficiency and cost cutting. OCS has consulted with affected employees through their union, the plaintiff, but to no avail. Both parties rely on the interpretation of the collective agreement to support their positions.

[3] At issue is cl 27.1 of the collective agreement which expired on 30 June 2009 but continues in force under s 53 of the Employment Relations Act 2000 whilst being renegotiated. Clause 27.1 provides:

> *Employees shall be paid fortnightly or weekly* in arrears by direct credit no later than Thursday. Where errors have occurred as a result of employer action or inaction, corrective payment must be made within two working days of the error being brought to the employer's attention. Each employee shall be supplied with written details showing how his/her wages are made up. (My emphasis)

[4] The plaintiff says that the reference to "*fortnightly or weekly*" indicates and confirms a continuation of existing pay arrangements which are either weekly or fortnightly. The defendant says that the clause permits it to choose whether to pay employees weekly or fortnightly and it has elected to pay fortnightly in reliance upon that choice. The Authority confirmed the employer's interpretation of the clause.

[5] OCS planned to change its pay arrangements from about 11 January 2010 so that all employees are paid fortnightly. An interim arrangement to delay that planned change has enabled the status quo to be preserved until this case is decided.

[6] The interpretation and operation of particular provisions in collective agreements must be undertaken in a number of contexts including consideration of the whole of the agreement, the nature of the enterprise, relevant background information and the influence of any relevant statutory provisions.

[7] The Authority's reasons supporting the employer's interpretation are encapsulated in its determination as follows:

> [17] I find clause 27.1 of the collective agreement allows the employer the discretion to pay employees either weekly or fortnightly. I also find that whether the payment of wages is made weekly or fortnightly is a practice which can be changed during the employment relationship. I can think if no

> other reason why the parties would have agreed to the wording they have, if that was not what was intended.
>
> [18] There are no provisions in the collective agreement to restrict the employer's discretion to change the frequency of the payment of wages.

[8] The Authority considered that cl 36.1.1 of the collective agreement was relevant to its interpretation of cl 27.1. That provides:

> The parties to this collective agreement accept that change in the health service is necessary in order to ensure the efficient and effective delivery of health services. They recognise a mutual interest in ensuring that health services are provided efficiently and effectively, and that each has a contribution to make in this regard.

[9] The Authority concluded that "[t]he plain meaning of the words in clause 27.1 [is] clear and unambiguous." It is, however, difficult to reconcile that absolute conclusion with the tenable alternative interpretations advanced by the parties and the Authority's preference of one interpretation over the other.

[10] In fairness to the Authority, it must be said that the parties acknowledged at the hearing that incorrect evidence had been given to the Authority (and on which it had relied) about practice at Wellington Hospital affecting the same issues as in this case. This evidence influenced the Authority's conclusion and although not deliberately so, nevertheless erroneously.

[11] The frequency of wage payment is a matter of contract or agreement and is not governed by statute. The Wages Protection Act 1983 is silent on the question. So too is the Employment Relations Act 2000 and, in particular, s 130 dealing with requirements of employers to keep wage and time records.

[12] I respectfully disagree with the Authority's conclusion that there is no other imaginable reason for cl 27.1 except to permit the employer flexibility in deciding whether to pay wages weekly or fortnightly.

[13] As already noted, OCS has inherited contracts and employees with different employment arrangements which have included both weekly and fortnightly wage payments. I consider that the more probable rationale for clause 27.1 is to accommodate a continuation of those existing wage payment arrangements so that

the clause obliges the employer to pay employees either weekly or fortnightly depending upon their actual individual contractual entitlement. This is a grandparented provision in the sense that it continues terms and conditions of employment of employees inherited by OCS although, in respect of new employees engaged by the company, it permits the company to contract individually for either weekly or fortnightly payments.

[14] Altering after a long period the frequency of wage payment and, in particular, reducing that frequency by half, is a significant event for any employee and, particularly, for a low paid employee such as those affected by this case. That is so, even if protective transitional arrangements can be made to ensure no disadvantage at the time of the changeover. People budget, not only to the amount of their income, but in reliance on the frequency of its payment. In addition to the wage earner, others, including families and creditors, depend upon the regularity of income based on its frequency. That is why the law presumes that the frequency of wage payments is a matter of contract requiring agreement to both set and alter.

[15] I respectfully disagree with the Authority that cl 36.1.1 set out above affects the interpretation of cl 27.1. The changes proposed by the employer are not changes in the health sector necessary to ensure the efficient and effective delivery of health services. Rather, they are changes proposed in the employment relationship between OCS and its employees for the purpose of efficient and cost effective operation of its employment systems. There is no sufficient connection between what OCS wishes to do, and the collective agreement's aspiration of "ensuring that health services are provided efficiently and effectively" that this clause should influence the interpretation of another. This case is concerns the cost of OCS employing labour.

[16] Nor was the Authority correct to rely upon the judgment of the Supreme Court in *Wholesale Distributors Ltd v Gibbon Holdings Ltd*.[1] This judgment accepted in principle that the conduct of parties in the performance of their contract may be a legitimate factor in its interpretation. I respectfully agree with that statement of the law in relation to employment agreements. Indeed, that has been the

[1] [2007] NZSC 37, [2008] 1 NZLR 277.

law applied by this Court for some time. But in this case the evidence of the performance of the agreement is that OCS has paid its employees both weekly and fortnightly depending upon the existing arrangements for payment when OCS inherited those employees along with the contracts for the work performed by them. It is not, as the Authority held, a matter of how the union may have viewed the operation of cl 27.1 or identical provisions in other collective arrangements in operation. These are rights and obligations incumbent upon the employer in dealing with individual employees and it is, if not irrelevant, then largely immaterial what the union may have thought of cl 27.1 type arrangements in other cases. It is even more tangential to take into account, as the Authority did, what another service company did in relation to the pay of previous employees of OCS when that other service company (Spotless Services (NZ) Limited) took over another OCS contract at Wellington Hospital.

[17] If there is consent to an arrangement given by an authorised representative of an employee such as a union, then this amounts to a consensual variation which is effective. Here, neither the employees nor their representative, the union, has agreed to vary the pay frequency arrangements. The case now for decision is whether the employer is entitled to do so unilaterally, that is in the absence of agreement or, as here, in the face of express opposition.

[18] The defendant's case is that it is only required to consult with affected employees by their representative about its intended changes and that it has done so. I agree with the latter proposition but it is only determinative of the case if frequency of wage payment is not a term or condition of employment for affected employees. It is a term or condition, not merely impliedly as determined by custom and practice in operation but expressly by reference to it in the collective agreement. Variation of the term or condition as interpreted must be consensual and cannot be effected by the employer unilaterally even following consultation.

[19] The defendant also emphasises that a very substantial majority of its employees are now paid fortnightly and that for reasons of business efficiency it should be permitted to standardise the pay arrangements for all of its employees. As has been said before in judgments of this Court, contractual rights and obligations

cannot be overridden unilaterally for reasons of efficiency or cost saving by one party. Terms and conditions of employment are to be bargained for, individually or collectively, including how and when remuneration is to be paid.

[20] For the forgoing reasons, I conclude that the Authority was wrong. Section 183(2) of the Employment Relations Act 2000 deems, by operation of law, that the Authority's determination is set aside. In substitution for that I determine the dispute by deciding that OCS Limited is not entitled unilaterally to change the frequency of payment of wages to its employees who are members of the Service & Food Workers Union Nga Ringa Tota Inc in reliance on cl 27.1 of the collective agreement.

[21] The Authority reserved costs, indicating that it was inclined to let these lie where they fell. No application has been made to the Authority to determine costs in that forum. Nevertheless, the Authority's substantive determination having been set aside, costs are again in issue in the Authority and in this Court. When asked by either of the parties to deal with them, I will do so globally.

[22] I would encourage the parties to deal with matters of costs in the first instance by discussion between counsel. If resolution cannot be reached, the plaintiff is entitled to apply by memorandum within three months of the date of this judgment, with the defendant having the period of a further month to reply also by memorandum.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Monday 17 May 2010