

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 266
3103852

BETWEEN

VALERIE RAGGETT,
CATHERINE TALBOT,
FRANCELLE BURNS,
NICHOLAS SWAN, HELENA
NATHAN AND MICHELLE
HOOD
Applicants

AND

EASTERN BAYS HOSPICE
TRUST t/a DOVE HOSPICE
Respondent

Member of Authority: Marija Urlich

Representatives: Paul Pa'u, counsel for Applicants
James Crichton, counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 29 May and 11 June 2020 from the Applicants
5 and 17 June 2020 from the Respondent

Determination: 30 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Eastern Bays Hospice Trust t/a Dove Trust (Dove) provides hospice services in East Auckland.

[2] Valerie Raggett, Catherine Talbot, Francelle Burns, Nicholas Swan, Helena Nathan and Michelle Hood (the workers) were employed in ancillary services supporting the core work of Dove namely six retail stores, human resources and communications. Ms Raggett was employed as human resource manager for

volunteers and staff. Ms Talbot, Ms Burns, Mr Swan and Ms Nathan were employed as retail store managers. Ms Hood was employed as communications manager.

[3] This employment relationship problem concerns decisions made by Dove in response to the COVID-19 lockdown and the concomitant effects on the workers of those decisions which involved reductions to their wages or salaries and dismissal for redundancy.

Background

[4] On 23 March 2020 COVID-19 level 4 restrictions were implemented. The same day Dove applied for and received the government wage subsidy (GWS). In making that application Dove signed a declaration which included:

- You agree you will, using best endeavours, retain the employees named in your application in employment on at least 80 percent of their regular income for the period of the subsidy

[5] On 24 March Dove closed its retail stores consequent to the level 4 COVID-19 restrictions. Ms Talbot, Ms Burns, Mr Swan and Ms Nathan did not perform work for Dove from that date.

[6] On 25 March Dove sent a memorandum to all staff which, amongst other matters, advised:

- (i) normal salary and wages would continue until the pay period ending 29 March;
- (ii) from 30 March staff would be paid 80 per cent of salary and wages until 22 April (the then anticipated end of the COVID-19 level 4 lockdown);
- (iii) to then be reviewed on stated criteria.

[7] The memorandum does not state the 20 per cent reduction in pay was agreed with staff. The memorandum is silent on when or if Dove would pay the shortfall.

[8] On 30, 31 March and 17 April respectively, the workers received letters proposing restructuring of their positions. They were invited to give feedback on the proposal which they duly gave.

[9] On 7, 9, 14, 15 April and 1 May, respectively, the workers individually received letters which included:

- (i) their positions were disestablished effective at date of letter;
- (ii) eight weeks' notice of termination of employment;
- (iii) the first four weeks of notice to be paid at 80 per cent of their salary or wages;
- (iv) the second four weeks of notice to be paid at the GWS rate of \$585.80 (gross);
- (v) they were not required to undertake any work for Dove during the notice period;
- (vi) their final pay was to be calculated on the last day of the notice period;
- (vii) how final pay would be calculated and when it would be paid.

[10] On 8 May 2020 the workers lodged in the Authority challenging the justifiability of their dismissals and the short pays. They sought and were granted urgency for part of their application concerning the payment at 80 per cent of normal wages and salary and the four weeks' notice paid at the GWS rate. This determination deals with that part of the application.

[11] The workers say they did not agree to be paid anything short of their normal wages and salary. They seek a determination that Dove has:

- (i) unlawfully made deductions from their normal wages or salary in breach of obligations under the Wages Protection Act 1983 (WP Act) and/or their employment agreements;
- (ii) a penalty for breach of such obligations.

[12] Dove says there is no breach of the WP Act or the relevant employment agreements because:

- (i) due to the COVID-19 restrictions the workers were not ready, willing and able to work and therefore, there can be no question of any breach of the WP Act or the relevant employment agreements; and
- (ii) the extended notice period was offered on specific terms which the workers accepted.

The Authority's investigation

[13] By consent this matter is determined on the papers.

[14] In accordance with timetabling directions witness statements, supporting documents and submissions were filed. The Authority affirmed the evidence of the witnesses, Ms Raggett, Ms Talbot, Ms Burns, Mr Swan, Ms Nathan, Ms Hood and Simon Jones, an executive trustee of Dove.

[15] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. In determining this matter the Authority has considered written evidence, submissions and relevant background documents filed prior to the hearing. It has not recorded all evidence and submissions received.

Issues

[16] The issues requiring investigation and determination are:

- (i) in accepting the government COVID-19 wage subsidy is Dove released from the obligation to pay wages or salary under the parties' employment agreements and/or the Wage Protection Act 1983?
- (ii) if so is a penalty warranted?
- (iii) should either party contribute to the costs of representation of the other party?

Employment agreements

[17] The workers were all employed on individual employment agreements (the employment agreements). The employment agreements contain clauses outlining how much and when they would be paid, four weeks' notice of termination¹, termination, redundancy and deductions.

[18] The deduction clauses specify anticipated events where Dove might make a deduction – over-payments, outstanding debts or monies owed, value of unreturned

¹ With the exception of Ms Raggett whose employment agreement provides for eight weeks' notice of termination.

property, failure to give agreed notice of termination. None of those events include or could be argued to include the circumstances faced by Dove during the COVID-19 restrictions.

Relevant law

[19] Terms of employment cannot be unilaterally varied².

[20] Section 2 of the WP Act defines wages as salary or wages agreed to be paid to a worker for performance of service or work.

[21] Section 4 of the WP Act provides where wages become payable the entire amount must be paid to the worker without deduction.

[22] Section 5 of the WP Act provides deductions may be made from wages payable to a worker for a lawful purpose with written consent (or written request).

[23] Whether wages are payable in terms of section 4 of the WP Act will depend on the relevant employment agreements and, if wages are payable in terms of the employment agreements, then any failure to make either full or part payment of wages is an unlawful deduction within the meaning of s 4 of the WP Act.³

[24] A failure to pay full or part payment of wages due under an employment agreement is a deduction within the meaning of the WP Act.

Did Dove fail to pay wages or salary due under the employment agreements in breach of employment agreements and/or the Wages Protection Act 1983?

Did the workers' agree to the deductions?

(i) 80 per cent of wages or salary

[25] The workers did not agree to be paid 80 per cent of their wages or salary. Although some of the documents before the Authority describe the deductions as agreed, this was not a position advanced by Dove in either the written evidence or submissions.

² Sections 63(2) and 63A Employment Relations Act 2000.

³ *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580 at [78].

(ii) extended notice period paid at GSW

[26] The second four weeks of the notice period falls within the deduction claim. For all but one of the workers Dove doubled their contractual notice of termination. This extension was properly acknowledged as generous and sensitive to the impact of the redundancies on the workers.

[27] However, because Dove extended the contractual notice period it could not set a remuneration rate different to that agreed within the relevant employment agreement. The parties had an agreed instrument for payment of redundancy notice. To unilaterally vary part of that instrument, albeit to the benefit of the affected workers, did not release Dove from the remaining obligations under that instrument.

[28] Dove submits the affected workers have accepted the offer of the variation to their notice period by their acceptance of the extended notice. This argument cannot succeed because the extended notice period was never offered. Dove unilaterally varied the notice period.

[29] Dove could have consulted with the workers about the proposal to extend the notice period by four weeks and to pay that extended period at a different rate to the contractual wages or salary and then sought their agreement to vary the terms of their redundancy notice. In the absence of consultation and agreement to vary the terms of the notice period Dove did not have a legal basis to reduce normal wages or salary due under the employment agreement during the extended notice period.

No performance of service or work

[30] Section 2 of the WP Act is an interpretation section and includes:

wages means salary or wages and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a worker *for the performance of services or work*; and also includes any part of any wages.⁴

[31] Dove says it was released from its obligations under the WP Act and the relevant employment agreements to pay the normal wage or salary when it became

⁴ Emphasis added.

payable because the workers have not performed service or work under their employment agreements. Dove says what they have been paid is not wages.

[32] This argument cannot succeed on the following grounds:

- (i) if the WPA were to operate as argued, any non-performance of service or work would release the employer from its contractual obligation to pay wages. As the Court of Appeal held in *Spotless* the application of the WP Act operates within the context of the relevant employment agreement.⁵ The parties' employment agreements do not provide for suspension of wages or salary for non-performance in the circumstances faced by Dove in late March;
- (ii) Dove's proposed interpretation of the WP Act's definition of *wages* stretches the statutory language too far. The definition places the requirement to pay within the framework of a contract of service. The conjunction *for the performance of services or work* is at the end of the definition of wages and cannot properly be read in isolation from the definition as a whole; and
- (iii) on the unchallenged evidence the workers were at all times ready and willing to work. But for the intervening event of the COVID-19 restrictions and/or Dove's decision to not require them to attend work during the notice period, on the evidence, they were able to fulfil their obligations under the employment agreements.

Penalty

[33] For the forgoing reasons Dove has breached obligations owed to the workers to pay contractual wages and salary during their employment without deduction.

[34] Dove raised an objection to the workers' seeking a penalty because this part of their claim was raised during the directed timetable for filing evidence and submissions. Dove is entitled to a fair opportunity to respond all the claims made by the workers.

⁵ *Spotless Services*, above n 3, at [78].

[35] A consideration of a penalty is warranted but is adjourned until the totality of the workers' employment relationship problem has been investigated and determined.

Outcome

[36] Dove has breached obligations owed to the workers under the relevant employment agreements and the WP Act to pay contractual wages and salary during their employment without deduction.

[37] Any short paid amounts outstanding at the applicants' final pay calculation remain due and owing.

[38] If the parties are unable to resolve this issue between them the workers have leave to lodge a claim for arrears of wages.

[39] Consideration of penalty is adjourned per [35] above.

Costs

[40] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority