Dispatch

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Contract is King when restructuring

Public Service Association – Te Pukenga Here Tikanga Mahi Incorporated v Secretary for Education [2024] NZERA 432

Late last week, the Employment Relations Authority issued a determination that, in much the same way as the Employment Court's earlier and widely publicized decision in the *TVNZ* case, again places employment agreements firmly front and centre in restructuring situations.

In early 2024, the Ministry of Education proposed significant change to its organisation structure in the wake of the Government's December 2023 cost saving directive. No issue arose as to the 'why' in this particular case. The focus was, instead, solely on the 'how' and the 'who'.

A collective agreement was in place between the Ministry and the Public Service Association (PSA) which contained detailed provisions relating to structural change. In particular, the collective agreement provided that the various change management process steps outlined within it would be undertaken with "*the aim*" of the parties reaching agreement about and making recommendations to "*management*", which would then "*endeavour to take the views into account as far as possible in making final decisions*".

It was only towards the tail-end of the extensive consultation process that was undertaken that the PSA raised concerns that this particular requirement had not been met. Those concerns resulted in urgent proceedings being filed in the Employment Relations Authority, which applied the well-established 'plain and ordinary meaning' approach to contractual interpretation, and found in favor of the PSA.

In doing so, the Authority determined that the words the parties had agreed to meant that the Ministry had effectively negotiated away aspects of its managerial prerogative in restructuring situations. As a result, rather than retaining a right to design and propose change for consultation on its own terms, the Ministry had instead committed to engaging proactively and collaboratively with the PSA with the aim of reaching agreement and making recommendations about what that change might look like to the Ministry's decision-makers (even though the Ministry ultimately retained final decision-making authority).

The Authority held that this collaborative engagement "*must be between members of the Ministry and PSA at an appropriate level and the contractual right of the PSA to be an active participant in the change management process must be secured*". That engagement was not required to be included as a separate 'step' in the change management process (although that approach could be taken) but clear evidence that it had occurred as part of or ahead of the broader consultation process would be required in the event of challenge.

Despite what it described as "*evidence of a significant volume of engagement*" between the Ministry and the PSA at various levels and throughout the consultation period, and the Ministry's 'commendable' approach to dealing with the concerns raised by the PSA (which included pausing its processes, reviewing its stance and putting forward proposals designed to "*wind back the clock on critical aspects*"), the Authority concluded that the express requirement to work collaboratively had not been met.

Rather, the Authority found that the PSA's involvement in the Ministry's process had been effectively limited to acting as "*a recipient of information from the Ministry and disseminator of information to its members*". There was insufficient evidence that the Ministry had worked deliberately and proactively with the PSA to reach (or try to reach) agreement on recommendations for the decision-makers. The extensive consultation that had been undertaken therefore fell short of "*the bargain the Ministry signed up to*" and was required to honour.

The decision is also notable because of the Authority's approach to the eight options (which included redeployment, retraining, severance and voluntary redundancy) listed in the collective agreement for consideration in surplus staffing situations, once it was clear that individual roles would be disestablished, and their incumbents significantly impacted.

The collective agreement specified in this regard that the Ministry and the PSA would "*meet to reach agreement on the options which are appropriate to the circumstances and will be available*", with the stipulation that "*How these options, or other options…are implemented, will be negotiated on a case by case basis between the Ministry and the PSA*".

The Authority held that these provisions required a two-stage process which, once again, effectively cut into the Ministry's managerial prerogative to make its own decisions. First, the Ministry must meet with the PSA to agree which, and how many, of the eight options would be available to surplus employees in the particular change process at issue. Second, once that agreement had been reached, then implementation of the available options must be negotiated (and therefore again agreed) between the Ministry and the PSA in respect of each ("*case by case*") individual surplus employee represented by the PSA.

That interpretation also applied to severance itself – "*The severance option (which includes a redundancy payment) can only be implemented once the Ministry and the PSA have* [stage one] *agreed it is an available option, and* [stage 2] *once the individual has agreed to take the option*". In other words, the Ministry would not be able to apply the option of severance (i.e. the ending of employment) unless or until the relevant individual employee had agreed to that outcome.

What that might mean for the Ministry's broader ability to terminate employment for redundancy outside of this particular provision (i.e. unilaterally) was, the Authority held, "*unnecessary to determine*" in this case.

The decision has rightly sent shockwaves through the public sector, given that generously worded 'agreement' and 'negotiation' provisions of the sort that have led to these potentially onerous findings are neither new, nor uncommon. Contract law requires that clauses are interpreted on the actual words the parties have themselves chosen to use, and words like this mean what they say, whether or not either or both parties ever genuinely intended them to and irrespective, in particular, of whether that places additional obligations on employers.

Any organisation that is contemplating or in the process of restructuring needs to be very clear from the outset as to just what their own employment agreements require of them, and prepared to amend their approach to make sure that those agreements are complied with.

Even more importantly though, careful thought and attention should also be given to the employment agreements that are reached or amended in collective bargaining. While the employment relationship is undeniably unique at law, it is still underpinned by contract law. Every word within an employment agreement is potentially critical, and taking a rigorous and cautious approach to considering what clauses might actually mean or require before they are set in stone has never been more important.

Dundas Street has unparalleled experience in collective bargaining and contract drafting and interpretation across all sectors and industries. We are available at any time as a trusted resource on your bargaining team, or as a valuable additional set of eyes behind the scenes. We are also highly sought after as change-related experts and can advise on all aspects of the process.

The Team at Dundas Street.