

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 50
5598771

BETWEEN	NZEI TE RIU ROA Applicant
AND	SECRETARY FOR EDUCATION Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicant Sally McKechnie, Counsel for Respondent
Investigation Meeting:	7 April 2016 at Wellington
Determination:	26 April 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant union (NZEI) applies to the Authority concerning the interpretation, application and operation of the operative collective agreement covering the employment of support staff in schools.

[2] Many of these staff work 40 weeks per year (effectively the school year) and then on top of that of course, receive annual holiday leave of four weeks and payment for some public holidays.

[3] It follows that despite those additional payments of holiday leave, staff are effectively off pay for some weeks at the end of the school year and before the commencement of the new school year.

[4] Because of that problem, the parties entered into an agreement recorded in the operative collective agreement providing for annualisation of the income of these

employees. Put simply, the effect of this provision is to calculate the expected annual earnings of staff for a 12 month period and then pay that sum by equal fortnightly instalments over the whole year rather than just the school year. Of course, the effect of annualisation is to ensure that staff receive income across the whole year and not just in the school year.

[5] The detail of that annualisation arrangement is set out in a document styled Appendix D which forms part of the operative collective agreement.

[6] The critical provision in Appendix D is clause 2(c)(ii) and is in the following terms:

Any period of annualisation must begin at the start of pay period 23 (i.e. the pay period that begins closest to February 1st) in any year and run until the end of pay period 22 in the following year (12 months).

[7] Clause 4 of Appendix D goes on to provide how the annualised fortnightly rate is calculated and paid. As to the calculation, it says simply that the rate is calculated by dividing the projected annual earnings by the number of fortnights in the ensuing 12 month period and in respect of the payment itself, the clause says that the annualised fortnightly rate is paid each fortnight throughout the 12 month period starting at pay period 23.

[8] I pause to note here that clause 4(a) appears to contemplate a variation in the number of fortnights there might be in the “*ensuing 12 month period*” because it requires that the rate be calculated by dividing the annual earnings “*by the number of fortnights*” in the 12 month period in question. That phrase suggests to me some acknowledgment that there can be more than 26 pay periods in a given year because, according to the Secretary for Education anyway, there is an equation between pay periods and fortnights for the purposes of this collective employment agreement.

[9] What is more, as the Secretary for Education points out, there is no reference anywhere in either the operative collective employment agreement or, in particular, Appendix D, to there being only 26 fortnights in any year because the number 26 does not appear anywhere in the documents.

[10] But what the NZEI says is that the Secretary for Education has confused two concepts, the pay period on the one hand and the pay day on the other. Perhaps more importantly, the Secretary for Education arguably conflates fortnights with pay

periods. NZEI says a year is a year and that if the year commences on 20 January 2016 then that same year ends on 20 January 2017 and there can be no more than 26 fortnights in that year.

[11] But as a matter of fact, as the Secretary for Education points out, in the current pay year there are 27 pay periods.

[12] Another highly relevant factor in this matter is that not all staff adopt the annualisation approach. Indeed, on the evidence I heard, the majority of staff are paid in effect just for the school year with their holiday and statutory holiday leave on top of that, such that those staff go off pay for a period in each year and do not commence receiving income again until the beginning of the new school year.

[13] It is self-evident that the outcome of this current dispute in terms of the application of the annualisation provisions cannot have the effect of entitling either group of employees to be paid a different total quantum from the other group.

[14] Moreover, the Secretary for Education maintains that there is common cause that the amount payable to annualised workers on the one hand and workers who work only the school year on the other, is the same although that proposition does not seem to be accepted by NZEI. If the same amount of projected annual income is spread over 27 fortnightly pays rather than 26 fortnightly pays, then it is said nothing would appear to have been lost by the annualised group. So, to put the same point another way, and quoting now from the Secretary for Education's submission:

The annualisation process has no effect on the employee's total income.

[15] The Secretary for Education says that the annualisation period in the documents "*is defined by reference to the tax year*". I think it would be more accurate to say that the numbering of the pay periods aligns to the tax year while the annualisation arrangements align to the school year.

[16] I am not sure that anything much turns on the distinction that I draw save for the fact that the start of the annualisation process is the beginning of pay period 23 (which is the pay period beginning closest to 1 February, broadly the beginning of the school year) while pay period 1 is the pay period closest to the start of the tax year.

[17] Because there are 27 pay periods in the current year, the Secretary for Education says that the annualisation arrangements had to reflect that and in facilitating staff to make their election as to whether they wanted to annualise earnings or not (a process which happens each and every year), the Secretary for Education was careful to set out the fact that staff were receiving annualisation over 27 pay periods comprising 54 weeks or 378 days.

[18] But those figures seem to me to identify the core of the difficulty for the Secretary for Education because in effect what they convey is that staff are being asked to accept an annual payment for a period that is longer than a year. Put another way, staff are being asked to accept payment for 378 days or 54 weeks at the annualised rate that would apply for 365 days and 52 weeks.

[19] The Secretary for Education says that this is just a consequence of the unequal number of days in each year. Twenty six fortnights, for instance, equals only 364 days and in consequence, a 26 fortnight year is one or two days short of a full year because each year is either 365 or 366 days long.

[20] It is said that over a period of 11 or 12 years depending on the fall of leap years, the deficit amounts to a full fortnight and this year is one such year.

[21] Put simply then, the extra fortnight this year catches up the extra days that have accumulated over 11 to 12 years and effectively starts the new school year (the 2017 school year) in the “*right*” place.

[22] At its simplest, what NZEI asks me to do is to look at the current year in isolation whereas the Secretary for Education encourages me to look at the current year in a continuum which includes the other 11 or so years which have created the phenomenon caused by the current 27 pay period year.

[23] I am satisfied that my obligation is to apply the collective agreement insofar as that is possible. I observe in that regard that there is nothing in the agreement or in Appendix D which contemplates the effect of the unequal length of years save for some observations in a supporting affidavit filed for the Secretary for Education which refers to discussions between the Ministry of Education and NZEI in 2007. The effect of that affidavit evidence is to suggest that there was an understanding about the process now being advanced by the Secretary for Education but that evidence is disputed by NZEI.

Issues

[24] The only issue in contention here is whether the Secretary for Education is correctly applying the relevant provisions in the collective agreement on the one hand and in Appendix D on the other.

Is the Secretary for Education's application correct?

[25] It is common ground that the annualised payment being made to staff in the current year is payable over 27 fortnights rather than 26 and NZEI says that the effect of this is to give annualised staff a wage decrease which they have not agreed to.

[26] Conversely, the Secretary for Education says that the spreading of the payments has no effect on the totality of the annualised income that staff are entitled to and is required in order to reset the beginning of the new year (the 2017 school year) because of the cumulative effect of the unequal length of successive years.

[27] As I have already noted, I am satisfied that my obligation is to apply the agreement and determine whether or not the payment is made in conformity with the agreement.

[28] I begin the analysis by observing that there is nothing in either the employment agreement itself or Appendix D which refers specifically to this circumstance notwithstanding the contested evidence supplied by the Secretary for Education to the effect that there was an understanding between the Ministry of Education and NZEI about this very phenomenon. The closest we get to an acknowledgment of the phenomenon in question here is the fact that nowhere in any of the relevant provisions is there a reference to the number of pay periods or fortnights in a particular year or even in a typical year.

[29] However, the relevant provisions do refer specifically to the length of time by months that a period of annualisation lasts and the reference is plainly to 12 months: see paragraph [6] above setting out clause 2(c)(ii) of Appendix D.

[30] Conversely, as I have already noted, the annualisation period for the current year comprises 378 days which incorporates 54 weeks and therefore 27 pay periods. In my opinion, the employee declaration which staff have been asked to execute, which accurately records the effect of the annualisation proposal for the current year,

is not consistent with the explicit requirements of Appendix D because it contemplates a longer period (longer than 12 months) than Appendix D requires.

[31] That said, I accept without reservation the points made for the Secretary for Education that there needs to be an arrangement for dealing with the consequences of uneven years but those arrangements need to be a matter for negotiation between the parties. They cannot simply be imposed unilaterally by one party on the other and in the absence of agreement from NZEI as to the understanding which affidavit evidence for the Secretary for Education suggested existed between the parties, the appropriate place for that understanding to be reached is in the context of the renegotiation of the terms of the collective agreement.

[32] I venture one other observation in respect of the interpretation of the relevant provisions in Appendix D. The central provision (clause 2(c)(ii) of Appendix D) defines the period of annualisation as beginning at the start of pay period 23 and running until the end of pay period 22. On the face of it, that is precisely what the Secretary for Education has provided for but as I have already observed, the difficulty is that the provision then goes on to use the words in parentheses, 12 months. As I have already observed, the period in the current year is more than 12 months and that does not, in my view, comply with the clear provision in the agreement.

[33] Equally though, there is an argument for the view that the drafting of the provision contributes to the lack of clarity because it requires that the period of annualisation begins at the start of pay period 23 (a given) but then goes on to define pay period 23 as the pay period that begins closest to 1 February whereas in the current year, the pay period that begins closest to 1 February is actually pay period 24, not pay period 23 at all.

[34] Pay period 24 begins on 3 February 2016 so arguably it is closer to 1 February than pay period 23 which begins on 20 January.

[35] Clearly, if annualisation in the current year had commenced at pay period 24, there would have been only 26 pay periods but of course that does violence to the provision which says that the period of annualisation must start on pay period 23.

[36] All of this emphasises the need for the parties to agree on some explicit provisions to deal with this phenomenon.

Determination

[37] I am satisfied that the Secretary for Education is not paying the annualisation arrangements for the subject group of employees correctly and that this is because the annualisation payments are made over 27 pays rather than 26 and that this does not comply with the requirement in the relevant provisions which refers to the period of annualisation comprising 12 months. 12 months must be 12 calendar months: s.29, Interpretation Act, 1999. That constitutes my principal conclusion.

[38] Given that time is running on these arrangements, it is urgent that the parties reach some understanding about what ought to apply in respect of the current year's arrangements and to that end, having issued this determination, I direct that the parties are to return to mediation to endeavour to arrange matters appropriately between themselves, having regard to the determination that I have made.

[39] Leave is reserved for the parties, or one of them, to revert to me for further orders, including the putative compliance order sought by NZEI.

Costs

[40] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority