

4. The pre investigation meeting arrangements involved the parties' representatives agreeing on the facts that apply. Affidavits were filed from Mark Williamson and Kevin McBride for AvSec and Dean Chandler-Mills and Gary Reading from the PSA in reply.
5. Additional documents were tabled at the investigation meeting:
 - The Aviation Security Service Collective Agreement dated 1 April 2001-30 June 2003.
 - The Aviation Security Service Collective Employment Contract 1 July 1995-1997.
 - The Aviation Security Service Collective Employment Contract 7 February 1994-30 June 1995.
 - Aviation Security Officers, Sergeants and Receptionists Salary Bands and Steps 1 October 2000, 1 April 2001 and 1 October 2001 dated 1 December 2001.
6. Evidence was given at the investigation meeting by Messrs Mark Williamson, Graeme Barrett PSA delegate, Gary Ready PSA organiser and Dean Chandler-Mills.
7. The Authority also raised an issue about the EMPU's standing in the employment relationship problem given that it is not a party to the collective employment agreement and no EMPU member was included in the proceedings. David Adams and 46 others have not signed the Statement of Problem or given any direct evidence of their involvement in the problem, except to the extent that from the agreed Statement of Fact their individual employment agreements mirror the provisions of the collective agreement. I have proceeded with an investigation on the basis of the agreed Statement of Fact. I have accepted the involvement of the EMPU in addition to the PSA and David Adams and 46 others represented by NUPE. The employer's consent recognises that the EMPU will have an interest in the outcome and has provided information to assist the investigation.

Background

8. The agreed facts are as follows:
 1. *The Aviation Security Service ("Avsec") is a Crown-owned entity reporting through a Board of Directors to the Minister of Transport. It currently has approximately 360 staff and has branches at seven locations as well as a national office in Wellington.*
 2. *The Aviation Security Service Collective Agreement was negotiated with the New Zealand Public Service Association ("the PSA") in April and May 2001 and has a term of 1 April 2001 to 30 June 2003. Clauses 14 to 19 of the Collective Agreement relate to the application of the AvSec performance pay system (attached as appendix 1).*

3. *AvSec currently has three unions representing its staff. The PSA primarily represents Auckland staff, Christchurch staff are represented by the National Union of Public Employees ("NUPE") and Wellington staff are covered by the New Zealand Amalgamated Engineering, Printing and Manufacturing Union ("EPMU").*
4. *Non-PSA union members are currently employed on individual employment agreements as the PSA is the sole union party to the collective agreement. Also employed on individual employment agreements are officers and sergeants who do not belong to any union. Within AvSec, individual employment agreements for officers and sergeants mirror the provisions of the collective agreement.*
5. *Negotiations between the PSA and AvSec, for the Collective Agreement, concluded in May 2001.*
6. *Dean Chandler-Mills, an organiser for the PSA sent out a "Union News" to members of the PSA on May 30 2001 detailing a recommended offer for ratification by the members of the PSA and a draft copy of the proposed collective agreement.*
7. *Under the heading Movement to a revised scale and movement upward within a scale, Dean Chandler Mills advised members that:*

"There has been a change to the salary review procedure, and this is clarified in the text of the contract. At October 1st each year there will be a two step salary review procedure, and this is clarified in the text of the contract. Firstly, each officer's salary will be adjusted from the old scale to the corresponding step on the new scale, unless performance concerns have been signalled to an officer in writing, or alternatively, if an officer has moved to a new position within the previous twelve months. Secondly, demonstrable efforts in performance will be rewarded by an increase up one or more steps on the new scale".
8. *On 16 May 2001, AvSec issued a Collective Agreement Negotiations Update which stated:*

"AvSec has tabled proposed remuneration bands to apply from 1 April with a further review to be undertaken as at 1 July.... The only officers who will receive automatic salary adjustments will be those whose current salary falls below the new minimum salary for their band. All other adjustments will be performance based".
9. *The PSA held ratification meetings for its members in early June 2002. The PSA's members in Christchurch delayed their ratification meeting pending clarification of the salary scales that would have applied to them between 1 April to 1 July 2001.*
10. *On 6 June 2001, Mark Williamson of AvSec sent an email to Dean Chandler-Mills, which stated:*

"It is regrettable that the (sic) Christchurch delayed voting on the contract because they couldn't see the full range of salary steps that will apply from 1 April to 1 July 2001 and therefore will be rarely used".
11. *On 10 July 2001, Dean Chandler-Mills emailed Mark Williamson and advised the following:*

"I have had several enquiries about the backdating of the provisions of the new Collective Agreement. In particular salary placements...Our understanding was that all employees who are PSA members would have their salaries visited and would [be] placed at their equivalent in the new scales, as the minimum movement. It has been represented to me that expectation was not realised. Can you explain to me why this did not occur?"

12. On 14 July 2001, Mark Williamson responded to Dean Chandler-Mills by way of return email. In this email, Mark Williamson stated that:

"Those officers whose salaries were below the new \$34,000 for AK, Ch and Wgtn and the \$15.96 for regional officers have had their salary adjusted, with effect from 1 April 2001".

13. On 24 January 2002, Dean Chandler-Mills emailed Mark Williamson outlining the PSA's concerns in respect of the 2001 salary review process.

14. The salary ranges which applied to employees of the respondent covered by the Collective Agreement from 1 July 2001 are set out in clause 14.1 of the Collective Agreement. The salary ranges were:

Aviation Security Officers

\$34,400 - \$38,200 - \$42,000

Aviation Security Sergeants

\$42,900 - \$47,700 - \$52,500

Receptionists

\$27,300 - \$30,300 - \$33,300

15. The Aviation Security Service has operated its performance pay system since 1994/95. The key elements of the annual process are as follows:

Task	Target completion date
<i>Set salary bands</i>	<i>31 July</i>
<i>Complete audit process with PSA (on salary bands)</i>	<i>Mid August</i>
<i>Issue staff newsletter advising of new salary bands</i>	<i>30 August</i>
<i>Complete officer performance appraisals</i>	<i>30 August</i>
<i>Complete salary review for officers</i>	<i>30 September</i>
<i>Advise officers of outcome of salary review round</i>	<i>Mid October</i>
<i>Pay results of salary review round</i>	<i>Late October (backdated to 1 October)</i>

16. In 2001 AvSec was late in completing the process because of the events in New York on 11 September, and consequent changes to aviation security in this country.

17. In 2001 AvSec negotiated a collective agreement with the PSA, replacing the collective contract that had previously been negotiated under the Employment Contracts Act. The underlying philosophies of the performance pay system remained unchanged, but a new salary band for aviation security officers was negotiated with a starting rate of \$34,400 p.a. This rate is reflected in the collective agreement (refer appendix 1).

18. Under the heading 'Review of salary ranges', clause 15.1 of the Collective Employment Agreement provides:

"All salary ranges shall be reviewed annually as at 1 July with the next review occurring as at 1 July 2001. Adjustments to ranges covered by this collective agreement shall be advised in writing to the parties to this agreement."

19. The parties agree that the words 'salary range' and 'salary bands' are used interchangeably in the Collective Employment Agreement and nothing turns on the difference in terminology.
20. In the period after July 2001 AvSec recruited a large number of additional officers. Those officers were appointed on the new starting salary of \$34,400. An individual expressing interest in a position with AvSec is sent an information kit, which includes a sheet on employment conditions. The information sheet sent to potential recruits over the last twelve months stated that the starting rate for officers was \$34,400 p.a. The starting rate was reiterated to short-listed candidates as they proceeded through the selection process. A copy of the information sheet is attached as appendix 2.
21. The letter of appointment and individual employment agreement that successful candidates were sent also made reference to the starting rate of \$34,400 p.a. A generic letter of appointment and individual employment agreement are attached as appendix 3. The starting rate was reiterated at the induction session on employment conditions and AvSec human resources management that is presented as part of each recruit course. A copy of the relevant overhead is attached as appendix 4.
22. The events of 11 September delayed the usual salary setting process that is undertaken in June and July. This process was completed in early December 2001 and on Thursday 6 December there were discussions with the PSA on the adjustments made to the bands. That meeting was also attended by Kevin McBride of McBride HR Consultants.
23. On 14 December 2001 a newsletter was issued to all staff advising of the new salary bands and the process that was to follow with the salary review. The newsletter represents the written notification of the 2001 review of salary ranges for the purposes of clause 15.1 of the Collective Employment Agreement. A copy of the newsletter is attached as appendix 5.
24. Under the heading 'Outcome of review of salary bands', the newsletter states:

"As a result of this review of the salary bands, the mid point of the officers' ... salary bands have been increased by 2.1% ...

The new bands are as follows:

Aviation Security Officers

\$35,100 - \$39,000 - \$42,900

Regional Security Officers

\$15.96 - \$17.30 – \$19.42 per hour

Sergeants

\$43,800 - \$48,700 - \$53,600

Receptionists

\$27,800 - \$30,900 - \$34,000”

25. *Under the heading ‘Review of officers’ placement within the band’, the newsletter goes on to state:*
- “This year for the first time, the salary review process will be broken into two segments, as follows:*
- An assessment of whether the officer’s performance warrants movement from their salary step on the “old salary band” to the comparable step on the “new band”;*
- Secondly, an assessment of whether the officer’s performance warrants further recognition by way of additional progression within the new salary band, or a bonus payment. This will only apply to those officers who have transferred to the new salary band.”*
26. *Also included in the newsletter is the following statement:*
- “Officers who have commenced with AvSec in the last four months are generally still learning the ropes and are likely to stay on their current salary step unless their performance to date is sufficiently good and their progress in becoming fully competent in the key aspects of the job is such to warrant movement across to the new salary band.”*
27. *The statement set out in paragraph 26 above has been reiterated at all induction courses since July 2001.*
28. *On 4 July 2002, the PSA raised with AvSec its contention that all Aviation Security Officers in the three main centres should be on a minimum salary of \$35,100. NUPE subsequently raised the same issue in relation to its members.*
29. *AvSec’s response has been that there is a key principle at stake, namely, that there is no movement from one band to another except on the basis of performance.*
30. *There are 206 officers who are currently on \$34,400.*
31. *The parties attach copies of the following documents which the parties agree are relevant to the matter:*
- 1.1 Clauses 14 to 21 of Aviation Security Service Collective Agreement;*
 - 1.2 Information sheet for new staff;*
 - 1.3 Generic letter of appointment and individual employment agreement;*
 - 1.4 Overhead from presentation to recruit courses;*
 - 1.5 Newsletter (14 December 2001);*
 - 1.6 Collective Agreement Update dated 16 May 2001;*
 - 1.7 PSA Union News, AVSEC, dated 30 May 2001;*
 - 1.8 Email from Mark Williamson to Dean Chandler-Mills dated 6 June 2001;*

- 1.9 *Email from Dean Chandler-Mills to Mark Williamson dated 10 July 2001;*
- 1.10 *Email from Mark Williamson to Dean Chandler-Mills dated 14 July 2001;*
- 1.11 *Email from Dean Chandler-Mills to Mark Williamson dated 24 January 2002;*
- 1.12 *Letter from Gary Reading, PSA Organiser to Mark Williamson, dated 4 July 2002;*
- 1.13 *Individual Agreement of a member of EPMU who was employed by the Aviation Security Service after 1 October 2001.*

The parties' submissions

- 9. The applicants submitted that the issue relates to the interpretation of the provisions in clauses 14, 15.1 and 17 of the collective employment agreement upon the ordinary and plain meaning of the relevant clauses in applying the law. The applicants are seeking a compliance order from the Authority.
- 10. AvSec have submitted that the Authority has no jurisdiction to entertain what the PSA, EMPU and NUPE unions have claimed by virtue of section 163 of the Act. Further that the problem involves whether or not the newsletter dated 14 December 2001 is inconsistent with the collective employment contract.
- 11. AvSec submitted that if the Authority makes an adverse finding the problem can be resolved using the Contractual Mistakes Act.
- 12. AvSec denied it has breached the collective employment agreement and opposes any compliance order.

Determination

- 13. The issue is an interpretation issue. AvSec has applied the collective employment agreement by carrying out a review under clause 15.1 of the collective agreement. AvSec advised the PSA and issued a newsletter to all staff as formal notification in writing of a new salary range under clause 15.1.
- 14. That review under the collective employment agreement was meant to be a review of the salary ranges for the positions of security officer, sergeants and receptionists by virtue of an evaluation of a job sizing determined by a job evaluation. Clause 14.3 provides that "*the salary range for each position shall be linked to the job size for the position, which will be determined by a job evaluation system that assesses the levels of skill and responsibility of positions*". It is very clear on this

point that the review under 15.1 related to the positions in clause 14.1, for example “aviation security officer”, and that the review related to the job size of the position under clause 14.3.

15. Furthermore clause 17 *Individual Remuneration Adjustments* sets out the translation to the new scale that takes account of individual performance. Both parties interpret the affects of this differently in regard to what happens to the salary ranges. The unions say that anyone on the minimum salary of \$34,400 on the old salary range must move to the new minimum salary of \$35,100 on the new salary range. AvSec says that they stay where they are.
16. It is common ground that there has been no variation to the collective agreement. Both parties agree that the “new” scale applies and it is how it applies that is at the core of the problem. I hold that this is a straightforward matter of interpretation. In this regard I have applied the law in determining the matter on the plain meaning of the words of the collective employment agreement. First I find that AvSec have applied clause 17.2 differently to what should apply. For example Mr. Williamson decided that the placement would be applied by:

An assessment of whether the officer’s performance warrants movement from their salary step on the “old salary band” to the comparable step on the “new band”; (my emphasis);

and that the adjustment would be applied for the new employees as follows:

“Officers who have commenced with AvSec in the last four months are generally still learning the ropes and are likely to stay on their current salary step unless their performance to date is sufficiently good and their progress in becoming fully competent in the key aspects of the job is such to warrant movement across to the new salary band.” (my emphasis).

17. Furthermore the PSA says that clause 17.2 cannot apply to the affected employees who were appointed since June 2000 in that none of the employees had been employed for twelve months as envisaged under clause 17.2 (b) of the collective agreement. This is not a correct reading of the whole clause. It is correct for an individual assessment for movement within the band (17.3 and 17.4) or under clause 17.2 (b). However, Clause 17.2 (a) does not limit the placement on the new band so long as the assessment relates to the period within the previous 12 months and takes account of any time served in that period unless the exceptions in clause 17.2 (a) apply.
18. I conclude that it is absolutely consistent for AvSec to carry out a review and provide new bands for the positions in clause 14.1 by applying clause 15.1 and making placements under

clause 17.2 and 17.2 (a). The clause can be interpreted on its plain meaning despite any inconvenience to AvSec that relates to the pool of money available for performance pay¹. In other words *if the words are clear and can only have one possible meaning that should generally determine the matter* (see *Air New Zealand Limited v Trevor Barker and others* below). In this regard the new range is a printed rate as given to the PSA and announced by the newsletter and serves to become the applicable range or band for the positions: see clause 6 of the collective agreement for the definition of “salary range” and “salary review” in the Aviation Security Service Salary Structure. Thus it is unambiguous that the rate of \$35,100 becomes the minimum because of the application of clause 15.1 by AvSec.

19. AvSec has relied upon the words in the main paragraph of clause 17.2 “*where their performance justifies this*” to support its position to apply the movement as a performance related matter. These words relate to the whole clause applying clause 17 (2) (a). AvSec has committed itself to the new band that applies under clause 15.1 and 14.1 instead of the old band because of the review that it properly undertook and then promulgated the new band for the positions in clause 14.1. There is absolutely no question that the terms and conditions already exist in terms of clause 15.1, the announcement of the adjustment to the PSA and in the newsletter. Therefore I reject the argument raised by AvSec that I would be imposing new terms and conditions.
20. What clause 17.2 (a) means is that Avsec has to show an employee’s performance has declined at some point in the proceeding 12 months. Also AvSec has to show employees are working below their potential and they have been advised in writing, so as to withhold payment at the comparable point on the new band. Otherwise placement occurs in respect of individual remuneration adjustments for performance with no salary regression (clause 17.1) and to meet the minimum rate of the new range for the position.
21. Further I hold that nothing turns on the parties referring to either band ‘co-existing’ or ‘running parallel’ or ‘steps off the band’ because the band or range presumably retains the same number of steps in the promulgation of the adjustment that presumably retains the same number of steps.
22. This is not a matter to apply the Contractual Mistakes Act.

¹ The well settled law on interpretation raised with me by the parties and confirmed in *Air New Zealand Limited v Trevor Barker and others* (unreported) 6 December 2002 AC 76/02 Colgan J. *Inspector of Awards v ARA* [1960] BA 2316; *Inspector of Awards V Taniwha Products Ltd* [1970] BA 5085 and *NZ Commercial Travellers IUOW v Andrews and Beaven Limited* [1983] ACJ 557 and 560).

23. I have been requested to make a compliance order to resolve this matter. That is not my intention at this stage. This is because there has been a genuine dispute in this matter between AvSec and its employees, particularly the PSA members. There is insufficient evidence for a compliance order to be made in respect of the individuals named in the proceedings and any members of the EMPU employed by AvSec and covered by individual employment agreements. It is appropriate for the employer to have an opportunity to comply with the determination of the dispute.
24. Therefore I will reserve the parties' rights to seek a compliance order. This gives AvSec the opportunity to meet its obligations under the collective employment agreement and any obligations under the individual employment agreements.
25. There was a claim raised that AvSec has breached the collective employment agreement. This was a genuine dispute between the parties. There was no evidence of any deliberate and wilful action on the part of AvSec despite applying the collective agreement incorrectly to make a compliance order in regard to any breach given the background evidence produced on AvSec's view of the interpretation and application of the collective agreement.

Conclusion

26. The minimum rate of \$35,100 in the new salary scale for aviation security officers applies in applying clause 17 (2) (a) as I have explained in paragraph 20 above and applies as the minimum rate in the new salary range as I referred to in paragraphs 18 and 19 above.
27. Costs are reserved.

P R Stapp
Member of the Authority