IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 97/07
5046870; 5046873;
5046875; 5046877;
5046879; 5046886;
5046889; 5046892;
5046894; 5046895;
5076804

BETWEEN	KATHRYN TAYLER, TONY HUTCHISON, CAROLYN THOMAS, PHILIPPA BAKER, DALE PENE-SMITH, CATHERINE MORTON, ANGELA LAGERBERG, PAUL McKINNEL, THOMAS PARSONS, BRETT SEAWARD and LEIGH WILLIAMS Applicants
AND	OFFICE MAX NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Phil Shamy and Kathryn Dalziel, Counsel for Applicants Anthony Drake, Counsel for Respondent
Investigation Meeting:	15 and 16 May 2007 at Christchurch
Submissions received:	31 May 2007 from Applicant 14 June 2007 from Respondent
Determination:	9 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants (the applicants) are all employed by the respondent, Office Max New Zealand Limited (Office Max) in a variety of roles of a sales nature in

different locations around the South Island. There are differences in job title between the applicants and differences also in respect of their relevant employment agreements.

[2] The dispute between the parties arises as a consequence of a proposed change to the commission structure which Office Max sought to introduce to its business and which the applicants say affected them to their disadvantage. The applicants say they have a personal grievance by reason of the employer's unjustified action to their individual disadvantage and they each seek a compliance order requiring Office Max to observe the terms of their individual employment agreements together with the award of penalties for breaches of good faith.

[3] For its part, Office Max resists those claims and contends that there has been no disadvantage to the applicants because immediately it became apparent to Office Max that the applicants could not or would not accept the proposed changes to the commission structure offered by Office Max, Office Max withdrew the new commission structure and returned the applicants to their original commission structure.

[4] The factual basis for the dispute between the parties is largely uncontested. In around December 2004, Office Max commenced a review of commission structures and during the course of calendar 2005 undertook a process of consultation with its staff on a proposed new commission structure.

[5] That new commission structure was introduced on 1 April 2006 but was to operate in tandem with the old scheme until 1 July 2006 when the new scheme would take effect in its own right.

[6] During June and July 2006, the applicants gave notice of personal grievances. The effect of this action by the applicants was to cause Office Max to revisit its decision and it determined to return all of the applicants to the old commission structure. In consequence, Office Max claims that, by reason of its prompt change of heart, none of the applicants suffered disadvantage or financial loss and the applicants all remain employed on their previous commission structure.

Structure of this determination

[7] By reason of the fact that there are 11 applicants each with their own individual circumstances, it is necessary to fairly and equitably deal with each of their employment relationship problems.

[8] However, the factual matrix has significant similarity for each of the applicants and as a matter of fact, in the interests of administrative convenience, all 11 applications were heard together in the same investigation meeting.

[9] Accordingly, I intend to deal with the matter on a common basis.

Issues

[10] The first issue is whether the process adopted by Office Max in implementing the proposed change was a fair and reasonable one in all the circumstances.

[11] A further issue which will require examination is the question whether the consent of the employees was required before the new scheme was implemented.

[12] Then, the Authority must consider whether the different terms and conditions of the applicants' employment bears on the problem.

[13] Next, the Authority must consider the central question of whether the applicants did suffer disadvantage by the actions of Office Max and if they did, whether that disadvantage was occasioned by unjustifiable actions of Office Max or not.

[14] Next, the Authority needs to consider the question of whether there is anything improper in the behaviour of the applicants in mounting their claim. During the course of the investigation meeting, Office Max advanced the proposition that the applicants had been guilty of collusion and of *scripting* their claim so as to maximise their position.

Was the process fair?

[15] By a memorandum dated 13 November 2004, to the applicants, Office Max's predecessor in title gave the bare outline of a scheme which, according to the author of the memorandum, John Wafer, was designed to reward *over performance*. Staff were encouraged to talk to their regional manager if they had *any questions*.

[16] The evidence heard by the Authority was that all of the applicants took up the opportunity to speak with their regional managers and where possible other members of the management team, including in particular territory managers.

[17] None of the regional managers or territory managers who were spoken to by the applicants were called to give evidence before the Authority and so the only evidence of those discussions comes from the applicants themselves.

[18] The prevailing impression which the applicants' evidence gives of those discussions is that they were frustrating in the extreme with the managers appearing to have little or no information about the proposed new scheme (other than what was contained in the bare outline of the 13 November 2004 memo). According to the applicants that remained the position throughout the consultation process with regional managers appearing to have little or no access to information about the scheme.

[19] Perhaps of more concern was the conviction strongly expressed by many of the applicants in their evidence that there was little or no ability to influence Office Max in relation to the scheme. In addition, there was a strong sense from some of the applicants that the discussions they had with their managers were completely pointless because Office Max was intent upon introducing the scheme anyway.

[20] If there had been a conviction on the part of the applicants that the introduction of the scheme would produce better incomes for them, then there would have been less general anxiety than in fact there was. However, the conviction of the applicants (to a man and woman) was that the scheme would not produce better incomes for them in their commission selling roles and would in fact result in a reduction in their incomes.

[21] The applicants produced a schedule at the investigation meeting which gave an indicative figure for the likely loss of income to be sustained by each of them and the loss for each of the applicants varies from $25,640 in the worst case to $6,904 loss in the *best* case on an annualised basis.

[22] While the employer argued that those figures were misleading, I am satisfied on the balance of probabilities based on what I heard that the trend accurately represents the actual position.

[23] I have particularly reached that conclusion because of the number of occasions on which one of the applicants indicated in evidence that their manager had told them that the scheme being introduced by Office Max would not work for them as an individual sales person.

[24] For instance, Ms Tayler gave evidence that the South Island regional manager told her *... we realise it* [the new scheme] *is not going to work for you*.

[25] Similarly, Ms Thomas was told by her regional manager *we know we will have to do something about you*. Again, Ms Lagerberg gave evidence that she was told that she *was one of three who the scheme would not work for*.

[26] A further concern which the applicants had was their fear that despite the developing conviction that the new scheme would lower their incomes, they had no ability whatever to influence the implementation of the scheme. Although all of the applicants spoke to various of their managers, sometimes extensively, there were numerous examples of individual applicants being told, according to their evidence, that irrespective of what they said or what concerns they might have, the scheme was going to be implemented anyway.

[27] For instance, Ms Taylor told me that her manager, Mr Ian Cunningham, told her that *his hands were bound*. She took this to mean that he had no influence over the scheme or any ability to change it. Ms Baker said that her manager, Mr Ian Cunningham, told her *Philippa it is happening – they are going to bring in the new commission scheme*.

[28] Mr Seaward says he was told by his territory manager, Mr Andrew Nicholson, that *I strongly recommend that you do not challenge the company or take any action over this*.

[29] Again, Mr Parsons told me that the major thing for him was that the employer's managers told him that they could change the scheme without his consent.

[30] I am satisfied on the balance of probabilities then that, on the evidence before the Authority, there was no reasonable opportunity for the applicants to have proper input into the employer's plan. If, in truth, the employer's new commission scheme was a proposal, as Office Max contends, then it seems plain on the evidence before the Authority that there was no realistic prospect of the applicants having any

meaningful input into the nature and extent of that proposal so as to have some influence as to its structure and implementation.

[31] If, as seems more likely on the basis of the documentation before the Authority, this new commission scheme was a decided outcome by Office Max (and that view is consistent with the original memorandum of 13 November 2004 and the subsequent memorandum of a year later about implementation), then the consultation process was no more and no less than a sham and in consequence is in breach of the good faith obligation in Section 4 of the statute.

[32] During the period from August 2005 through to June 2006, Office Max say there were a succession of exchanges between it and some or all of the applicants, the thrust of which was that Office Max was listening to its staff, that the uncertainty was acknowledged to be difficult for staff, that the scheme was still being negotiated with staff, that the individual nuances of each applicant's position would be taken into consideration, and that the financial consequences of the new scheme as it impacted on individual applicants would be disclosed or was disclosed as part of the consultation process.

[33] There is no doubt that there was extensive contact between Office Max and the applicants, either individually or collectively, but the end result of that extensive period of contact between the parties was, according to the applicants, and I accept, no discernible change to the structure of the proposed new commission scheme. The refusal to change the scheme led inexorably to the raising of a succession of personal grievances by the applicants in respect of the proposed commission structure implementation.

[34] The majority of the personal grievances were raised on 21 June 2006 in the context of which Office Max was asked to give an assurance that it would maintain the old commission structure until the personal grievances were resolved.

[35] No such assurance was forthcoming and it was not until September 2006 and the prospect of injunctive relief being sought by the applicants in the meantime that Office Max gave the assurance requested, namely that the old scheme would remain in place until the personal grievances had been resolved.

[36] I am satisfied on the balance of probabilities that, on the evidence available to the Authority, there was no proper consultation of the proposal to implement a new

commission scheme and it follows that the process adopted by Office Max in implementing the scheme was unfair. There was no evidence that the proposal advanced by Office Max was changed in any particular from its initial appearance in November 2004 down to its aborted implementation in the middle of 2006.

[37] Office Max points to various meetings between the applicants and various of its regional and branch managers as evidence of consultation. From the evidence of those meetings, I am satisfied that the applicants assertively advanced their concerns about the scheme, no doubt in their own unique ways and having regard to their own particular circumstances, and that they received various assurances from the various managers to whom they were speaking that their concerns were being taken into account, were being passed up the management chain or, in one or two cases, were not capable of being addressed at all.

[38] However, despite the strong evidence from the applicants that they sought to influence Office Max in the implementation of the new scheme, there is no evidence at all that Office Max took any account whatever of the concerns of the applicants. The most significant theme from the applicants' testimony is that they told Office Max that the proposed new scheme would *attack their income*. Office Max's response seems to have been limited to an attempt on a case-by-case basis to prove to individual applicants that in fact the new scheme would benefit them rather than *attack their income*.

[39] That attempt by Office Max to satisfy the applicants of the benefits of the new scheme seems to have been universally unsuccessful and given the figures presented by the applicants for the loss of income which each expected to sustain as a consequence of the new scheme, that can hardly be the subject of great surprise.

[40] Having reached the conclusion that the process adopted by Office Max did not meet the legal test for consultation: (*Coutts Cars Ltd v. Baguley* [2002] 2 NZLR 53 applied) the next question for determination is whether Office Max required the consent of the applicants before implementing the new scheme or whether in fact it was able to simply impose it.

Was consent required?

[41] The appropriate place to start is a consideration of the evidence of Office Max's managers given to the Authority at its investigation meeting.

[42] The evidence of Mr Peter Leathley has become pivotal because it is relied on by both Office Max and by the applicants to support their respective positions. There are two paragraphs of Mr Leathley's evidence which are particularly relevant and for the sake of completeness I set the two paragraphs out now in full:

> *23. It was the company's honest belief that if it consulted with the employees and sought their views, it could move to implement the new commission scheme. This belief was in part based on legal advice which the company received from its employment adviser, Paul Tremewan.*
>
> *24. While I cannot recall specific dates or times, I do recall having a number of conversations with Mr Tremewan regarding the changes to the commission scheme and the appropriate process that the company should follow. The company knew that it could not simply make changes unilaterally, and that is why it embarked on such a lengthy consultation process. The company's objective was to obtain commitment from the employees to the new scheme to ensure its success and achieve an increase in sales and growth.*

[43] Office Max encouraged me to read these two paragraphs in context and suggested I should take the thrust of Mr Leathley's view to be that while consultation was required, agreement was not.

[44] The applicants, on the other hand, encouraged me in the view that the burden of Mr Leathley's evidence is that Office Max cannot make *unilateral* changes to the remuneration structure of its staff, and thus by implication there is a need for agreement from staff before those changes are actually implemented.

[45] Ms Pickering, who was the human resources manager for Office Max and who took over from Mr Leathley in that role, arrived at Office Max midway through the implementation process for the new commission scheme. Her view of the legal obligations that Office Max had is expressed in one succinct sentence in her written brief of evidence, a view that she stood by in her oral testimony: *I was also informed that the company had a genuine belief that it could implement the new scheme following consultation*.

[46] The third Office Max witness was Mr Kevin Obern. Mr Obern is the managing director of Office Max, a role that he did not commence in until mid April 2007. In Mr Obern's oral evidence at the investigation meeting, he said that *the company believed for most of the time that it had the right to impose the scheme*. He also appeared to accept the proposition put to him that if a consequence of that was

that staff could lose money from the implementation of the new scheme, then that could in fact be imposed upon them.

[47] The issue then in terms of the company's belief is whether the company understood that it had to obtain the informed consent of its staff before implementing the new scheme or whether it believed that it simply had to consult with the staff in a meaningful way before imposing the scheme. Obviously there is a range of views from the three company witnesses who gave evidence to the Authority. At one end of the spectrum is Mr Leathley's view in para.24 of his brief of evidence that the company knew that it could not make changes *unilaterally* and that it needed to *obtain commitment* from staff; at the other end of the continuum is Mr Obern's view given in oral testimony that the company could *impose* the scheme and he accepted the logical consequence of that might conceivably be that staff could effectively be directed to take what amounted to a pay cut.

[48] I have reached the conclusion that it is more likely than not that Mr Leathley's view just referred to is the position of Office Max. I think Mr Leathley's view is to be preferred over the other company witnesses simply because Mr Leathley was involved at the genesis of the scheme and gave evidence as to that, whereas neither Mr Obern nor Miss Pickering were in that position. Further, I do not accept Office Max's attempt to minimise the importance of that observation of Mr Leathley by seeking to put a context round it. I accept the submission of the applicants to the effect that the plain words of the observation must be taken to mean what they say and I prefer to read para.24 of Mr Leathley's brief as adding to para.23.

[49] A consequence of that interpretation would be that whereas in para.23 Mr Leathley refers to the need for consultation and then the ability to move to implement the new scheme, in para.24 Mr Leathley goes on to talk about various conversations that he personally had with the company's employment adviser and he then states what the company knew from those various discussions. I do not think those views can be minimised in the way that Office Max seeks to have me accept.

[50] Even if I am wrong in the conclusion I have just reached, everybody accepts that a proper process of consultation is required in order for the scheme to be implemented. I have already found that the process of consultation was not in fact a proper one at all, and that the process adopted by Office Max was completely flawed because staff had no reasonable opportunity to influence their employer to change the

scheme and they were left with the prevailing stress and anxiety of the prospect that they could effectively have a wage cut imposed upon them.

[51] The company never told staff that their commitment to the scheme was required, never made it clear that the employment relationship, particularly in a selling environment, was a symbiotic one requiring both parties to work together for mutual benefit and never showed evidence of taking proper note of the concerns of the staff about a loss in their income.

[52] It is plain from the evidence of the applicants that the level of consultation which the applicants were able to engage in was almost exclusively unsatisfactory in that it was at branch or regional manager level. Mr Leathley, as the human resources manager at the time, did not meet with all of the applicants and there is dispute about how useful the meetings that he did have, were. There seems to have been no genuine effort by Office Max to engage one-on-one with the individual applicants and explain and assure them of the benefits of the proposed new scheme.

Differing terms and conditions of employment

[53] The next issue that I need to consider in this context is whether the differing terms and conditions of employment of the applicants has any bearing on the issue, particularly the issue around consent.

[54] It is the case that the applicants have a number of different individual employment agreements derived from a variety of different templates occasioned by the merger of a number of smaller firms when Office Max was created. In effect, Office Max has inherited the applicants from a variety of different smaller businesses and the applicants have brought with them their own terms and conditions of employment which sometimes are very different, one from the other.

[55] The applicant Ms Carolyn Thomas, has a unique provision in her employment agreement which no doubt is a function of her having commenced employment with one of the predecessor companies on 1 June 2004 (that is, comparatively recently).

[56] In the individual schedule to the employment agreement, there is this provision:

> *This scheme (the current commission scheme) will be changed at some time in the future at the sole discretion of the company, at which time the new scheme will apply.*

[57] Office Max says that this provision entitles it to unilaterally change Ms Thomas' commission structure although it has chosen not to do so by virtue of the present proceedings and the practical utility of treating all of the applicants similarly.

[58] In relation to whether, as a matter of law, Office Max could impose its proposed scheme on Ms Thomas, the applicants, through counsel, make a number of points. Having considered those submissions, the Authority is satisfied that Office Max has accepted that it cannot impose the new scheme on Ms Thomas and must treat her similarly to the other applicants, and that being the position, Office Max is estopped from now changing its position, Ms Thomas having relied on Office Max's position throughout. In any event, Ms Thomas must have the right to bring a claim of disadvantage if a consequence of a unilateral change made in reliance on this provision, leaves her with a disadvantage.

[59] Two further applicants (Mr Hutchison and Ms Baker), have a provision in their employment agreements in the following terms:

> *Management reserves the right to change commission structures … as required for the best interest of the company.*

[60] Given the concession that Office Max has already made in respect of the treatment of all of the applicants as if their circumstances were absolutely on all fours the one with the other, the same argument applies to these two applicants as applied in respect of the position with Ms Thomas.

[61] Finally, Mr Seaward and Ms Morton have a provision in their employment agreement which reads as follows:

> *Change to this framework (pertaining to commission) will be fully negotiated with the employee.*

[62] Arguably, this provision strengthens the position that Mr Seaward and Ms Morton have in requiring Office Max to reach an agreed arrangement with them in respect of any changes to the commission structure.

[63] It follows from the foregoing that I do not accept that the terms and conditions of employment of any of the applicants necessarily changes the broad scope of the argument between the parties for the reasons that I have advanced above.

Collusion and scripting

[64] In the filing of the statement in reply and subsequently in the briefs of evidence filed in the Authority by Office Max, the allegation is made that the evidence filed by the applicants is so similar in its composition as to suggest that the applicants had colluded the one with the other and that there had been some *scripting* of the applicants' evidence to enhance the argument.

[65] Those allegations were effectively resiled from during the oral evidence of Mr Obern and Ms Pickering and properly so.

[66] Mr Obern said that the statements of evidence filed by the applicants *showed areas of commonality. The difference between the individuals did not come across in the briefs of evidence.* However, Mr Obern went on to make clear that he did not believe that *our people* were lying. That observation effectively takes the sting out of the criticism.

[67] That being the position, it is both surprising and disappointing that in the closing submissions of Office Max, it seeks to revisit these allegations, allegations which the applicants have vigorously denied.

[68] In a group action such as this, based as it is on essentially common facts, there will of necessity be some high degree of similarity in the briefs of evidence that are filed. This is particularly so when all of the briefs of evidence are prepared in the same lawyer's office.

[69] I accept that the briefs of evidence have an air of similarity to them but I do not think that that similarity is evidence of anything sinister. When the applicants gave their oral evidence, they each drew on their own personal experiences of the issue that they had been through with their employer and their individual evidence was both graphic and memorable. I am satisfied that there is nothing improper in the way the applicants have prepared for the investigation meeting before the Authority.

Did the applicants suffer disadvantage from Office Max's unjustifiable action?

[70] I am satisfied on the balance of probabilities that the applicants did suffer disadvantage and I have identified where I consider that disadvantage rests. First, I have identified that the process used by Office Max in consulting with the applicants was an unfair one. The ultimate consequence of that unfair process was that the applicants were unable to get any traction in their complaints about the implementation of Office Max's proposed new commission scheme. Office Max appears to have pushed ahead with the unilateral implementation of the scheme without taking any note whatever of the protests of its staff involved in this proceeding.

[71] I find then that the applicants have suffered disadvantage by reason of the implementation of a scheme of commission remuneration after a long period in which the applicants were left in a state of perpetual anxiety about the possible reduction in their income. In principle, there is disadvantage.

[72] I am also satisfied that because Office Max knew or ought to have known that its scheme required the informed consent of its employees, the unilateral imposition of the scheme without any evidence of acceptance by staff constitutes an unjustified action on the part of Office Max.

[73] Even if I am wrong in ascribing to Office Max the requirement that it obtain the informed consent of its staff before imposing the new commission scheme, it is common ground that a proper process of consultation would, as an absolute minimum, be required and I have already found that that process of consultation was fatally flawed, both because there was an absence of proper information provided by Office Max to the applicants and more particularly because there was no genuine prospect of the applicants influencing Office Max in the implementation of the proposed new commission scheme.

[74] The final issue that I must dispose of is the submission of Office Max that it acted promptly to wind back the implementation of the new scheme as soon as it became clear to it that there was opposition to it from the applicants. The contention essentially is that just as soon as Office Max became aware of the difficulties, it cancelled the implementation of the scheme so that the applicants were not subjected to the allegedly negative consequences of the imposition of the new scheme.

[75] I do not accept that submission at all. In my view, it is not accurate to say that Office Max acted promptly to withdraw the implementation of the scheme. Even if we concentrate the argument on the narrow window after the notification of the first collection of personal grievances on 21 June 2006, it was not until 19 September 2006 that Office Max was finally persuaded to wind back the effect of the new scheme. That window between those two dates does not, in my view, constitute prompt action at all.

[76] Office Max must have been absolutely clear that on receipt of the personal grievances in June, there was a serious problem with the implementation of its new commission scheme and yet, despite various legal skirmishes between that date and 19 September 2006, the implementation of the new scheme was still on foot.

[77] However, I prefer to take an even wider view of the company's obligation of good faith in this matter and in that wider view, I look to the company's behaviour over the whole period that this implementation proposal was being considered. In my view, it is fair and reasonable of the applicants to claim that the effect of the consultation process over the new commission scheme was to create a level of unbearable uncertainty from December 2004 when the proposed new scheme was first flagged, down to September 2006 when the implementation of the proposed new scheme was finally aborted.

[78] Given that the applicants were clearly fearful about their ability to meet their financial obligations with what they saw as a straightforward reduction in their income for the same amount of work, and no doubt their growing frustration at being apparently completely unable to influence the employer despite numerous meetings with their line managers, I am persuaded by the applicants' argument that this has been a flawed process which has breached good faith obligations imposed on parties by the statute.

[79] In advancing its view on this matter, Office Max seeks to interest me in the so-called *patch up* principle derived from the *Rankin* case: *Rankin v. Attorney-General in respect of the State Services Commissioner* [2001] ERNZ 476. I think the question in the present case is not about whether the patch up principle can apply but rather whether the patch in question is big enough to cover the wound.

[80] Clearly the employer eventually wound back the scheme in respect of its imposition on the applicants. However, I say that it did not act promptly enough to do that and that it would have been clear to the employer at a very early stage (at the latest within a matter of months of the original notification of the proposal) that the scheme had some credibility problems with long serving and valued staff in the South Island. Instead of responding positively to that intelligence, Office Max seems to have pressed ahead with the implementation of the scheme, presumably in the hope that the applicants would ultimately be influenced to change their position on the scheme.

[81] Even if that standard is seen as setting the bar too high for Office Max, it is still plain that by the time it received the notification of the personal grievances in June 2006, it must have been abundantly clear to it that there was a serious problem with the new scheme and yet it still took another several months before it was eventually persuaded to wind the scheme back.

[82] For all those reasons then, I do not accept that the patch in this case is large enough to deal with the injury.

Determination

[83] Despite the evidence of Office Max that its witnesses were surprised at the level of hurt and stress apparently occasioned by the commission proposal, I am satisfied on the evidence available to the Authority that the stress, hurt, damage to health and wellbeing of each of the applicants is very real indeed.

[84] I have given earnest consideration to whether the level of compensation can somehow be individually adjusted to meet the nuances of difference that exist in terms of the impact of the respondent employer’s action on individual employees. I have reached the conclusion that I cannot fairly and properly separate out the individual applicants’ entitlement to compensation, the one from the other, and accordingly I now make an order in respect of each of the applicants for the same compensatory sum.

[85] Office Max will pay to each of the applicants the sum of $6,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[86] Counsel are to confer and identify if there are any payments owing to any of the applicants as a consequence of the change in commission payment and structure and in the event that any of the applicants has been short paid by the imposition of the *new* scheme rather than the old or existing scheme, then that money is to be identified and paid by Office Max to the applicant so identified.

[87] I also direct that Office Max is to retain the applicants on the existing or old commission scheme unless and until there is a complete agreement between itself and the applicants as to implementation of a new scheme which benefits both parties appropriately.

[88] Finally, I consider that Office Max has breached its good faith obligations but I do not think it necessary to contemplate the imposition of a penalty as the payment of an adequate amount of compensation to each of the applicants is in my judgment the appropriate remedy in all the circumstances.

Costs

[89] Costs are reserved.

James Crichton
Member of the Employment Relations Authority