

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 150/08
5032377

BETWEEN ASSOCIATION OF
 UNIVERSITY STAFF
 Applicant

AND VICE-CHANCELLOR
 UNIVERSITY OF
 AUCKLAND
 Respondent

Member of Authority: Dzintra King

Representatives: Peter Cranney, Counsel for Applicant
 Shan Wilson, Counsel for Respondent

Investigation Meeting: 20 December 2007

Determination: 23 April 2008

EMPLOYMENT RELATIONSHIP PROBLEM

[1] This case concerns the Vice-Chancellor of the University of Auckland, Professor McCutcheon, making an offer of a pay increase to non-union staff on individual employment agreements without advance notice to or input from the applicant, the Association of University Staff (“the Union” or “AUS”).

[2] The applicant claims that the Vice-Chancellor’s actions breached the respondent’s good faith obligations under sections 4 and 32 Employment Relations Act 2000.

[3] The s4 breaches refer to:

- Communications about the Employment Court’s 2005 decision
- Tripartite meeting on 16 February 2006

- Communications with Union members
- Acceptance of the without prejudice pay offer by the applicant
- Letter to individual employment agreement (“IEA”) staff after 30 days

[4] The Union says that the University breached s32 in that the Vice Chancellor’s actions have undermined the bargaining and the authority of the Union.

[5] The Union also claims that the actions breach:

- (a) The respondent’s obligations under clauses 8.1 to 8.4, 9 and 10 of the Umbrella Agreement for the Universities Tripartite Forum Process
- (b) The principles set out in clauses 4.2, 4.4, 5.1, 5.2 and 5.3 of the Umbrella Agreement;
- (c) The applicable collective employment agreements between the parties, namely the Academic and General Staff Collective Agreement of 2005 to 2006 and 2006 to 2007.

[6] The Vice-Chancellor denies that his conduct breaches obligations of good faith or contractual obligations

[7] The Union’s case is essentially that it should have been advised in advance of the offer to staff on individual employment agreements (“IEAs”). The University does not accept this, saying:

- (a) Staff on IEAs have no relationship with the Union and are not represented by the Union. The employment relationship is directly between the individual employee and the Vice-Chancellor.
- (b) It is not appropriate for the Vice-Chancellor to discuss with the Union matters affecting non-Union members before advising the affected employees themselves.
- (c) The Union has no legal right to know in advance of non-Union members, whom it does not represent, what terms and conditions will be offered to staff on IEAs. There is nothing in the Employment

Relations Act 2000 to prevent an employer from discussing matters with its IEA staff.

[8] The University says that the Union has not been consistent in its views about the timing of a pay offer. In 2005 the offer made to staff on IEAs was made after bargaining had been initiated. In 2006 and 2007 it was made prior to the initiation of bargaining. The Union had also publicly said it was against any form of passing on of offers after bargaining.

[9] In the case before the Authority, the Union challenges the University's making of a pay offer to staff on IEAs in 2006 and 2007 prior to bargaining being initiated.

Background

[10] The history of the matter is relevant solely as background.

[11] In May 2004, the University's Director of Human Resources wrote to staff on individual employment agreements who were not members of the AUS or PSA. Staff were offered a pay increase and advised that the next base salary increase would be effective from 1 May 2005. The University says that this offer came about as a result of staff on IEAs having had to wait for a significant period of time before receiving their annual increase due to protracted collective bargaining. The Vice-Chancellor says that the letter created an obligation for the University to offer staff on IEAs an annual increase at that time of the year.

[12] In February 2005 AUS initiated bargaining for a multi-employer collective agreement ("MECA"). On 10 March 2005 the Vice-Chancellor sent letters to staff on IEAs offering a 4.5% increase so at the time of the Vice-Chancellor's offer, bargaining had been initiated. The letters were received by staff on 11 March. On 11 March the Vice-Chancellor sent a letter to AUS advising of the pay offer to IEA staff

[13] The events in 2005 were the subject of a decision by a Full Bench of the Employment Court in *Association of University Staff v. Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224. The case dealt with whether the University was entitled to resist multi-employer bargaining and whether the communications by the University undermined AUS's authority and the bargaining.

[14] There is some dispute between the parties about the meaning of the Employment Court's decision.

[15] Ms Helen Kelly, the General Secretary of the AUS and currently the President of the NZ Council of Trade Unions, said that the Employment Court criticised Professor McCutcheon's direct communications with AUS members, the timing and unilateral nature of the communications and the instantaneous and personal distribution by email. Ms Kelly says that the Vice-Chancellor has engaged in the same or similar behaviour that was criticised by the Employment Court.

[16] The respondent disputes this and says that the Union's references to the 2005 claim and to the communications in the present case are misleading in that the part of the Court's decision referred to (para. 90) is not relevant to the respondent's actions in making an offer to staff under IEAs. It says the Court's criticisms were about the timing and nature of communications to staff in 2005 regarding the University's stance on the form of collective agreements and bargaining for a MECA. The Court's comments were not in relation to the offer of a pay increase to staff on IEAs. The Court's reference to communications to non-members containing the increase is dealt with at para. 92 of the decision. The respondent's view is correct.

[17] At para. 93 the Employment Court said that an employer was entitled to communicate freely with those employees who had not chosen to be represented in the bargaining and that the Union's witnesses had not disputed that

[18] The University says that the Employment Court did not find that the Vice-Chancellor had undermined the bargaining or the role of the Union or failed to comply with the good faith obligations by making the offer to non-Union members; nor did it find that the Vice-Chancellor was required to advise the Union in advance of making the offer to staff on IEAs, even after bargaining had been initiated. No orders were made by the Court. The Court did find that there was a risk of undermining which could have been alleviated by making it clear to the Union that the offer being made to non-members would also be a claim the Vice-Chancellor would make in bargaining with the Union. I agree that that is what the decision says.

[19] Ms Kelly said the AUS took the Court's decision to mean that Professor McCutcheon should desist from making unilateral communications about matters at the heart of the bargaining until after a bargaining process agreement was settled.

However, what was specifically being referred to in the decision was the form of bargaining.

[20] Ms Kelly's view is that the University should not make an offer to IEA staff until a bargaining process arrangement has been agreed, and then the Vice-Chancellor could discuss with the Union what offer he would make to IEA staff. Ms Kelly said the Vice-Chancellor should not make offers to non-union staff at any time prior to bargaining commencing unless he spoke with the Union about it first.

[21] The Union claims that in 2006 and 2007 the Vice-Chancellor followed the same or similar approach as he did in 2005. However, that is not the case. The Vice-Chancellor has had no direct communication with Union members in 2006 or 2007. Nor has he again communicated directly with Union members regarding his views on a MECA.

[22] Also, since 2005, the Vice-Chancellor has changed his approach in relation to the offer to staff on IEAs. In 2005, the offer to staff on IEAs was made after the initiation of bargaining. In both 2006 and 2007, the offer was made prior to the initiation of bargaining.

[23] In 2005, the Vice-Chancellor did not simultaneously communicate to the Union that the offer being made to non-Union members would also be a claim he would make in bargaining with the Union. The Union was not made the same offer until the Vice-Chancellor initiated single employer collective employment bargaining 10 days later.

[24] In order to address the criticism that Union members may have felt disadvantaged, and taking note of the Court's comments in the 2005 case, in 2006 and 2007 the Vice-Chancellor simultaneously advised the Union that the offer being made to non-Union members would also be a claim that the University would make in bargaining with the Union.

[25] In 2006 and 2007, the Vice-Chancellor advised the Union that it could accept the offer of a pay increase and receive it at the same time as non-Union members in order to ensure its members were not disadvantaged. That offer was made on the basis that it was without prejudice to the Union's abilities to negotiate a higher increase or other terms and conditions for its members.

[26] The majority of the staff at the University, approximately 7%, are not represented by the Union and are employed on IEAs.

[27] On 23 February 2006, the Vice-Chancellor sent a letter to non-Union staff stating:

By having placed a high relative priority on salaries and constructing its budget for 2006, the university is in a position to increase salaries by 4.5% and that is the offer I am now making to staff on individual employment agreements, effective from 1 May 2006. Under the Employment Relations Act I cannot formally initiate bargaining with staff unions until 21 March 2006. However, I am currently informing the relevant unions that on or about 21 March 2006 I will be making the salary offer through them to their members which is based on principles of paying the staff the best offer I can in the circumstances and ensuring an even handed and equitable approach to remuneration of all university staff.

[28] In a letter to Ms Kelly dated 24 February and faxed to her, he states:

When I am legally able, I will be offering the same 4.5% through you to your members, with effect from 1 May 2006. I appreciate that you are currently balloting members and anticipate that you will be initiating bargaining some time around 1 March.

[29] On 8 March 2007, the Vice-Chancellor communicated with non-IEA staff offering a 4% increase on salary effective from 1 May 2007. He also wrote:

Under the Employment Relations Act I cannot formally initiate bargaining with staff unions until 21 April 2007. However I am currently informing the relevant unions that on or about 21 April 2007 I will be making a salary offer to them through their members that is based on principles of paying staff the best offer I can in the circumstances and ensuring an even handed and equitable approach to remuneration of all university staff.

[30] To Ms Kelly he wrote on 8 March:

As a courtesy, I am writing to you about my negotiations with staff on individual employment agreements and to assure you that I do not want to disadvantage staff on our collective employment agreement covering academic and general staff.

When I am legally able, I will be offering the same 4% through you to your members, and also with effect from 1 May 2007. I appreciate you are currently balloting members and anticipate that you will be initiating bargaining some time around 1 April.

[31] Ms Kelly said that on 27 April 2006, the Union felt compelled to accept the 4.5% wage increase on behalf of all Union members on a no prejudice basis to both impending legal action and upcoming bargaining despite the collective agreement not

having settled at that stage. Ms Kelly said that the AUS had no choice but to accept this because it had to prevent Union members from being disadvantaged compared with non members who were to receive the pay increase on 1 May 2006.

[32] The Union says the Vice-Chancellor's approach to unionised employees' bargaining rights has been unsatisfactory. He had sought to abridge control and limit effective collective bargaining and that approach has marginalised the Association of University Staff, nullified or severely limited the impact of collective bargaining and denied large numbers of employees access to effective collective bargaining processes. The approach taken is unlawful and contrary to the Employment Relations Act. It conflicts with solemn undertakings which the Vice-Chancellor assumed when he signed the Umbrella Agreement in 2005. It also conflicts with the collective employment agreement which contains clauses 8 to 10 of the 1 September agreement.

[33] The Umbrella Agreement of 2005 states:

6. *During the course of the bargaining the government established universities tripartite forum involving the government,, the Vice-Chancellors and the unions to consider among other things issues that have arisen in bargaining.*
7. *Set out below are the parties' obligations in relation to the university tripartite forum process.'*
8. *It is agreed the parties will work actively and cooperatively with each other through the universities tripartite forum.*
 - 8.1 *To ensure that the issue of competitive and fair salaries for all staff at all universities is given a high priority in the universities tripartite forum work plan.*
 - 8.2 *To use best endeavours to develop and agree and implement sustainable solutions to providing competitive and fair salaries for all staff in all universities.*
 - 8.3 *To implement, as appropriate, agreed outcomes from the universities tripartite forum into collective agreements.*
 - 8.4 *To use best endeavours to develop solutions to other funding and resourcing issues facing universities.*
9. *The unions and the Vice-Chancellors accept that the following principles will apply to the implementation of this agreement.*
10. *This agreement will come into effect when all the Universities (except Auckland University of Technology) have negotiated SECAs with the relevant unions, and it will have a term of one year from 1 September 2005. Prior to expiry the parties will review the agreement and may renew it by mutual agreement.*

11. *SECAs will include the following term: “To ensure the parties are able to enforce clauses 8-10 of the agreement entered into on 1 September 2005 between the unions and the Vice-Chancellors of NZ Universities (The Umbrella Agreement) in the employment jurisdiction, it is a term of this collective agreement that the parties will comply with clauses 8 to 10 of the Umbrella Agreement. For the avoidance of doubt the terms of the Umbrella Agreement do not form part of this collective agreement.”*

[34] The Agreement was renewed in the following years.

Breach of the Employment Relations Act 2000: offers to staff on individual employment agreements

[35] It has been accepted that employers are free to communicate to employees who have chosen not to be represented by a bargaining agent: *Ivamy v. New Zealand Fire Service Commission* [1996] 1 ERNZ 85 (CA). An employer is entitled to communicate with individual employees who are not covered by collective bargaining provided its communications do not undermine the collective bargaining or the role of the Union

[36] The Objects section, s 3 Employment Relations Act 2000, provides for two main objects:

- to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by, in subsection (iii), promoting selective bargaining and in subsection (iv) promoting the integrity of individual choice.
- to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to organise and Bargain Collectively.

[37] The right to bargain collectively entails both negative and positive rights: workers cannot be prohibited from bargaining collectively and employers cannot refuse to bargain.

[38] The Union had made it clear on several occasions that it would oppose free-loading or passing on. By making the offer of a pay increase to people on individual employment agreements before bargaining for a collective agreement was initiated, the Vice-Chancellor sought to avoid the criticism he faced in 2005 and sought to

avoid a claim made by the Union of breach of s.59C of the Employment Relations Act 2000.

[39] The offer to the Union that it could accept the pay increase effective May was made without prejudice to collective bargaining claims. I understand the Union's position that once an offer has been made, from a practical perspective, particularly if the offer is accepted because of a desire not to disadvantage union members, it will be difficult, albeit not impossible, to negotiate on the matter of salary.

[40] The University says that the Vice-Chancellor's offer of a pay increase to employees in IEAs does not relate to or impact upon the collective bargaining. I cannot accept this argument. It will impact on the collective bargaining. Offers made to IEA staff are part of the matrix in which the collective employment negotiations will take place. Similarly, any provisions in a collective employment agreement will impact on the employer's negotiations with non-union staff. The issue is whether there is a statutory or contractual prohibition on the making of the pay increase offer.

[41] The respondent says there is no evidence that bargaining or the Union's role was undermined as a result of the Vice-Chancellor's offer and the Union's members are no worse off as a result of the offer of a pay increase made to employees on IEAs.

[42] Union membership in 2005, 2006 and 2007 did not decrease after the University made offers to staff on IEAs. In fact in 2005, there was evidence that a number of members joined the Union. It was agreed that Union membership had remained stable over those years.

[43] In that sense, the Union has not been undermined; it has sustained its membership level.

[44] Before considering the issue of undermining I need to deal with s32. The respondent referred me to the Court of Appeal's decision in *Christchurch City Council v. Southern Local Government Officers' Union Inc* [2007] 1 ERNZ 37 in which the Court of Appeal considered the meaning of "bargaining" in s.5 Employment Relations Act. The Court held that the phrase "*interactions that relate to the bargaining*" only applied to interactions which occurred after bargaining had been initiated (p.50 para 58). The respondent says that therefore the claim that the bargaining had been undermined could not be sustainable if the parties were not bargaining. The applicant said that these were obiter statements based on obiter

statements in the Employment Court's judgment. I do not accept that. In 2006 and 2007 bargaining had not been initiated when the Vice-Chancellor made his offers to IEA staff. Pursuant to s32 those communications could not undermine the Union or the bargaining. The evidence I heard also fell short of establishing an intention to undermine.

[45] In *National Distribution Inc v. General Distributors Ltd* [2007] 1 ERNZ 120, a Full Bench of the Employment Court noted that collective bargaining was to be promoted but so too was the integrity of individual choice, including the choice to bargain individually for the terms and conditions of employment agreements (para 68). The Full Court quoted the Employment Court in *Epic Packaging Ltd v. New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* [2006] ERNZ 617 at para 35:

The two objects of promoting collective bargaining and protecting individual choice are arguably in tension, if not in conflict. Promoting collectivity of bargaining inevitably impinges on the integrity of individual choice which is to be protected. So interpretation of relevant parts of the statute cannot promote collective bargaining at all cost. Equally, it cannot protect the integrity of individual choice above all else. In interpreting the Act, regard is to be had to both of these objects but as a means to the ultimate end of building productive employment relationships.

[46] The conflict identified by the Court and the need for a balance between the two was a major issue in this case.

[47] The University has obligations to both its non-union staff and those who are union members. I cannot see any prohibition on the University making offers to non-union staff before bargaining has been initiated. Neither can I ascertain any entitlement for the Union to insist that it has prior knowledge of such offers.

Good Faith

[48] Section 4 Employment Relations Act 2000 obliges parties to employment relationships to deal with each other in good faith. Section 4(1A) states that the duty of good faith requires that parties to an employment relationship are to be active and constructive in establishing a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[49] Without limiting the definition of good faith, s.4 (1) (b) provides that the parties must not, either directly or indirectly, do anything to mislead or deceive each other or that is likely to mislead or deceive each other.

[50] The Court of Appeal in *Carter Holt Harvey v. National Distribution Union Inc* [2002] 1 ERNZ 239 held:

Good faith connotes honesty, openness and absence of ulterior purpose of motivation.

[51] In *Toll New Zealand Consolidated Ltd v. Rail and Maritime Union Inc* [2004] 1 ERNZ 392, the Full Bench of the Employment Court stated at para.[81]:

Unless there is evidence of bad faith, we cannot see that there is an absence of good faith in a party adhering to a genuinely held belief as to the correctness of its position when the matter was clearly arguable one way or the other.

[52] The University says that there is a high threshold for making a finding that one party has undermined the other in the employment relationship. This includes an intention to undermine the employment relationship and to show that the intent to harm was the purpose behind this action.

[53] In *Waikato District Health Board v NZPSA*, unrep, 20 March 2008, Colgan J, AC 6/08 the Court stated at para 36 that very high tests of egregious bad faith were required under s 4A before a penalty could be imposed.

[54] There was no obligation on the Vice-Chancellor to discuss the pay increase with the Union but as a gesture of good faith, he advised the Union of the offer to staff on IEAs simultaneously with staff on IEAs receiving the offer. He attached a copy of the letter to IEA staff so that the Union knew what had been said, provided his reasoning for the offer and, consistent with the Court's comments in the 2005 case, advised the Union that when he was legally able he would be offering the same increase through the Union to its members. This enabled the Union to communicate with its members by email at 10.33am that day in 2006 and to address any concerns members may have about the offer to staff on IEAs.

[55] The University says that the communication to IEA staff was worded so as to reassure non-Union members that Union members would not be disadvantaged without specifically stating what offer would be made to Union members so as not to circumvent the role of the Union in communicating with its members.

Communications about the Court's 2005 decision

[56] The Union advised it would not be seeking remedies in relation to this issue. I therefore will not address this.

Meeting on 16 February 2006

[57] This was a meeting between the Vice-Chancellor and Ms Kelly. Ms Kelly says that the Vice-Chancellor was under an obligation at that meeting to tell her that he intended to make an offer to non-Union staff. The Union says his behaviour was misleading and deceptive conduct or likely to mislead and deceive.

[58] The meeting on 16 February was between members of the NZSVCC, **in full** representatives of the AUS and Dr Cullen, Minister for Tertiary Education, to discuss tripartite issues. The Vice-Chancellor did not mention the offer he was considering making to individual employees for a number of reasons:

- (a) The meeting was in relation to tripartite issues and government funding in the sector, therefore issues relevant to individual universities were not relevant.
- (b) Given the meeting was with third parties, namely other Vice-Chancellors and the government it was not appropriate to discuss issues affecting the University and particularly non-Union employees in front of them.
- (c) The respondent was under no legal obligation to disclose to the Union in advance its intention to make an offer to IEA staff. Any issues relating to individual universities and terms and conditions of employment were outside the scope and purpose of the 16 February meeting.

[59] I find there was no legal obligation to disclose the intention. Neither do I see anything deceptive or misleading in the Vice-Chancellor's conduct.

Inadvertent and unintentional communications with Union members

[60] The University endeavoured to ensure, to the best of its ability, that communications intended for staff on IEAs did not go to Union members and only

sent such communications to staff listed as non-Union members. Furthermore, at the beginning of the communication to non-Union staff, the recipients were advised that it was not intended for Union members and that any Union member receiving the communication should return it and advise of their Union membership so that the University could correct its database.

[61] It is agreed that there was only a very small and insignificant number of Union members who could have mistakenly received the offer of a pay increase to non-Union members. The error rate was 0.04% in 2006 and 0.24% in 2007.

[62] There was no breach of good faith.

Acceptance by applicant of without prejudice pay increase offer

[63] The applicant says that it felt compelled to accept the offer of a pay increase but the respondent denies that this was the case.

[64] The University says that it was still open for the Union to negotiate for whatever terms and conditions it may have wished. For example, it may have done so by identifying money elsewhere in the University's budget to further increase salaries or negotiate other terms and conditions. The Union also retained the ability to take strike action in support of any additional claims it wished to make.

[65] Each year, the Union has been given the opportunity to accept a guaranteed minimum pay increase at the same time as IEA staff so as to ensure its members are not disadvantaged. The Vice-Chancellor's offer of an increase at that time is unconditional and without prejudice to the Union's right to negotiate. The offer was accepted by the Union on that basis. In 2005, that approach was accepted by the Union which then went on to negotiate additional benefits for its members through bargaining.

[66] The University denies the Union was being pressured to accept the offer. Communications from Mr Kurt Dammers asking for a response to the offers were at the end of April 2006/2007, the Union, having been advised of the offer several weeks earlier (on 23 February 2006 and 8 March 2007).

[67] Mr Dammers' communications were in order to ensure that Union members received the benefits and the same pay increase at the same time as non-Union

members but still had the advantage of the without prejudice ability to bargain for more and/or different terms and conditions.

[68] The Union's claim that it felt compelled to accept the offer or that in doing so bargaining was undermined is not supported by the evidence. In communications to Union and non-Union members, the Union acknowledged that the acceptance of the increase on the without prejudice basis did not mean the end of bargaining, it encouraged non-members to join the Union and stated that it was continuing with the bargaining process with the intention of obtaining higher salaries.

[69] The 2006 email to non-Union members stated, for example: "*Despite this we expect to continue the tripartite work and settle collective agreements at a higher level than the offer that has been made to you*". The 2006 email to Union members stated: "*This does not mean that the collective agreement is settled or even that bargaining has started – it is simply an adjustment in pay.*"

[70] The 2007 email to non-Union members in relation to an offer of a pay increase stated: "*Despite this we expect to continue the tripartite work and settle collective agreements at a higher level than the salary offer that has been made to you as we did in 2006.*" The 2007 email to Union members indicated that the Union was "*considering claims and continuing with the bargaining process. Further meetings with members are scheduled for later this month and again in April to discuss and endorse Union claims*".

[71] Furthermore, in 2006 and 2007, it was the Union that subsequently proposed the roll over of the existing collective agreement without bargaining for salaries at a higher level or proposing other terms and conditions. The University wished to negotiate with the Union but at the Union insistence, local claims were referred to local problem solving committees. Ms Kelly accepted that the Union took this approach to bargaining because of tripartite pressure.

[72] Ms Kelly says that the Union was pressured to accept the offer and that the Vice-Chancellor's approach denied the Union the ability to negotiate. She claimed the Union may have wanted to negotiate for something other than a straight increase, perhaps a different allocation or packaging of the money. However, at the same time Ms Kelly was telling non-Union members that the Union would be bargaining for a higher salary increase. An increase was negotiated in 2005.

[73] The respondent says it is disingenuous for the Union to claim it would have bargained for something other than a straight increase. An email from Professor Sharp to the Vice-Chancellor on 9 March 2007 says that Ms Kelly was, from the outset, looking to do a deal and settle collectives on exactly the same basis as the previous year and with a straight salary increase of 3% or more. In recent years, each year the Union has accepted a straight increase throughout every tertiary institute in New Zealand. There was no evidence that other universities made offers to IEA staff in a similar fashion to Auckland. To claim that the Auckland situation undermined the bargaining there seems anomalous.

[74] Ms Kelly stated in her evidence that the presence of a substantial number of non-members created an opportunity for the University to undermine collective bargaining. I agree that the very existence of a high proportion of non-members inevitably creates difficulties for a union endeavouring to bargain collectively.

[75] Ms Kelly says the University has unilaterally determined the wage movement and that the announcement to non-members of the wage increase has been carried out strategically at the time most damaging to the collective bargaining process; and in a manner that also amounts to a communication to members of the same information.

[76] Ms Kelly says that the process adopted by the Vice-Chancellor minimises, limits or eliminates the Union's role in collective bargaining.

[77] While I understand Ms Kelly's position and perspective there has been no breach of good faith.

Letters to IEA staff after 30 days

[78] Ms Kelly raised concerns about the letter sent by the Vice-Chancellor after the first 30 days of employment to staff who had chosen not to join the Union advising them of the pay increase being offered to staff on IEAs.

[79] The Vice-Chancellor says it is not for the University to communicate with those staff about matters affecting Union members. That is the role of the Union and the Union has the opportunity during the first 30 days and thereafter to advise new employees of the benefits of Union membership. It is not credible for the Union to say that staff are not aware of the pay increase that will be provided to Union

members. The Union has always communicated with all staff about its views and position and had the opportunity to update all new staff within the 30 days.

[80] There has no breach of good faith.

Breach of contract and Umbrella Agreement

[81] The respondent denies that in making offers of a pay increase to IEA staff he had breached any obligation under the Umbrella Agreement. The respondent says that the Umbrella Agreement relates to the tripartite process which is a process involving the government, the Vice-Chancellors of eight universities and eight unions working together to consider issues affecting the tertiary sector, in particular, funding and resourcing issues. It is a way for universities and unions working together to release government funding and a way of involving the government in issues which affect the sector. This is quite distinct from the bargaining process which should be free from government influence. The tripartite process and the Umbrella Agreement are separate and distinct from the bargaining process. It says the two processes, bargaining and the Umbrella Agreement, are distinct and separate.

[82] The heading of the agreement is *Umbrella Agreement: Universities Tripartite Forum Process*. Clause 7 of the agreement states:

Set out below are the parties' obligations in relation to the tripartite forum process.

[83] Throughout clause 8, reference is made to the tripartite forum.

[84] The respondent says the Umbrella Agreement is a process-focussed document and sets out the manner in which 16 different parties will work together. It is not specific to the Union and the University. At clause 7 it sets out principles which apply to the implementation of the Agreement, that is the agreement between the numerous Vice-Chancellors and unions to work together. Those principles do not create broader obligations or apply outside the context of the tripartite process. The principles apply to the parties' behaviour in the tripartite forum process.

[85] The theme of the Umbrella Agreement is reflected in clause 2 which sets out that a principal issue was whether there should be a MECA or a number of SECAs and identifies a number of principles relating to bargaining. It identifies common

understandings between the numerous parties so as to enable them to work effectively together in developing a well resourced and successful university sector.

[86] The Union says the Umbrella Agreement creates an obligation to give the Union advance notice of a pay offer to staff on IEAs. There is no such express obligation in the Agreement.

[87] The respondent says that communications to IEA staff about the offer of a pay increase are not relevant to the tripartite process or union members' rights in that process. Clauses 4 and 5 of the Umbrella Agreement have not been referred to in the applicable clause of the collective agreement, which only refers to clauses 8 to 10.

[88] In any event, the University says that it has complied with the Umbrella Agreement and worked with the Union actively and constructively and in good faith to achieve the objectives of the agreement, namely a better resourced tertiary sector.

[89] The memorandum of understanding attached to the collective agreement does not create any obligations in relation to collective bargaining or the collective agreement in the way to interpret it. It is simply an understanding and, it is stated, is included in the collective agreement to "*ensure the parties are able to enforce clauses 8 to 10 of the agreement in the employment jurisdiction*". Further it states "*for the avoidance of doubt the terms of the umbrella agreement do not form part of this collective agreement*".

Decision

[90] I fully understand the Union's concerns about the impact on bargaining of the salary offer made prior to bargaining being initiated. However, the issue is whether there is anything illegal about the University's actions.

[91] I agree that renegotiation of a collective agreement is the most significant and high profile action of a union. It is the action that is most visible to members and most relevant and has the most effect on members' working lives, as Ms Adams said in her evidence. It is certainly possible that union membership could increase as a result of collective bargaining. The evidence was that membership had essentially remained static. Although members may feel disgruntled and dissatisfied the level of the dissatisfaction is clearly not such as to result in an exodus from the Union.

[92] An employer clearly has obligations to staff who choose not to be union members and those who do and wish to have their terms and conditions set through a collective bargaining process. There is an inevitable tension between these obligations.

[93] As to the tripartite forum, I accept that there is a relationship between that forum and the bargaining process. That is very clearly set out. But that is a substantive connection, not a process connection. There has not been a breach of the Umbrella Agreement or of the CEC or of the good faith provisions of the Employment Relations Act 2000.

Costs

[94] Costs were reserved. If the parties are unable to agree the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority