

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 175A/08
5118594

BETWEEN DOTSE STAFF
 ASSOCIATION INC
 Applicant

AND CHIEF OF DEFENCE FORCE
 Respondent

Member of Authority: R A Monaghan

Representatives: T Williams, Advocate for Applicant
 J Holden, Counsel for Respondent

Investigation Meeting: 24 July 2008

Submissions received: 30 July 2008 and 1 August 2008 from Applicant
 28 July and 1 August 2008 from Respondent

Determination: 1 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The DOTSE Staff Association Inc (referred to by the parties, and now also by the Authority, as the ‘DSA’) and the Chief of Defence Force (referred to as the ‘NZDF’) are parties to a collective employment agreement (“the cea”). The current cea has a term of 1 July 2007 – 30 June 2009.

[2] The DSA says the NZDF has breached both the rights of a new employee, and its own rights, under ss 62 and 63 of the Employment Relations Act 2000. The statement of problem did not specify the relevant breaches any further. I record, however, that s 62 applies to a new employee who is not a member of a union party to a cea covering the work to be done by the employee, and who enters into an individual employment agreement with an employer party to that cea. The section sets out the obligations of the employer in those circumstances. Section 63 makes

provision for the terms and conditions of employment of an employee to whom s 62 applies.

[3] The present problem has arisen because on 5 November 2007 the NZDF offered a position of research leader to an applicant for appointment to a vacancy at that level. A letter of offer of the same date attached an individual management agreement (“IMA”) and said:

“As a management designated position, your position is outside the coverage of any of the NZDF Collective Employment Agreements. The grade for your position is 23. ...”

[4] The employee concerned is not a party to this employment relationship problem.

[5] The statement of problem did not seek a remedy based directly on any breach of s 62 or 63, rather it said the NZDF did not act in good faith and sought penalties for breach of s 4 of the Act. The allegations of breach of good faith were not particularised. The statement of problem also raised a number of other matters which had been raised in an earlier statement of problem filed in the Authority and settled in mediation. The matters already resolved were excluded from this investigation pursuant to a determination on that preliminary point¹.

[6] The NZDF maintains that the position in question is outside the coverage of the cea, and denies acting in breach of its duty of good faith.

Background - the development of the coverage clause

1. The coverage clause in the preceding cea

[7] The coverage clause in the preceding cea read:

¹ **DOTSE Staff Association Inc v Chief of Defence Force** 13 May 2008, R A Monaghan, AA 175/08

“This collective employment agreement may apply to all employees on the DTA establishment who are members of the DSA. It will not however apply to the Director, Group Managers, Executive Officer, or those employed on a fixed term or casual basis.”

[8] The ‘DTA’ is the Defence Technology Agency, which is an agency of the NZDF.

[9] Most relevant for present purposes, the positions of research leader and research scientist were included in that coverage. Both positions were paid under the R03 grade in the scale contained in the cea.

2. Coverage of employees on Individual Management Agreements

[10] IMAs are, as their title suggests, individual employment agreements on which staff at a managerial level are employed. According to a summary of the various salary scales under which NZDF civilian staff in general were paid as at February 2008, IMAs apply to employees whose positions fall within salary bands 21 – 27 (inclusive).

[11] The summary also indicates that salary bands up to and including band 20 apply to a collective employment agreement negotiated between the NZDF and the NZPSA, as well as to others whose circumstances are not relevant here. The bands set out in the summary were said not to apply to ‘the NUPE Collective Agreement’, ‘the DTA Collective Agreement’ and certain other employees on individual employment agreements. Otherwise the bands apply to a significant majority of civilian employees, and were an aspect of the NZDF’s attempt at standardisation when renegotiating the cea.

[12] Regarding any definitions of, or criteria for entry into an IMA I observe that the cea negotiated with the NZPSA covers a significant majority of the unionised civilian staff. The applicable coverage clause in the cea covering NZPSA members expressly excludes ‘persons employed on a salary band of 21 or higher’. At least as far as coverage under that cea is concerned, if IMAs are offered only for positions

falling within bands 21 – 27 then there is a clear cut-off point. As I will describe, that was not the approach taken to the coverage clause in issue here.

[13] Both the research leader's and research scientist's positions are the equivalent of band 23, and are within the band for which IMAs are offered.

3. The negotiations for the new cea

[14] Negotiations for the new cea began in December 2006. One of the NZDF's bargaining objectives was to realign the DTA with the rest of the NZDF in terms of matters such as coverage, remuneration and performance management. The NZDF explained its objective regarding coverage, namely that the positions graded R03 be excluded, at the commencement of the negotiations.

[15] Accordingly at a meeting on 11 January 2007 the NZDF tabled a proposed coverage clause drafted as follows:

“This collective agreement may apply to all employees of the DTA establishment graded D05 to D15 or R01 and R02 who are members of the DSA. It will not apply to employees graded R03, the Director, Group Managers ...”

[16] The response of the DSA was that the exclusion of R03 staff was unacceptable. It maintained that position. At the same time, some 6 research leaders had recently resigned from the DSA and entered into IMAs. One senior scientist, who was due to retire and has since done so, wished to retain coverage and career progression options under the cea. The NZDF was willing to address that person's circumstances. According to Mark Williamson, the principal negotiator for the NZDF, there was an undertaking that coverage arrangements for that person would be preserved.

[17] There were a number of issues between the parties during bargaining. Negotiations broke down, and subsequently proceeded with the assistance of a mediator.

[18] One such meeting went ahead on 3 July 2007. Mr Williamson put a settlement package to the DSA. The package would include a salary increase, changes to the structure and format of the cea, and several other items of importance to the parties. Following that, agreed written terms of settlement of the same date were prepared. The terms of settlement addressed coverage as follows:

“2. Implementation of a new CEA modelled on the current NZDF IEA, with the following variations:

(a) coverage clause – amended to exclude reference to those on an IMA or any HRA.”

[19] The terms of settlement, including the term regarding coverage, were signed in front of the mediator.

[20] Subsequently the NZDF drafted a full cea and put it to the DSA. In an emailed message to Mr Williamson dated 12 July 2007 the then-president and lead negotiator for the DSA, Tina Williams, commented on the draft coverage clause. She noted the change from the previous cea, commented that she had removed an exclusion from the draft coverage clause relating to ‘any other position designated by CDF’ as that had not been agreed, and said: “We only agreed to exclude reference to those on an IMA or any HRA”.

[21] The text of the coverage clause in the ratified and signed cea reads:

“This agreement may apply to all employees on the Defence Technology Agency (‘DTA’) establishment who are members of the DSA.

It will not however apply to any employee or position under coverage of an Individual Management Agreement. This includes the positions of the Director DTA, Group Directors, and Manager Business Services.

This agreement will not apply to those employed on a Fixed Term or Casual basis or to those employed as Human Resources Advisors.”

[22] The salary scale in the new cea included an R03 grade. That was deliberate, as a few individuals have retained employment in R03 positions under the cea.

Whether the disputed position is within the coverage clause

1. The meaning and application of the coverage clause

[23] It is, of course, the law that the clause as ratified and signed is binding on the parties. If either party misunderstood the wording and made an agreement regarding coverage which it did not intend to make, except in circumstances not relied on here it remains bound by that agreement.

[24] Secondly, the Authority is obliged to interpret the coverage clause in accordance with legal principles relevant to the interpretation of contractual documents. One of the most fundamental of these is that the words used must be applied according to their ordinary meaning if the meaning is clear. If the meaning is clear, it is not open to me to look behind the words used and consider whether, despite the words used, there is some other meaning to be applied.

[25] The competing interpretations here concern the two sentences setting out the exclusion in respect of IMAs.

[26] The DSA says the scope of 'employee or position under coverage under an IMA' for the purposes of the clause is defined and limited by the second of the two sentences. In other words, the second sentence amounts to a closed category of exclusions.

[27] If that is correct, then there is no material difference (for present purposes) from the coverage under the preceding cea. Indeed the DSA says that, in order for one or both of the research leader and research scientist positions to fall within that category of exclusions, they should have been listed in it. Because they were not, they remain within the coverage clause.

[28] The DSA says further that, consistently with its interpretation, the R03 salary band was retained.

[29] Finally, it says that an individual or position cannot be 'under coverage of an IMA' if the issue is whether or not an IMA can be offered in the first place. Where an

IMA has already been entered into - as was the case with the DSA members who resigned their membership and entered into IMAs - the individual and position are 'under coverage of an IMA.'

[30] The NZDF says the research leader's position offered in November 2007 is a 'position under coverage of an IMA.' It submitted in general terms that, if one of the 'former executives' was replaced, the incoming employee would be moving into a 'position under coverage of an IMA'. In November 2007 the individual concerned was being appointed to a position of the same type, being a research leader's position, and was therefore being appointed to a 'position under coverage of an IMA.'

[31] Further to the retention of the R03 salary band, it was submitted that there are R03 positions which are not management positions, and these positions are not 'under coverage of an IMA.'

[32] Some meaning must be given to the inclusion of the new reference to 'under coverage of an IMA,' so I cannot accept the DSA's submission that second of the sentences in question lists a closed category of exclusions.

[33] Beyond that, attempts to ascertain the meaning of 'under coverage of an IMA' result in a series of circular arguments which are not assisted by the deliberate retention of an R03 grade in the cea, or the apparent flexibility in the application of the clause in practice.

[34] Moreover, it was Mr Williamson's evidence that:

"10. The letter of offer dated [5] November 2007 is consistent with NZDF's approach to designation of management positions and with NZDF's signalled intentions and commitments made during bargaining. Namely that Research Leader positions would be appointed on the IMA but R03 Research Scientist positions would be covered by the cea but with the option of moving to an IMA after the initial 30-day period."

And,

“11. (f) in response to [the DSA’s] concern, NZDF modified its position, leaving research scientist positions within coverage. This is the situation now. All individuals employed in a research leader position are now covered by an IMA while the single research scientist position retains access to cea coverage even though that person has recently accepted an IMA.”

[35] While I take the above as the explanation for retaining the R03 grade in the body of the cea, I do not read the coverage clause as permitting distinctions of that kind. Not only that, Mr Williamson referred in evidence to the exclusion of ‘comparable sized positions’ from the coverage of other ceas. However his reference to sizing was a reference to salary bands 21 – 27, and 23 in particular. There was no evidence of any distinction between research leaders’ and research scientists’ positions within band 23. To the extent that the distinction may lie in the ability of a delegate of the CDF to designate a position as falling ‘under coverage of an IMA’ – the position contended by Steven Wilce, the director of the DTA - then nothing in the coverage clause permits that.

[36] I therefore construe the coverage clause by saying it applies to the individuals who, when the cea was signed, had agreed to enter into IMAs or to other individuals already employed on IMAs. Otherwise it applies equally to research leaders and research scientists, in that both are covered by the cea at the commencement of their employment for so long as their positions are graded R03, but may opt out of coverage by moving to an IMA after the initial 30-day period if an IMA is offered to them and they accept it.

[37] The appointment made in November 2007 should have been addressed in that way.

Whether the NZDF breached its duty of good faith

[38] The DSA believes the NZDF attempted to deceive it by excluding R03 graded positions from coverage under the cea in the knowledge that the DSA did not agree to that exclusion.

[39] I do not go so far as to find that there was a deliberate deception of that kind. The DSA was aware of the final wording of the coverage clause. It was open to it prior to ratification to assess the extent to which that wording reflected accurately the wording of the terms of settlement, and if not, whether the wording went further than had been agreed.

[40] On the other hand the wording did attempt to go further, and Ms Williams did seek to address it. It is of concern that, despite Ms Williams saying the DSA did not agree to the exclusion of positions 'designated by CDF' and requiring the deletion of proposed wording to that effect, Mr Wilce has in effect sought to rely on a right of designation.

[41] Further, in emailed exchanges with Ms Williams in March 2008, Mr Wilce provided details of advice he had received, and which ostensibly permitted him to designate positions as being outside coverage of the cea. I do not accept that interpretation of the coverage clause.

[42] As for whether there was any deception involved in any of this, while there was considerable inconsistency in the position of the NZDF, there was no evidence of a wilful attempt to deceive. I find accordingly.

Costs

[43] Costs are reserved.

[44] If either party seeks a determination from the Authority on the matter, it shall have 28 days from the date of this determination in which to file and serve a memorandum setting out its position. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority