

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 104/09
5134972

BETWEEN THE NEW ZEALAND
EDUCATIONAL INSTITUTE
TE RIU ROA
First Applicant

PERSONS LISTED IN
SCHEDULE A
Second Applicants

AND SECRETARY FOR
EDUCATION
Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicants
Trish McKinnon for the Respondent

Investigation Meeting: 10 March 2009 at Wellington

Further Information
and Final Submissions: 2 July 2009

Determination: 7 August 2009

DETERMINATION OF THE AUTHORITY

[1] The second applicants are service managers within Group Special Education, which is a division of the Ministry of Education. They claim that the payment of lower bonuses to non-union managers at the same performance level as them was unlawful, as it arose from an arrangement which conferred a preference on the non-members because they were not union members. They therefore seek payment of bonuses on the same basis as that paid to non-members, a declaration that the Ministry has breached the Act, and costs.

[2] The Ministry defends the claim on the basis that the second applicants were covered by a collective agreement that makes no provision for lump sum payments, as opposed to the conditions applying to non-union members. Thus it claimed it was under no obligation to pay union members bonuses in accordance with the system applicable to non-union members. It considered that it need not have paid the union members any bonuses at all but did so, albeit at a lower level, because of confusion amongst the staff about the payment of bonuses.

The Facts

[3] There are approximately 50 union members and 20 non-union members, who have similar jobs as service managers, whose positions are relevant to this case. Non-union employees are employed under individual employment agreements that are all effectively identical. Remuneration is to be reviewed at least once each year. The process which is to be used for the review is set out in the Ministry's remuneration and performance management policies applicable at the date of each review.

[4] For the year in question (the year ending 30 June 2007) those policies are set out in the Ministry's *Managers' Guide to A & B Pay Band Remuneration*. The B band is relevant to this case. Within that band, there is a total remuneration range from 80% to 120% of the midpoint. Total remuneration consists of fixed remuneration and variable remuneration. Fixed remuneration is set at 80%-108% of the midpoint. Beyond 108% the only additional remuneration available is variable remuneration (the lump sum performance payment).

[5] The range is reviewed annually with regard to external relativities and affordability. A range of information from market surveys is considered, with particular emphasis on public sector median information. Any adjustments resulting from the review are applied to the band, not to individuals. Adjustments to individual remuneration are based on performance and current position in range.

[6] The Ministry's performance rating system applies to all staff. Under the Guide lump sum performance payments for B Band staff are set at different levels according to their rating. However, while the rating system also applies to union members, the Guide does not.

[7] For non-union members, the lump sum payment amounts are determined each year by the senior management group within set ranges, after considering Ministry performance, affordability and the current remuneration of staff. Those non-union members rated FP+ are paid lump sum performance payments in the range of 1-3%, for VS 3-6%, for VS+ 6-9% and for O 9-12%.

[8] The collective agreement 2006-2008 provides an entirely different formula for setting remuneration. The collective agreement was a new agreement in that it brought in one set of remuneration agreements for what had previously been provided for in the collective agreement for two categories of union staff, SM(Ms) and SM(Ls). The SM(Ms) remuneration arrangements mirrored those of the non-union employees until the 2006-2008 collective agreement was entered into. They were classified as being band B1 employees, which was effectively the same as the B band employees until the 2006-2008 collective agreement came into force.

[9] To allow for the merging of the two sets of conditions, a complex formula was established and is set out below in clause 3 and Schedule 2.

3.2 Remuneration

3.2.1 *The following salary scale will apply to service managers with effect from 1 July 2006. Employees will move to this salary scale in accordance with the translation outlined in the terms of settlement to this Agreement:*

<i>Step</i>	<i>Description</i>	<i>Remuneration</i>
<i>5 – (100%)</i>	<i>Full performance</i>	<i>\$83,454</i>
<i>4 – (95%)</i>	<i>Progressing well</i>	<i>\$79,281</i>
<i>3 – (90%)</i>		<i>\$75,109</i>
<i>2 – (85%)</i>	<i>Learning the job</i>	<i>\$70,936</i>
<i>1 – (80%)</i>		<i>\$66,763</i>

3.2.2 *The rates of steps 1-4 will be set as the expressed percentage of the full performance step (Step 5).*

3.2.3 *If a service manager is a member of the Government Superannuation Fund a 5% proxy for the employer contribution will form part of their remuneration. Where this occurs, the service manager's base salary will be the rate for their step divided by 1.05.*

3.3 Placement and Movement within Scale

3.3.1 *A new appointee to a service manager position will be placed on the appropriate step in the salary scale taking into account their development needs to achieve full competency/performance in the role. Placement on step 4*

(95%) or step 5 (100%) will require the approval of the Group Manager.

- 3.3.2 *All new appointees will have a six month performance review, and may be eligible to move to a higher step on the remuneration scale on the basis of the outcome of this review.*
- 3.3.3 *Further movement through the salary scale will be contingent on the outcome of the employee's annual performance review. Taking into account the employee's performance rating established through the annual performance review process and their current step in the scale, the employee's manager may approve movement through the scale in accordance with the guidelines for the Service Manager remuneration system. Any movement as a result of the annual performance review will have effect from 1 July following the performance review period.*
- 3.3.4 *Where a service manager receives the same performance rating in two consecutive annual performance reviews and s/he is below the minimum salary step corresponding to that rating s/he will move to at least that minimum step.*
- 3.3.5 *The salary for an individual employee will not be reduced by reason of the operation of the remuneration scale or the annual performance review process.*
- 3.3.6 *Following the outcome of the performance review, an employee may request a review of their manager's decision. Any request for a review should be raised and dealt with in a timely manner by the employee and their immediate manager. Where agreement cannot be reached at this level, the request should be escalated to the Group Manager for a decision...*

Schedule 2 – Terms of Settlement

1. Remuneration: Translation to the New Scale

...

Service Managers (M) will translate onto the next highest step in the new scale in clause 3.2.1 based on their position in the B1 range following the outcomes of the 2005/06 remuneration round. This salary step will take effect from 1 July 2006.

Where a Service Manager's (M) salary rate following the 2005/06 remuneration round is higher than the full performance (step 5) her/his salary will be protected. No further increases will be available under this agreement until the full performance step increases above their protected salary rate.

2. Remuneration: Operation of the New Scale

Following this settlement, the basis of the remuneration system for service managers will move a 1 July to 30 June year to align with the ministry's performance review cycle.

Except for the six month review for new appointees, the salary movement for service manager will follow the conclusion of the annual performance round.

The parties will jointly develop guidelines for the operation of the Service Managers' remuneration system based on the discussions and understandings reached in the negotiation process.

3. Performance Management

The parties agree that the performance management system should ensure that a Service Manager has ongoing management/leadership development opportunities to meet 'Full Performance' expectations for the role in a timeframe appropriate to the individual.

Starting in the 2006/07 performance year, the annual performance review process for Service Managers will be conducted in accordance with the Ministry's performance management processes applying to A and B Band Staff.

The parties acknowledge that performance management processes are currently under review for Ministry of Education employees. The parties agree to consider the performance management framework for Service Managers in the context of this work.

[10] It is clear from the collective agreement and the evidence of the witnesses in the case that the union rejected the B band remuneration system for inclusion in the 2006-2008 collective agreement because it did not want a performance pay system contained in it.

[11] When comparing the two types of remuneration structure, it is clear that the main differences are that the union members have some certainty over their pay in that it will be set within five steps of the band, there is a set process for progressing up the band and no one's pay can be reduced. By contrast, non-union members' pay is set according to the employer's assessment of where, in a range, an employee's performance is placed, the level of which may change from year to year. There is therefore no certainty that an employee's remuneration will increase or even stay the same in any given year.

[12] The parties had agreed to develop guidelines for the operation of the service managers' collective agreement salary scale after the settlement of the agreement. Unfortunately, they have not been able to do so. This was because there was a difference over the Ministry wanting to reserve to itself *the right to pay one off lump*

sum payments to all service managers who are over the 100% if their performance merits it.

[13] In response, the relevant NZEI official stated:

*If you want to make lump sum payments then you're free to do that.
But what NZEI expects is that members will move through the scale.
They wouldn't want to see a lump sum instead of progression.*

[14] In the event, for the relevant year, the Ministry of Education decided to pay discretionary bonus payments to union members of \$2,000 for outstanding performance, \$1500 for very strong or very strong plus performance, and nothing for those assessed as performing at a lower level. Comparable non-union members were paid lump sum performance payments significantly in excess of these amounts. Hence the claim from the union, which at the time was described as constituting disparity of treatment, but has now come to encompass claims for unlawful preference and consequently unjustified actions to the second applicants' disadvantage. The union accepts, however, that there is no other evidence of discriminatory actions by the Ministry in this case.

[15] The matter has been to mediation but remains unresolved despite the best endeavours of both parties. It therefore falls to the Authority to make a determination.

The Law

[16] The law on preference was assessed in *New Zealand Meat Workers & Related Trades Union v. Taylor Preston Ltd* (unreported, Shaw J, WC8/09, 22 April 2009) at paras.[41]-[49]. They state:

[41] *Section 9 of the Act (Prohibition on preference) provides:*

- (1) *A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union, -*
 - (a) *any preference in obtaining or retaining employment; or*
 - (b) *any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.*
- (2) *Subsection (1) is not breached simply because an employee's employment agreement or terms and*

conditions of employment are different from those of another employee employed by the same employer.

(3) *To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits –*

(a) *of a collective agreement:*

(b) *arising out of the relationship on which a collective agreement is based.*

[42] *In Air New Zealand Ltd v. Kippenberger [1999] 1 ERNZ 390 Randerson J described a preference as some advantage in the terms or conditions of employment conferred on a person.*

[43] *Although s9 prohibits a preference where it is conferred because a person is or is not a member of a union, s9(2) acknowledges that mere difference in employment terms in a workplace does not make preference unlawful. Section 9(3) licences collective agreements to contain terms and conditions that recognise benefits. Different terms and conditions conferred on employees employed by the same employer may amount to preference but of itself this is not prohibited by s9.*

[44] *In National Union of Public Employees (Inc) v Asure New Zealand Ltd [2004] 2 ERNZ 487 a full Court of the Employment Court held that s9(2) means that the conferring of different terms and conditions does not in itself constitute an unlawful preference and the Court should focus on the reasons for the preference. The Court stated that the relevant test involves both causation and motive, that is, the purpose for which the preference was conferred. The Court held at p504:*

... A preference cannot lawfully be conferred simply because a person is a member or non-member of a union. If it were conferred for some entirely different purpose, for example because that the employee has conferred a greater benefit on the employer by agreeing to work extra hours, it would not amount to an unlawful preference for the purposes of s9. In the end it is a matter of fact whether there is a preference and if so, what was its purpose.

[45] *As Chief Judge Colgan pointed out in Eastern Bay Independent Industrial Workers Union v ABB Ltd (AC41/08, 26 September 2008) Parliament added s9(3) in 2004 to follow and statutorily confirm the effect of the NUPE judgment. While subsection (3) is concerned with terms contained in a collective agreement and is not directly relevant to the facts of this case, it reinforces my view that one of the purposes of s9 is to permit preferences which recognise benefits arising out of agreements between employers and employees.*

[46] *In ABB Chief Judge Colgan examined the real substance of a preferential payment to members of one union over another. After analysing the provision and the history of negotiations leading to it the Chief Judge found that in spite of the preferential payment being labelled a “relationship premium” it was unlawful. The “premium” was an*

additional payment the employer made to settle bargaining with one union which he characterised as a strategy to immunise a discriminatory lump sum payment to one union from a legal challenge.

[47] *In contrast, the preference in NUPE was found to have been unlawful. Members of one union received a preference over members of another union because of the benefits that they had brought to the employment relationship as a result of a Partnership for Quality (PfQ) agreement between their union and their employer. The difference between the two cases is that in NUPE there was an objectively identifiable reason for the preference other than membership of a union. The full Court found that there was a greater benefit to the employer from those members agreeing to work extra hours than members of another union who had not entered into the same PfQ. In ABB there was no such added value.*

[48] *Chief Judge Colgan found that the employer in that case preferred to deal with one union over another and made preferential payments to members of that union giving those payments a “convenient label”.*

[49] *Although the Full Court referred to motive in its discussion of s9, I do not read the NUPE decision as requiring an examination of the employer’s subjective motives for conferring a preference to the extent urged on me by counsel. Motive is defined as “a factor inducing a person to act in a particular way” (Concise Oxford Dictionary 10th Edition). Section 9 does not refer to motive but uses the word “because” which means “for the reason that” (supra). The question is to be determined as a matter of fact. In both NUPE and ABB the Court inquired into the real substance of the preferential payments, that is, the reason why they were conferred. The issue is what caused the preference to be conferred. If it was union membership then it is prohibited.*

Determination

[17] Clearly, the second applicants have been paid less in discretionary payments for the relevant year than the equivalent non-union managers. The key question for determination is whether that is a result of an unlawful preference or because of a lawful difference between the terms and conditions of employment enjoyed by both groups.

[18] I conclude that, unlike the non-union employees, the second applicants had no enforceable right to lump sum performance payments based on their performance rating. The union members’ terms and conditions provided for no such formula or reference to a formula.

[19] Whether they have a better or worse remuneration system than their non-union counterparts is not discernible because of the difference between the two systems. On the one hand the non-union band range is significantly greater. On the other hand, the union members have more certainty of progression within the range, up to 100%. In any event, this is largely irrelevant to whether or not an unlawful preference has occurred.

[20] Both remuneration systems are of contractual effect. The individual employment agreements provide an enforceable link to the Managers' Guide. Even though the Guide may be changed by the Ministry, and it currently provides for considerable discretion to the Ministry in pay setting, an employee can enforce the applicable provisions to ensure that the Ministry acts reasonably in setting remuneration levels, including lump sum performance payments. Equally, the union members can enforce their collective employment agreement, which operates in quite a different way.

[21] I conclude that the different remuneration systems in place are, of course, terms and conditions of employment. They are, however, different according to whether one is covered by the collective agreement or not. The reason for the difference in payments at issue is because of the different remuneration systems in place. While both the second applicants and the non-union members have the same performance rating system, the implications for remuneration arising from that rating system are fundamentally different because of their differing remuneration systems. The union's remuneration system does not provide for lump sum performance payments because the union and its members did not want to be subject to such provisions.

[22] It is always open to an employer in these circumstances to make bonus payments on an ex-gratia basis. Such payments as were made to the union members bear no relation to the system involving lump sum performance payments that the Ministry of Education is obliged to apply to non-union members. Thus in effect the payments to non-union members were enforceable lump sum performance payments, while those to union members were ex-gratia bonuses.

[23] Therefore, as the reason for the different payments arose because of the different remuneration systems, there is no unlawful preference in this case. I dismiss the applicants' claims accordingly.

Costs

[24] Costs are reserved.

G J Wood
Member of the Employment Relations Authority

SCHEDULE A

Gnida	Christine	Hills	Janneen
Van der Wal	Jeanette	Hogg	Sally
Ward	Robyn	Hunter	Jenny
Wilson	Christine	James	Stephanie
Allen	Glenis	Kessler	Elayne
Coatsworth	Ian	Long	Pauline
Dwyer	John	Malins	Grant
Hutton	Ron	McMahon	Bernice
Kerr	Lyn	Mitchell	Marilyn
Logan	Rose	Morris	Leonie
McGovern	John	Ness	Mike
Sheward	Jane	Overton	Annie
Barry	Louise	Pease	Maryanne
Coyle	Patrick	Pullar	`Bill
Curnow	Christine	Tutty	Chris
Davidson	Juanita	Van Dorp	Mairi
De Candole	Rosalind	Williams	Amelia
Dowson	Gill	Yeo	Denys
Ellison	Sally	Vautier	Kelly
Farmer	Jane	McEntyre	Patrick
Ford	Jill	Watson	Julianne
Hampshire	Nicky	Edwards	Terence
Haslam	Vicky	Dunckeley	Ingrid