

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5139289
AA 38/09

BETWEEN NATIONAL DISTRIBUTION
UNION
First Applicant

AND EPIFANIA ALESANA and 551
others
Second Applicants

AND THE FARMERS' TRADING
COMPANY LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Peter Cranney, counsel for Applicants
Penny Swarbrick, counsel for Respondent

Investigation Meeting: 30 January 2009

Determination: 9 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The immediate problem between the parties for resolution by the Authority is a dispute about the interpretation, application or operation of certain provisions of a collective employment agreement entered into between The Farmers' Trading Company Limited and the National Distribution Union ("NDU").

[2] The CEA covers the 552 applicants who are members of the NDU and are employed by Farmers' as shop assistants.

[3] In total, about 3,000 retail shop assistants are employed by Farmers' in 59 stores throughout New Zealand.

[4] A method of managing and measuring the performance of shop assistants was introduced by Farmers' in 2005. It is known as the Performance Management and Development System, or PDP, and is applied to all Farmers' employees, whether under the CEA or an individual employment agreement.

[5] Using PDP, employees are assessed in their performance against standards set for their roles. They are given a grade or rating ranging between "A," for exceptional performance, down to "D," for employees who are not meeting performance expectations. Employees new to their role are rated "E" to begin with.

[6] After PDP had been introduced Farmers' sought to establish a link between the graded performance of employees and increases in pay to reward higher levels of attainment. A link in this regard was introduced in 2006 but only for employees who were under an IEA. They have received pay increases as a reward for achieving gradings of "C" or above. By contrast, regardless of the PDP annual grading achieved by them, the applicants have not received pay increases linked to their individual performance as assessed. This is because Farmers' does not consider the applicants are contractually entitled to such an increase under the CEA.

[7] The NDU has alleged that the administration of PDP by Farmers' in this way amounts to an unlawful preference, a breach of the employment agreement and an unjustified action affecting the applicant employees to their disadvantage. Remedies of damages, lost wages and compensation have been sought.

[8] The parties have agreed that at this stage a determination of all the actions or claims brought by the NDU on behalf of the applicants is not required. They view the resolution of a dispute about the interpretation, application or operation of the relevant provisions of the CEA as likely to assist them in the negotiations currently taking place for a new CEA. An investigation and determination of the other problems can be deferred and returned to later if necessary.

[9] The NDU contends that the CEA currently in force requires Farmers' to recognise performance ratings of "C" or above with a pay increase, in the same way as employees covered by an IEA invariably have received one.

[10] The NDU relies in particular on a provision which incorporates the PDP System by express reference made to it. The union also relies on the intent of the parties to the CEA as expressed in the document.

[11] Among those expressions of intent are the following:

5.1 General

The Employer's intent is to:

- *provide fair and equal opportunities for all employees.*
- *provide and ensure equal access to jobs, promotions, transfers, pay increases, training and development opportunities, and all other aspects of employment.*

[12] At the beginning of clause 8, the remuneration provisions, the CEA expresses the following, amongst other things, to be the intent of the employer:

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- *To recognise and reward differences in individual ability and performance.*
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- *To provide incentives for superior measured performance.*

[13] Clause 8 continues with a table showing the various roles that a shop assistant may be employed in under the CEA, and also the particular wage band and minimum rates of pay for each role.

[14] Immediately following the table and after a Note relating to the date on which the rates of pay become effective, is the following provision central to this dispute:

Advancement beyond the rates detailed above [in the Table] is by performance assessment (PDP).

[15] Clause 8.1 of the CEA makes provision for personal performance and remuneration reviews. In respect of the former, it provides:

Employees' personal performance will be reviewed over a twelve-month period.

[16] In relation to remuneration reviews, the remainder of the first part of clause 8.1 provides as follows:

Where an employees work schedule is varied or they are appointed to a different position their pay will be reviewed to reflect the changed circumstances. Any agreed changes to an employee's pay or work schedule will be confirmed by letter.

If an employee works more than the weekly hours specified in their letter of confirmation the additional hours will be paid at the rate specified in their letter of confirmation.

[17] No further reference is made to personal performance or to remuneration reviews.

The interpretation issue

[18] The legal principles governing the construction of contracts are well established. In relation to a dispute about a contract of employment, the Court of Appeal restated those principles in *Lowe Walker Paeroa Ltd v. Bennett* [1998] 2 ERNZ 558, a case referred to in submissions by Ms Swarbrick, counsel for Farmers.’ At page 11 of the Court’s judgment, Richardson P described the first two principles as follows:

First, the true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. Consideration must be given to the whole of the contract. In determining the legal substance of the bargain as disclosed by the documents before the Court, the circumstances surrounding the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard, too, to the genesis and objectively the aim of the transaction.

Second, where the contractual intention is clear from the words used then the court must give effect to it. It is not permissible to inquire into preliminary or background matters in order to find a different meaning; that would amount to the court holding that the parties really meant something different from what they chose to say. Similarly, oral evidence as to negotiations and preliminary documents are not admissible to contradict or vary or add to the plain meaning of the written contract. It is contrary to principle to invoke such material to create uncertainty and then use it again to resolve that uncertainty.

[19] A third principle stated by the Court is in relation to contracts arising from sham transactions. There is no suggestion of any such arrangement here connected with the bargaining and the CEA which resulted from that. A fourth principle discussed by the Court is in relation to the equity and good conscience jurisdiction in employment law. Although the case before the Court of Appeal was under the Employment Contracts Act 1991, the same or similar jurisdiction has been conferred on the Employment Relations Authority under the Employment Relations Act 2000. The Court pointed out that reliance on the equity and good conscience jurisdiction is subject to the important qualification that its exercise cannot be inconsistent with the statute or with any applicable collective employment contract. Under the current

legislation the same proviso applies where there is any collective employment agreement.

[20] In preparation for this case both parties collected evidence about the bargaining and negotiations that led to the inclusion of clause 8 in its present form, particularly the provisions referred to above in the CEA now under construction by the Authority. The parties offered that evidence, if the Authority thought it would assist.

[21] I find that the nature of most of the evidence infringes the principles stated by the Court of Appeal in the *Lowe Walker* case above and for that reason have set it aside. I rely on the CEA itself and its wording in relevant parts which, in my view, make clear the contractual intent of the parties that the Authority must give effect to in this case.

[22] In his submissions on behalf of the NDU, Mr Cranney acknowledged what is plain from the CEA, that it does not expressly state what the mechanism is for “*advancement.*”

[23] There is no argument, and it is clear from the reference to it in the CEA, that the PDP system which applies to the applicants is the same one that operates for the employees under individual agreements. There are no words of qualification, limitation or exemption used in relation to the way the PDP is to apply under the CEA.

[24] Although the PDP system is expressly referred to in the bolded line immediately under the first table of clause 8, there is no express reference there or anywhere else to a linkage between the PDP system and performance pay for employees covered by the CEA.

[25] To infer that there is such a linkage and that it must be the same linkage applying to employees covered by individual employment agreements, is beyond what is reasonable from the wording of the CEA, I find.

[26] I do not consider this to be a case where the wording of the CEA in relevant parts is ambiguous in any way. I find that the wording goes as far as making provision for the PDP system to apply, but no further than that.

[27] It is clear that “*advancement*” is in relation to rates of pay as set out in the Table immediately above the contentious bolded line in clause 8. It is also clear that PDP is the basis for any advancement, but what I find has not been provided is the linkage necessary to achieve that advancement.

[28] Any linkage, if one had been provided for, expressly or by a reasonable implication from the provisions of the CEA, might be expected to have given such details such as the degree of advancement, as well as the timing of it and other vital matters which are not addressed.

[29] I do not consider it can necessarily be implied that, for example, an “A” assessment given to an employee under the CEA must attract the same degree of advancement received by an employee under the IEA who has achieved that grade.

[30] It is fundamental that the bases on which pay rates are struck under the different types of employment agreement, collective and individual, need not be identical, but there is no indication as to whether allowance can be made by Farmers’ for any existing differential in pay rates and related conditions as between the CEA and IEA’s, when fixing the degree of advancement for a particular grade. The Authority is not empowered to fix new terms and conditions of employment to overcome this omission from the CEA.

[31] Clause 8 goes only so far as to provide that if there is advancement in pay rates that will be by means of PDP. The provision does not require there to be advancement. Why the CEA provision has not gone further and made the link to performance pay is not something the Authority is required to determine, the wording of clause 8 being plain and unambiguous in this regard. I note the evidence offered from Farmers’ witnesses who were involved in the CEA negotiations that the NDU resisted the move to introduce a pay for performance remuneration system (Lauren Jalfon, paragraph 23) when that was offered by Farmers.’ Whether that is correct and whether that explains the missing link, is not a matter that needs to be determined in following the fundamental principles of contract construction.

[32] I therefore cannot interpret the relevant provisions of the CEA as requiring advancement to occur if a particular rating, “C” or above, has been achieved under the PDP by an employee covered by the CEA.

Determination

[33] Accordingly I uphold the submissions of Farmers' in this regard and determine the dispute in favour of the employer's construction of the employment agreement.

[34] As agreed between the parties, the question of whether the actions of Farmers' in administering the PDP and the CEA for those employees covered by it may give rise to liability for any of the other actions commenced by the NDU, is a question for future argument in the event the parties are unable to resolve any differences in this regard themselves. They may return with the claims and in that event the Authority will give directions for the continuation of its investigation.

Costs

[35] Costs are reserved as requested by both parties, whose counsel will be well aware of the usual treatment of costs applications made in relation to disputes of this kind.

A Dumbleton
Member of the Employment Relations Authority