

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 240/09
5085985

BETWEEN Caren Wilson-Busing & Mere
 Karepe
 Applicants

AND New Zealand Public Service
 Association
 Respondent

Member of Authority: Vicki Campbell

Representatives: Joanne Watson for Applicant
 Peter Cranney for Respondent

Investigation Meeting: 27 March 2009 at Hamilton

Submissions Received: 4 May 2009 from Applicant
 13 May 2009 from Respondent

Determination: 17 July 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Caren Wilson-Busing and Ms Mere Karepe are claiming the New Zealand Public Service Association (“PSA”) has breached its obligations of good faith; breached section 51 of the Employment Relations Act; breached clause 3 of the PSA Rules; and has breached the bargaining process agreement between DHB’s and the PSA which applied to the 2006 negotiations for a multi-employer collective agreement (“the MECA”).

[2] Ms Wilson-Busing and Ms Karepe claim the failures by the PSA has disadvantaged them in their employment in particular their ability for advancement has been reduced. They are claiming penalties for the breaches and damages for loss of earnings and costs.

[3] The PSA denies the claims and acknowledges that there were errors made during the negotiation and ratification process for the 2006 MECA but that those

errors were made by both the DHB's and the PSA and that both parties were acting at all times, in good faith.

[4] The background facts in this matter have been canvassed in two previous decisions therefore it is not intended to restate all of the background facts in this determination. (See *NZPSA v Bay of Plenty District Health Board & Ors*, V Campbell, 3 October 2007, AA 305/07 and *Waikato DHB & Ors and NZPSA* [2008] 1 ERNZ 80)

[5] The issues for this determination are whether any breaches have occurred for which a penalty should be awarded and, if there has been a breach or breaches, whether damages should follow.

Claims for penalties

Breach of Good faith

[6] Section 4(1A) of the Act requires the parties to an employment relationship to be active and constructive, responsive and communicative in maintaining a productive employment relationship. Employment relationships include a union and a member of a union. Both applicants were, at the time this matter arose, members of the PSA. They were, therefore in an employment relationship.

[7] The Court of Appeal in *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 noted that:

Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.

[8] The applicants rely on the actions of the PSA in negotiating differences from the National Terms of Settlement document and the MECA without notifying its members of the differences to support their claims for a penalty. The claim from the applicants is that they were placed on the incorrect salary scale following the conclusion of the 2006 negotiations and that this came about due to a breach of good faith on the part of the PSA.

[9] By way of clarification there were two significant documents which were put before the members and which are relied on by the applicants in their claims. The first was a National Terms of Settlement (“NTS”) document which, while agreed to by the members including the applicants, never had the status of a contract. However it was common ground that the intention was for the NTS to be incorporated in MECA’s nationally.

[10] The second significant document was the purported MECA which resulted from the bargaining process in 2006. The full bench of the Employment Court held that the MECA was unlikely to have any legal effect as the whole document had never been ratified. (*Waikato DHB & Ors and NZPSA* [2008] 1 ERNZ 80).

[11] As a member and delegate with the PSA, Ms Wilson-Busing questioned the PSA when it became obvious to her that there were discrepancies over the translation from her current salary scale to the new salary scale set out in the 2006 MECA and where she understood she would be placed on the NTS.

[12] She was advised by the PSA that Health Promotion Officers, such as herself, had been split over two salary scales. This was contrary to what Ms Wilson-Busing understood from the NTS discussions held prior to the conclusion of the MECA document. Ms Wilson-Busing understood that under the NTS there was only one scale and she would be placed on the Allied Salary Scale.

[13] After Ms Wilson-Busing raised the issues with regard to the translations with the PSA the PSA took steps to challenge the DHB’s on the way the NTS had been incorporated into the MECA. At the investigation meeting in the Authority the PSA argued that all Health Promotion Officers should be on the Allied scale pursuant to the NTS document. This was consistent with Ms Wilson-Busing’s understanding.

[14] In my determination dated 3 October 2007 I held that the purported MECA had never been ratified. In particular, there were changes made to which salary scale particular employees would be placed following the conclusion of bargaining. These changes were made between the ratification of the NTS and the signing off of the MECA and had not been put before the members of the PSA for ratification.

[15] The DHB's challenged that determination and after a Court hearing on the preliminary matter relating to the ratification of the MECA, a settlement conference was held with the DHB's and PSA. During the course of that settlement conference the DHB's and the PSA, requested Judge Travis to give judgment in the matters raised in the respective challenges.

[16] While a claim of breach of good faith was not specifically addressed by the Court in *Waikato DHB & Ors and NZPSA* [2008] 1 ERNZ 80, the Court made an obiter comment about the issue of good faith to the effect that although a union member could theoretically sue the union for breach of good faith, the facts of this case were such that it would not meet the very high tests of egregious bad faith required under s4A of the Act before a penalty can be imposed.

[17] I find that during the course of the negotiations over the 2006 MECA, changes to where particular employees would be placed on the salary scale were made that were not discussed with union members before being agreed by the PSA delegates at the bargaining table. That was not a breach of good faith. In normal circumstances those changes would be put to members for ratification before the signing off of the MECA. Of course in this matter, ratification following the negotiations did not occur.

[18] Standing back and considering the matter objectively, I am satisfied the applicants have not shown that the actions of the PSA were egregious, deliberate or otherwise undertaken in bad faith and the claim is dismissed.

Section 51 of the Employment Relations Act

[19] Section 51 of the Act describes the requirements for ratification of a collective agreement prior to the signing of the agreement. There is no dispute having had the benefit of the Authority and Court's determinations of the matters between the PSA and the DHB's, that the process required by section 51 was not adhered to.

[20] The applicants' claim a penalty for a breach of s.51. Penalties are only recoverable for breaches of the Act where it is provided for in the particular provision (s.133). Section 51 does not provide for the imposition of a penalty.

Clause 3 of the PSA Rules

[21] Clause 3 of the PSA rules sets out the principles and objects of the organisation. Sub-clause (4) specifies that the PSA will:

...represent the interests of any member or members in accordance with PSA policy, before any person, group, organisation, government or local authority, statutory body or any other body.

[22] The applicants claim that when the PSA failed to go back to its members before agreeing to change what was set out in the NTS and those changes being incorporated into the MECA document it was in breach of clause 3(4) of the rules.

[23] The rule requires the PSA to represent its members in accordance with its policy. There was no evidence produced to the Authority to demonstrate that the PSA had not undertaken its bargaining in accordance with its policy. Even if I had found that the PSA was in breach of its rules with the applicants, there is no statutory provision which allows the Authority to award a penalty against the PSA. It follows that this claim fails and is dismissed.

Bargaining process agreement between DHB's and the PSA.

[24] Neither Ms Wilson-Busing, nor Ms Karepe were parties to the bargaining process agreement entered into for the purposes of bargaining for a MECA. That agreement was between the PSA and the DHB's. Therefore it can not be said that the PSA has breached any obligations to the applicants as a result of any breach of the bargaining agreement. This claim is dismissed.

Claims for damages

[25] The applicants have sought damages for the alleged breaches. This claim relies on the fact that the applicants were placed onto the Community Health Workers Scale instead of the Allied scale after the 2006 MECA document was signed off. The claim for damages is to recompense the applicants for their reduced earnings capacity due to being placed on the wrong salary scale under the 2006 MECA.

[26] As already set out the Court held that the 2006 MECA was not a valid collective agreement. In any event in his judgment dated 2 May 2008 Travis J, held that Health Promotions Officers could be placed on either the Allied pay scale or the Health Promotion and Community Health pay scale depending on their qualifications.

(Waikato District Health Board anors v The New Zealand Public Service Association, unreported,

Travis, J, 2 May 2008 ARC69/07; *The New Zealand Public Service Association v Waikato District Health Board anors*, unreported, Travis, J, 2 May 2008 ARC72/07)

[27] The applicants are both Health Promotion Officers without tertiary qualifications. They were therefore placed on the correct salary scale following the conclusion of the bargaining in 2006. It follows that no losses for which damages can be ordered have been incurred.

Costs

[28] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the PSA may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority