IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 203/10
5128960

	BETWEEN	THE NEW ZEALAND PUBLIC SERVICE ASSOCIATION Applicant
	AND	MINISTRY OF AGRICULTURE AND FORESTRY Respondent

Member of Authority:	R A Monaghan
Representatives:	P Cranney, counsel for applicant G Pollak, counsel for respondent
Investigation Meeting:	9 February 2009
Submissions received:	10 March 2009 from applicant 20 February and 30 March 2009 from respondent
Further information received:	1 and 8 May 2009
Determination:	30 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Public Service Association ("the PSA") and the Ministry of Agriculture and Forestry ("MAF") are parties to the 'MAF Collective Agreement' dated June 2007 ("the cea"). They are also parties to the 'MAF Quarantine Service Worksite Agreement for Duty Managers, Quarantine Officers and Quarantine Assistants Employed at Auckland International Airport ITB, which was in force before the commencement of the cea ("the ITB Worksite Agreement").' Their dispute centres on the terms and conditions of PSA members covered by the cea and employed at the ITB worksite, with particular reference to remuneration.

[2] The PSA seeks determinations that:

(a) the ITB Worksite agreement continues to apply to members at the ITB worksite;
(b) the applicable salary scale is that contained at p 62 of the cea; and
(c) the site rate referred to at p 53 of the cea applies.

Background

[3] The ITB Worksite Agreement was entered into as a variation to the cea then in force, and its 'term of agreement' clause read:

> "10. Term of Agreement
>
> This agreement shall come into force on the 13th December 2003 and continue in force until July 2005.
> The conditions of this document will remain in force until such time as a new agreement is signed."

[4] The overall purpose of the agreement was expressed to be to clarify the hours of work and corresponding remuneration applicable at the ITB worksite. To that end it set out rostering and other arrangements. Such hours of work agreements were permitted by the cea, in particular in clause 8 of the June 2007 cea.

[5] The agreement also provided that:

> "5. Remuneration
>
> In addition to the remuneration specified in Appendix I of the MAF CA a site rate is determined for staff working 'shift work' at the Akl ITB work site."

[6] In or about 2006 the parties became engaged in planning and consulting about a Quarantine Service Capability Change Plan, which the parties refer to as the Capability Project. The aim of the Capability Project was to deliver flexible and safe work practices and an appropriate remuneration model. The final plan, delivered in May 2007, included a proposal for a remuneration model which the PSA did not support. In particular the parties could not agree on the replacement of site

allowances with a non-standard hours of work allowance. Affected employees at the ITB site received a site allowance and had non-standard hours of work.

[7] The matter was addressed again during bargaining for the renewal of the cea. The outcome was that a joint working party was established under the cea and convened to consider and make recommendations on rostering and allowances for non-standard hours of work.

[8] The cea provided for this in Appendix 3 by setting out at (a) a role specific base salary scale for duty managers, quarantine officers and quarantine assistants to apply from 1 July 2007 and to continue in force until superseded as provided for in (b) of the Appendix. That section began:

> "(b)(i) The parties will agree on terms of reference for a working party that will include but is not limited to the following:
> . undertake a review of the allowance(s) payable to staff employed in the MAFBNZ role specific salary scale below to compensate for non-standard hours of work as provided for in this agreement.
> …

[9] This provision continued, on 'p 62' to read:

> "The working party will consider and evaluate the following scenarios to assess compatibility and cost effectiveness with the salary scale below:
> . …
> . paying for non standard hours of work as an allowance
> . the operation of allowances in accordance with the provisions of the collective agreement."

[10] The 'salary scale below' was preceded by this provision:

> "(b)(ii) If the parties do not reach a compatible and cost effective outcome through the above process, then MAF will consult with the PSA and/or staff in accordance with the provisions of this Collective Agreement to establish appropriate outcomes that will allow the implementation of the following Salary Scale no later than 1 July 2008.

[11] The provision for a site rate at 'p 53' of the cea fell within Appendix 1, which applied only to the roles specified in the role specific salary scale. The provision did

not quantify site rates, rather it recognised in general terms that site rates could be payable and made other arrangements not relevant here.

[12] When the working party convened, one of the matters to be addressed was the need for agreement on the replacement of the site allowances paid to Quarantine Service employees with a non-standard hours of work allowance. In or about November 2007 it presented a proposal that all taxable allowances be replaced with a new set of allowances, including a non-standard hours allowance expressed as a quantified loading on the base pay (or salary) rate.

[13] The working party's terms of reference also said:

> "RATIFICATION
> All PSA members who are employed in MAFBNZ Role Specific positions will have access to the agreed joint recommendations report. …
> Only those PSA members who are employed in MAFBNZ Role Specific positions will have the ability to vote on the agreed joint recommendations.
> The recommendations of the Working Party will be subject to ratification by a majority of those eligible to vote as described above and by approval of SLT.
>
> VARIATION TO THE COLLECTIVE AGREEMENT
> Any changes required to the Collective Agreement as a result of ratification of the agreed joint recommendations will be subject to the appropriate variation provisions of the collective agreement."

[14] The working party recommendations were put to qualifying PSA members for a vote in what was described in some of the papers as an 'endorsement process,' although it fell under the heading 'ratification' in the terms of reference. I use the word 'endorsement' to avoid confusion between that process and the separate process of obtaining ratification of a variation to the cea.

[15] According to a report from the PSA to MAF on the outcome of the vote, dated 27 November 2007, each of the recommendations was endorsed by more than 60% of 'voting members'. Regarding the need for changes to the cea, it was said:

> "The proposed variation to the collective agreement will now be written up in a final version and will go through a ratification process for the 660 affected members."

[16] Accordingly the working party prepared a document entitled 'Proposed Changes to the MAF/PSA Collective Agreement', dated 14 December 2007. The document included new or amended clauses covering non-standard hours of work, and proposed the deletion of the site rate provisions set out at p 53 of the cea.

[17] The ratification process involved a postal ballot by the PSA of its MAF members. The ballot closed on Monday 3 March 2008 ("the first ballot"). In a message to MAF dated Friday 29 February 2008 the PSA attached a union newsletter dated 4 March 2008, to be sent to members if the changes were ratified. The newsletter recorded that 296 members had voted. The result was 187 in favour of the changes, and 109 against. This was a majority of 63.17% of 'voting members' in favour. The result was confirmed in a further message from the PSA dated 4 March.

[18] MAF moved to implement the changes. Certain issues not relevant to the present matter arose in the course of this process, but both parties were proceeding on the basis that ratification of the changes had occurred. However, neither party signed an agreement varying the cea.

[19] Members of the staff at the ITB were dissatisfied because they were adversely affected by the changes. A legal opinion regarding the ratification ballot was obtained. In a message dated 28 March 2008 the PSA advised members that, upon review, it had concluded the variation had not been ratified by members. The reasons it gave were:

(a) the variation clause in the cea required that 60% of all of the members directly affected by the changes vote in favour of them, rather than 60% of those directly affected and who voted;
(b) there was an error on the form of the ballot, in that members signed a declaration that they were 'covered' by the coverage clause in the cea, not that they were 'affected' by the proposed variation.

[20] The message also advised that there would be another ballot, and that:

> "We can only declare the variation ratified if at least 60% of members affected actively vote in favour, …"

[21] The PSA confirmed its position to MAF in a letter dated 2 April 2008, advising, too, that it could not sign the variation to the cea.

[22] MAF did not accept that the ratification was invalid.

[23] A second ballot of affected members was conducted, and closed on 2 May 2008 ("the second ballot"). Although 240 members voted in favour, the PSA took the view that 254 'yes' votes were needed to ratify the changes. This was because of its view that a majority of 60% of those affected was required for ratification, not 60% of those who voted. Since that number was not achieved, the variation was not ratified.

Application of Appendix 3 of the cea

[24] The scheme of Appendix 3 was to identify a 'holding pattern' which set out the salary scale to be in force from 1 July 2007 until it was superseded. Site rate agreements were unaffected while continuing attempts were made to resolve matters associated with them - in particular the attempts to replace them with the non-standard hours of work allowance.

[25] The next step was to establish the working party, which proceeded as I have set out.

[26] In terms of clause (b)(ii) of Appendix 3 possible outcomes of the working party process were either that a 'compatible and cost effective outcome' would be achieved, or there would be consultation about outcomes that would allow the implementation of the salary scale set out at the end of (b)(ii) on 'p 62'.

[27] A great deal of MAF's evidence, which I have not set out, described the detail of the working party process and seemed to seek to emphasise MAF's view that a 'compatible and cost effective outcome' was achieved. It is not necessary to refer further to this material because on the facts the working party reached an agreement on what it considered to be a compatible and cost effective outcome regarding non-standard hours of work allowances and the operation of allowances in accordance with the cea. That is, the latter were to be replaced with the former.

[28] There remains a question of how the outcome was to be given contractual effect. The terms of reference recognised that implementing agreement on a 'compatible and cost effective outcome' might require a change to the cea, although such requirement would depend on the outcome in question. Regarding the replacement of the site allowances with a non-standard hours of work allowance, the working party identified a change to the cea. That change was to delete the site rate provision, and insert provisions enabling regular non-standard hours of work.

Whether proposed change to cea ratified

[29] Section 51 of the Employment Relations Act 2000 addresses the ratification of collective agreements. It provides:

> "(1) A union must not sign a collective agreement or variation of it unless the agreement or variation has been ratified in accordance with the ratification procedure notified under subsection (2)
>
> (2) At the beginning of bargaining for a collective agreement or a variation of it, a union must notify the other intended party or parties to the collective agreement of the procedure for ratification by the employees to be bound by it that must be complied with before the union may sign the collective agreement or variation of it."

[30] Clause 1 of the cea provided for the variation of the agreement. It read:

> "MAF and the PSA may agree to vary the agreement during the term. Ratification of any variation to the Collective Agreement will be by majority vote of the members to this Agreement (sic) directly affected by the variation. The vote will be done by ballot. The majority will usually be 60% but this may be varied by agreement of all parties to the change in advance of the vote."

[31] There was no application before the Authority for any form of declaration or other remedy in respect of the ratification ballot, and the statements of problem and in reply did not mention the ballot at all. The issue has developed as the investigation progressed.

[32] Mr Pollak's primary submission in the first set of submissions was that there was an agreed ratification process for varying the cea, being clause 1, as well as a

further agreement in advance of the vote to vary the ratification process. He relied on general assertions that in other matters the parties had accepted the required majority in a ratification ballot was a 60% majority 'of those who vote'. More specifically he relied on the approach to the vote on the endorsement of the working party recommendations, and on the terms of a settlement reached between the parties in mediation in another matter involving the disputed interpretation of clause 1, dated 15 October 2008 and recorded under s 149 of the Employment Relations Act.

[33] The settlement was not expressed to be confidential. It reserved 'the ratification issues' for this employment relationship problem, and provided:

> "2. MAF and PSA agree the following future operation and application of that provision:
>
> > 'Ratification of any variation will require a 'majority vote of the members' that is the majority of members directly affected who actually participate in the vote. The majority will usually be 60% but this may be varied by agreement of all parties to the change, in advance of the vote.'"

[34] There was no direct evidence of an agreement in advance of the ratification ballot regarding the majority required to ratify the proposed variations. There was no evidence that the parties expressly addressed the matter. I do not accept that such agreement can be inferred from the working party terms of reference. Instead the matter appears to rest on what I accept was a mutual assumption and expectation, which the parties acted on until a legal opinion to different effect was obtained.

[35] Although I would not necessarily expect to be made aware of the detail of the opinion I did expect to see something of the reasoning reflected in the submissions of the PSA, particularly as it had taken a different view of the outcome of the first ballot when the numbers first became available. That did not occur as the submissions were very brief.

[36] When I sought further information about the matter Mr Cranney referred to the issue of whether the word 'majority' in clause 1 meant a majority of the directly affected employees, or a majority of directly affected employees who voted. He said this matter was addressed in the second ballot in that it was conducted on the express basis that the requisite majority would be 60% of the members directly affected,

rather than 60% of those directly affected who voted. Although the PSA declared it would take that approach to the ballot, I do not accept the submission that the correct interpretation of clause 1 thereby became irrelevant.

[37] Overall, having sought further information about the matter, I remain unpersuaded that the ratification process required a majority of 60% of those directly affected who voted, and that there was a failure to reach the required majority. The ratification was valid.

Applicable salary scale

[38] Mr Cranney submitted that, in the absence of a signed variation to it, the cea continued to apply unvaried and that the ITB Worksite agreement also continued in force. He submitted further that the working party process did not reach an outcome and there was an alternative available in that event, namely that the salary scale on p 62 was applicable from 1 July 2008.

[39] I find the salary scale at p 62 applies, but that is because I find that the working party reached a compatible and cost effective outcome, which was endorsed. In reaching this view I have gained some assistance from the principles and sentiments enunciated in **NZ Engineering Union Inc v Shell Todd Oil Services (NZ) Limited.**[1]

Does the site rate still apply?

[40] With reference to clause 10 of the ITB Worksite Agreement I find there was a new hours of work agreement. It was agreed to by the working party, in the endorsement of its recommendations, and in the valid vote on the ratification.

[41] Therefore the site rate does not apply.

Costs

[42] Costs are reserved.

---

[1] [1994] 2 ERNZ 536

[43] If either party seeks a determination from the Authority any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority