

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 171
5307606

BETWEEN

THE NEW ZEALAND
PUBLIC SERVICE
ASSOCIATION INC
Applicant

AND

CHIEF OF DEFENCE FORCE
IN RESPECT OF THE NEW
ZEALAND DEFENCE FORCE
Respondent

Member of Authority: P R Stapp

Representatives: Peter Cranney, Counsel, and Catherine McNamara,
Counsel, for the Applicant
Nigel Lucie-Smith, Counsel, for the Respondent

Investigation Meeting: 4 November 2010 at Wellington
and Chambers Meeting 30 May 2011

Submissions by: 7, 14 and 15 June 2011

Determination: 7 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The determination of this matter has been delayed for mediation since the first investigation meeting. When the prospect of a settlement did not emerge I held a Chambers meeting to arrange for final submissions. It was agreed that further written submissions would be provided and this was completed by 15 June 2011.

[2] This is a dispute over the interpretation, application and operation of salary bands in the parties' collective employment agreement.

The issue

[3] Is, the signed terms of settlement document, admissible as evidence in interpreting the subsequent collective agreement?

[4] Whether or not the collective employment agreement provides for persons with 100% competency to change from proficiency level 3 salary to proficiency level 4 salary.

The facts

[5] The PSA and the Chief of Defence Force are parties to the collective employment agreement (CEA) dated 7 September 2007. The New Zealand Defence Force is constituted under s.11 of the Defence Act 1990. It is not included in the First Schedule to the State Sector Act. The New Zealand Public Service Association Inc (the PSA) is registered under Part 4 of the Employment Relations Act 2000.

[6] On 31 July 2007 the PSA and the Defence Force entered into written terms of settlement for a collective agreement (document A/SOP). The written terms of settlement read as follows:

NZDF/PSA Bargaining/Terms of Settlement

1. *Term of 1 September 2007 to 31 August 2009.*
2. *Payments of a package of \$1.54 being distributed to the existing PSA members, providing for an average salary adjustment in 2007/08 of 5.1% for those in bands 5 to 14 and 5.25% for those in bands 15 to 20.*
3. *Amendment to the CEA removing the following allowances:*
 - (a) *Holiday Pay Adjustment (clause 2.6).*
 - (b) *First Aid Allowance (clause 5.18).*
4. *Changes to other allowances as follows:*
 - (a) *VDU provision (clause 6.4) – restriction to eye examination process only.*
 - (b) *Transport Assistance (clause 9.6) and Daily Travelling Time (clause 9.7.1) to remain grandparented.*
5. *Local Work Agreements to be developed for recipients of:*
 - (a) *Work in wet places, and*
 - (b) *Work in the rain (clause 5.2.1(a)).*

6. *Payment for all the allowances listed in clauses 324 to cease for all new PSA members with effect from 1 September 2007.*
7. *Overtime payments to be set at x 1.5 with temporary grandparenting for those who work regular overtime. Overtime to be reviewed on a function by function basis. This exercise to be completed by conclusion of project team exercise. Changes will be by mutual agreement of the parties.*
8. *Coverage clauses to be amended to exclude HRAS from coverage.*
9. **Realignment of the salary band and pay progression structure** as follows:
 - (a) *For bands 5 to 14 introduction of four merit steps into the structure at 1A, 2A, 3A and 4A, providing for performance determined adjustments of 4.75% for 1A and 2A, and 2.5% for 3A and 4A, with effect from 1 September 07.*
 - (b) *For bands 15 to 20 introduction of four merit steps into the structure at 1A, 2A, providing for performance determined adjustments of 3.75%, and at 3A and 4A for performance determined adjustments of 1.875%, with effect from 1 September 07.*
 - (c) *For bands 5 to 14 change in the current band structure from 85% to 115% to 85% to 110%, with effect from 1 Sept 07. Mid point or 100% competent level to remain at PL3.*
 - (d) *For bands 15 to 20 change in the current band structure from 90% to 110% to 85% to 107.5% from 1 Sept 07. Mid point or 100% competent level to remain at PL3.*
 - (e) *For bands 5 to 20, change in the current band structure to 85% to 105%, with effect from 1 Sept 08. Mid point or 100% competent level change from PL3 to PL4, also with effect from 1 Sept 08.*
10. *Progression within the salary band structure, including the interim steps to be determined by performance as measured by NZDF's new performance management system (PDP) and by the NZDF salary review process. Pay **progression clause to be removed** from the CEA and replaced with reference to NZDF salary review process (clause 2.2.5).*
11. *PL to PL translation for all members to the new salary structure, with effect from 1 Sept 07. Each member covered by the CEA to receive a minimum salary adjustment of \$500 gross on an annual basis.*
12. *Salary bands and rates to apply from 1 Sept 08 to be bargained by NZDF and the PSA.*

13. *NZDF to guarantee a salary adjustment of \$1,000 gross on an annual basis to all PSA members covered by the CEA in the 2008/09 year.*
14. *Establishment of NZDF project team(s) to review:*
 - (a) *The content of the CEA.*
 - (b) *The allowance section – section 5.*
 - (c) *The grandparenting provisions – section 9.*
15. *NZDF and PSA to agree by 1 Sept 07 the terms of reference for the project team. Target completion date for the project team is 1 March 2008 at which time agreed changes will be implemented by the standard variation process.*
16. *NZDF and PSA to explore changes to union facilities arrangements in keeping with the philosophy of Pf Q3, to be agreed by 1 Sept 2007.*
17. *This Terms of Settlement to apply to PSA members covered by the coverage clause of the CEA as at 1 Sept 2007. (Emphasis added)*

[7] Clauses 9-13 are relevant in the current problem in regard to a realignment of the relevant salary band and pay progression structure. The realignment applied differently to different pay bands – namely Bands 5-14 and Bands 15-20.

[8] For Bands 5-14 the first step of the realignment was to occur from 1 September 2007 and involved a change to the salary scale as follows:

- (a) Prior to 1 September 2007 the scale that applied extended from 85% of the mid point at the low end to 115% of the mid point at the high end.
- (b) After 1 September 2007 the scale was to extend from 85% of the mid point at the low end to 110% of the mid point at the high end.
- (c) Before 1 September 2008 the required proficiency level to be paid the mid point of 100% was proficiency level 3.

[9] The second step of the alignment for grades 5-14 was to occur from 1 September 2008 and involved a change to the salary scale that after 1 September 2008 a scale extending from 85% of the mid point at the low end to 105% of the mid point at the high end. This meant the midpoint 100% competency level moved to PL4.

[10] For the PSA this meant that persons with 100% competency would change from proficiency level 3 salary to proficiency level 4 salary. This is denied by the respondent.

[11] For the Bands 15-20, the first step of the realignment was to occur from 1 September 2007 and involved a change to the salary scale as follows:

- (a) Prior to 1 September 2007 the scale applied extending from 90% of the mid point at the low end to 110% of the mid point at the high end.
- (b) After 1 September 2007 the scale was to extend from 85% of the mid point at the low end to 107.5% of the mid point at the high end.
- (c) Before 1 September 2008 the required proficiency level to be paid the mid point was proficiency level 3.

[12] The second step of the realignment for steps 15-20 was to occur from 1 September 2008 and involved a change to the salary scales that after 1 September 2008 the scale extended from 85% of the mid point at the low end to 105% of the mid point at the high end. This mean the midpoint 100% competency level changed to PL4.

[13] The PSA says that persons with 100% competency would change from proficiency level 3 salary to proficiency level 4 salary. This is disputed by the NZDF.

[14] The abovementioned arrangements were included in the CEA (document B/SOP). It is the PSA's position that employees with a proficiency level 3 salary should have moved to a proficiency level 4 salary from 1 September 2008. It is the respondent's position that employees with proficiency level 3 salaries should remain on proficiency level 3 salaries from 1 September 2008.

[15] Finally the parties have different views on the reasons behind the \$1,000 payment included in the terms of settlement. The reasons were not provided in the terms of settlement and or the collective agreement. The reasons for the payment have been provided by the parties' advocates involved at the time in their evidence.

The provisions of the Collective Employment Agreement

[16] Clause 2.2.5 of the CEA is as follows:

The parties agree to bargain any further adjustments to the bands to apply from 1 September 2008, in accordance with agreed bargaining parameters. All members of the PSA covered by the CEA as at 1 September 2008 are to receive a minimum \$1,000 salary adjustment to apply from 1 September 2008.

[17] Clause 2.2.6 reads as follows:

The following percentage ranges apply to all bands:

PERCENTAGE OF MID POINT BY PROFICIENCY LEVEL										
<i>Effective Dates</i>	<i>Grades</i>	<i>PL1</i>	<i>PL1A</i>	<i>PL2</i>	<i>PL2A</i>	<i>PL3</i>	<i>PL3A</i>	<i>PL4</i>	<i>PL4A</i>	<i>PL5</i>
<i>1 September 07</i>	<i>5-14</i>	<i>85</i>	<i>88.75</i>	<i>92.5</i>	<i>96.25</i>	<i>100</i>	<i>102.5</i>	<i>105</i>	<i>107.5</i>	<i>110</i>
	<i>15-20</i>	<i>85</i>	<i>88.75</i>	<i>92.5</i>	<i>96.25</i>	<i>100</i>	<i>101.875</i>	<i>103.75</i>	<i>105.625</i>	<i>107.5</i>
<i>1 September 08</i>	<i>5-20</i>	<i>85</i>	<i>87.5</i>	<i>90</i>	<i>92.5</i>	<i>95</i>	<i>97.5</i>	<i>100</i>	<i>102.5</i>	<i>105</i>

[18] Clause 2.2.7 of the CEA reads as follows:

Progression within the salary band structure, including the interim steps to be determined by performances measured by NZDF's performance management system (PDP) and by the NZDF salary review process.

The applicant's submission

[19] The PSA has accepted that the terms of settlement document is not a collective employment agreement or simply an agreement.

[20] For the PSA the issue is whether the phrase “*from PL3 to PL4*” means a change from a PL3 salary to PL4 salary. This is to ensure that the 100% competency level is maintained. The PSA submits that it is the only rational interpretation of the words, and that the answer lies in the first eleven words of clause 9 of the terms of settlement. It says that the subject matter of the clause is “*realignment of the salary band and pay progression structure...*”. This is supported by a clause that was about salaries and pay progression containing two distinct and separate translation methodologies. It says this is in stark contrast to the situation after 1 September 2008 where the translation was from PL3 to PL4 (for the 100% competent employee) and that this change was reflected in the employer's performance system.

[21] It claims that clause 2.11.1 of the agreement requires the employer to pay the correct salary under the Proficiency Levels (PL) system.

[22] Clause 2.11.1 reads as follows:

(Pay review)

An employee's manager will review the employee's salary at least annually, usually on the anniversary of appointment to the employee's current position. NZDF will use the PDP tool identified in DFO2/2007 and the improved NZDF salary review process to enable a quantitative and qualitative performance review to ensure the employee's salary reflects the value of the employee's contribution, performance, and the requirements of the position. There should be no expectation of a salary increase following any such review.

[23] The PSA relies on the terms of settlement and performance assessment documents being admissible as evidence in interpreting the CEA. It relies on the terms of settlement being an antecedent agreement in that this was the early agreement that both parties are aware of, and it is a crucial element and probably the most important element of the factual matrix. It was a signed record specifically accepted by both parties as to recording their intention.

[24] This distinguishes the *NZALPA v. Air New Zealand* [2008] ERNZ 8 case referred to by the respondent. In this case there was no reliance on disputed evidence of what was said orally in negotiations, as the terms of the settlement between the PSA and the Defence Force was an agreed signed terms of settlement in writing.

[25] The PSA says that the terms of settlement document is relevant to the interpretation of the agreement in that there is some ambiguity in the CEA and the terms of settlement resolves it.

[26] In addition, Mr Basil Prestidge Assistant National Secretary says:

- a. That the realignment applied differently to support a movement of the midpoint to PL4.
- b. That the \$1,000 increase applied as a salary adjustment and what would have applied to individual employment agreements.

[27] Where clause 2.2.7 of the collective agreement talks about progression "*within*" the salary band structure, it does not deal with the issue of translation.

[28] Clause 2.2.6 is ambiguous and capable of two meanings. There is the meaning argued for by the respondent that a 100% performer is downgraded to the 95% salary level. On the other hand, there is the 100% performer receiving a 100%

salary level. The PSA argues that the latter is consistent with the terms of settlement and the respondent's pre-1 September 2008 and post-1 September 2008 performance measuring system.

[29] It further argues that the latter interpretation is also the only interpretation consistent with clause 2.2.5. That is where that clause expressly contemplates (by the use of the word "*minimum*") that the cost of the settlement will be greater than the \$900,000 referred to at paragraph 36 of the respondent's submission, and that on the respondent's interpretation the \$1,000 payment becomes for many the maximum and not the minimum.

[30] The PSA further argues that its interpretation is consistent with clause 2.2.7 where progression is to occur as "*determined by the NZDF's performance management system*". Under that system every employee when reviewed is currently correctly labelled and can be advanced from that correct label to a higher level pursuant to objective criteria. The respondent's interpretation of the CEA was wrong because it is inconsistent with the whole performance system and pay system.

The Respondent's submissions

[31] The respondent's submissions argue against the Authority using the terms of settlement to constitute a collective agreement. To use it, it argues, would use parol evidence to contradict the terms of a written agreement and that no evidence was put before the Authority that prior to signing the terms of settlement by the applicant, the respondent and the mediator, the terms of settlement were first ratified by the PSA. There was no ratification prior to the signature so as to make it a collective agreement. It relies only on the CEA applying.

[32] Furthermore, the NZDF's position is that parol evidence is not admissible because:

- (a) The decision in *NZALPA v. Air New Zealand* that excludes parol evidence in the form of:
 - (i) Terms of settlement;
 - (ii) Mr Prestridge's (PSA organiser) evidence; and

(iii) The two performance assessment documents which are not part of the CEA.

(b) It contradicts express provisions in the CEA.

[33] Furthermore, the NZDF contended that for the Authority to reach the outcome contended for by the PSA it would be necessary for the Authority to amend express terms in the CEA, which it is precluded from doing under s.163 of the Employment Relations Act.

[34] Furthermore it was submitted by NZDF that the documents now being relied upon by the PSA do not form part of the collective agreement. As such the documents expressly contradict what the collective agreement says.

[35] Furthermore, the NZDF says that what changed was that instead of proficiency level 3 being 100% of the median after 1 September 2008, this dropped to 95% in accordance with clause 2.2.6 of the CEA.

[36] In order to avoid the consequence of an employee graded at proficiency level 3 suffering a pay reduction, all employees covered by the CEA as at 1 September 2008 received a one-off \$1,000 increase in pay as provided for in clause 2.2.5 of the CEA.

[37] Consequently an employee on proficiency level 3 whose salary would have reduced instead had a salary increase, assuming there was no increase in salary bands following the pay bargaining as envisaged by clause 2.2.5 of the CEA.

[38] The NZDF says that as provided for in clause 2.2.7 progression within the salary Bands structure was to be determined under the new performance management system (PDP) and the salary review process instead of the pay progression system that employees covered by the CEA previously had their pay reviewed under.

Outcome

[39] For the following reasons I agree with the arguments made by the NZDF because:

[40] The additional documents produced are not part of the collective agreement.

[41] The collective agreement says at 2.27 that:

“Progression within the salary band structure, including interim steps to be determined by performance as measured by the NZDF’s performance management system (PDP) and by the NZDF salary review process”.

[42] The collective agreement provides for those on PL3 on 31 August 2008 to remain on PL3 on 1 September 2008.

[43] This position is supported by the pay bands supplied to the PSA prior to 1 September 2008 (the subject of correspondence between NZDF and PSA).

[44] The PSA’s position in regard to the \$1,000 conflicts with the evidence supplied by NZDF and defeats the purpose of clause 2. 2. 5 which was to guarantee employees a minimum increase, but fails to say why it applied. For this information I have had to rely on what the NZDF says and it seems likely it was for consideration for agreeing to the new salary bands because of the change and the likelihood that there would be some reductions in pay in translation. Indeed clause 2.2.5 makes provision for further bargaining for further adjustments to the bands to apply from 1 September 2008. This is supported by the percentage ranges in clause 2. 2. 6 where employees at PL2, PL3, PL4 and PL5 would suffer a reduction in pay at 1 September 2008. This was the transition from the old midpoints to the new midpoints.

[45] Further the PSA’s use of the word “minimum” has to be construed with clause 2.2.5 where the parties agreed to bargain for further adjustments. Thus, the word is not about interpreting the \$1,000 payment becoming a maximum and not being a minimum, I hold.

[46] The PSA’s position does not explain what happens in regard to the impact on other bands where there has been no suggestion of any movement and change (eg PL1a, PL2, PL2a or PL3a, PL4 or PL4a). The position has added the consequential changes in regard to its claim in a submission dated 15 June 2011 from the PSA. The impact on other bands would not have been envisaged without some detail and express provisions, I hold. The absence of such the NZDF position is more persuasive, I hold.

[47] There are no words expressing that PSA members will move from PL3 to PL4 to realign with the 100% midpoint at PL4. The PSA relies on drawing inferences from extraneous documents, which I hold is not thorough and or conclusive enough to imply a meaning given what the consequences may be. I accept that the \$1,000 was

intended to ensure that no one took a reduction in salary as the bands were compressed and the 100% midpoint realigned, and that there is provision for further bargaining.

[48] In addition I hold that:

- a. The words “*Realignment of the salary band and pay progression structure*” are descriptive of the system and in context do not mean there is an automatic progression since there are no words expressing that PSA members will move from PL3 to PL4 to realign with the 100% midpoint at PL4 in the clause.
- b. The collective agreement provided for progression within the salary Bands structure to be determined under the new performance management system (PDP) and the salary review process instead of the pay progression system that employees covered by the CEA previously had their pay reviewed under.

[49] I hold that the translation is PL3 to PL3. The PSA’s claim is dismissed.

[50] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority