

to incentivise employees to upskill across all areas and provide more staff to cover shift work.¹

[2] Six acidulation employees had salaries in excess of their assessed skill level and applicable pay rate under the 2009 agreement. There was an express term in the 2009 agreement the acidulation employees received their current salary and a 2.5% salary increase only.² This is because they accepted a reduction in hours. All other employees received a 3% salary increase with no reduction in hours.³ The term of the 2009 agreement ended on 12 June 2011 or until a further collective agreement was made.

[3] During negotiations for the 2011 - 2013 collective agreement Ballance sent an email dated 9 August 2011 stating:⁴

New company proposal (from ratification)
Two year term
First year 3% increase (plus bonus payment)
Second year CPI plus 1%

[4] Between 9 August and 30 September 2011 the parties met and continued negotiating the terms of the 2011 agreement. Further changes are set out in the diary notes of MUNZ representative, Russell Mayn, and tracked changes in the 2011 agreement.⁵ Changes included deletion of the express term the acidulation employees received their current salary plus 2.5%.

[5] On or about 30 September 2011 MUNZ and Ballance concluded negotiations for a renewed collective employment agreement (2011 agreement). The 2011 agreement increased the printed pay rates by 3% with a proviso from 11 June 2012 for a further increase by the consumer price index plus 1%.⁶

[6] All employees, except the six acidulation employees, received the wage increase. The six acidulation employees continued to receive their current salary of \$61,073.33 because it exceeded the skill level 2 applicable pay rate of \$57,797.93.

¹ Agreed Statement of Facts paragraphs 1 to 9.

² Collective Agreement Mount Manganui 2009 - 2011 at p 20 bullet point 3

³ Collective Agreement Mount Manganui 2009 - 2011 at p 20 bullet points 1 - 3

⁴ BOE A Tsitsiras Attachment C

⁵ Statement in Reply Attachment

⁶ Collective Agreement Mount Manganui 2011 - 2013 at p 20

[7] MUNZ alleges the offer in the 9 August email was a 3% salary increase for all employees which was later accepted and ratified by its members. It claims any later changes in the 2011 agreement were insignificant and did not affect the offer which was ratified by its members.

[8] MUNZ originally applied for a compliance order with the 2011 agreement for all employee salaries to be increased by 3%, including the six acidulation employees. There were problems with this application. First, there must be a proven past breach of the 2011 agreement before compliance orders could issue.⁷ There was no proven past breach at the time of application. Second, ordering compliance by increasing the salaries of the six acidulation employees would have the effect of cancelling or varying the collective agreement. The Authority cannot make an order cancelling or varying a collective agreement.⁸

[9] Following the investigation meeting in Tauranga on 18 October 2012, MUNZ was given a further opportunity to file submissions clarifying the applications and orders sought.

[10] Submissions filed by MUNZ on 30 October 2012 contained an application under s129 to resolve a dispute about the 2011 agreement. The dispute was whether at the time of ratification there was an agreement to increase the salaries of all employees (including the six acidulation employees) by 3% or whether the increase was only to the printed salaries. If the increase is to the printed salaries, the six acidulation employees would not receive any salary increase. MUNZ argues the interpretation is possible because there was an additional term outside the 2011 agreement that the six acidulation employees salaries would increase by 3%.

[11] Ballance disagrees. It denies there was an agreement to increase the pay rate of the six acidulation employees who were already being paid above their skill level.

Issues

[12] The issues for determination are:

- (a) Is there jurisdiction to determine a dispute between the parties regarding the 2011 agreement?

⁷ Section 137(1)(a) and *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 at [58].

⁸ Section 163.

- (b) If yes, can the 2011 agreement be interpreted to include an additional term salaries for the six acidulation employees be increased in accordance with the offer of 3%?

Is there jurisdiction to determine a dispute between the parties regarding the 2011 agreement?

[13] Both parties agree there is a dispute about whether the 2011 agreement required payment of a 3% salary increase to the six acidulation employees.

[14] Although there is no evidence of notice to affected parties, this is a MUNZ obligation.⁹ Failure to notify may provide affected parties rights to reopen an investigation and expose MUNZ to costs.

[15] Given the agreed existence of a dispute, the Authority determines it has jurisdiction to consider this application.

Can the 2011 agreement be interpreted to include an additional term salaries for the six acidulation employees be increased in accordance with the offer of 3%?

[16] An additional term must be “mutually agreed to by the employee and the employer” and not “inconsistent with the terms and conditions in the collective agreement.”¹⁰ Ratification by one party of what it believes to be the offer is not definitive of the existence of an additional term.

[17] There is no evidence of mutual agreement to the additional term. This is because:

- it is the subject of the current dispute
- the 9 August 2011 email is equivocal and not determinative of the agreement between the parties
- negotiations were ongoing and further changes to the 2011 agreement were being made post 9 August

⁹ Section 129(2)

¹⁰ Section 61(1)(a) and (b).

- there was no discussion about the six acidulation employees receiving the 3% salary increase under the 2011 agreement¹¹
- the removal of a previous express term providing acidulation employees with a 2.5 % salary rise without replacement indicates a lack of agreement to the additional term

[18] The additional term is inconsistent with the collective agreement. The relevant principles in determining inconsistency are:¹²

- The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.
- The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.
- If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.
- Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.

[19] Objectively viewed, the 2011 agreement and the additional term cannot live together as terms of the employment agreement. This is because:

- the 2011 agreement expressly provides for an increase to the printed rates only¹³
- the additional term would provide the six acidulation employees with a 3 % salary rise in excess of the printed rates
- an additional term for the six acidulation employees to receive the salary rise irrespective is inconsistent with the basis for the printed rates namely incentivising employees to upskill without financial disadvantage

¹¹ BOE A Tsitsiras paragraphs 23 to 24 and BOE RL Mayn dated 1 October 2012 at paragraph 7.
¹² *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd* [2006] ERNZ 749 (EmpC) at [30] applied the principles in *New Zealand Meat Processors etc IUOW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143, (1990) ERNZ Sel Cas 834 (CA).

¹³ Collective Agreement Mount Manganui 2011 - 2013 at p 20

[20] Given there are true inconsistencies between the additional term and 2011 agreement, the 2011 agreement must prevail.

[21] The Authority determines the 2011 agreement cannot be interpreted to include an additional term salaries for the six acidulation employees be increased in accordance with the offer of 3%.

Costs

[22] Costs are reserved. Submissions are to be filed by 3 pm 18 January 2013.

T G Tetitaha
Member of the Employment Relations Authority