

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 47
5372188

BETWEEN

NATHAN PETER FRAHM
Applicant

A N D

NEW ZEALAND DAIRY
WORKERS UNION
TE RUNANGA WAI U INC
Respondent

Member of Authority: M B Loftus

Representatives: Peter Dalziel, Counsel for Applicant
Helen White, Counsel for Respondent

Investigation Meeting: 17 January 2013 at Timaru

Submissions Received: At the investigation

Date of Determination: 4 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Nathan Frahm, contends the respondent, the New Zealand Dairy Workers Union Te Runanga Wai U Incorporated (DWU), is in breach of the duty of good faith it owes him as a member.

[2] In particular he claims DWU officials made statements that either mislead, or were likely to mislead, members voting on the terms of a prospective collective agreement during ratification meetings. He says it was deliberate.

[3] DWU denies the claims.

Background

[4] The Union was party to a collective agreement with Fonterra covering members at various sites. It had a stated expiry of 30 September 2011. The Union negotiated for a replacement and the process resulted in a potential agreement.

[5] Members were notified of the terms thereof via a four page document entitled *Terms of Settlement Summary*. It was dated 29 September 2011 and placed on various notice boards around the country. The proposed collective had a term of 1 October 2011 to 31 August 2013. There were 32 proposed changes, though this claim concerns only one – the wage increase.

[6] Paragraph 3 of the terms of settlement summary is in bold and encased within a box. It reads:

First year – (11 months) - the wage increase and Unimed upgrade make a package of settlement of 5.01% (annualised).

Second year – CPI (consumer price index) for 12 months.

[7] In paragraph 5 it advises the increase in wages and allowances is:

4.15% for the first 11 months. (4.53% annualised). ...

[8] Paragraph 6 reads:

Part of the overall package of settlement is a Unimed upgrade. Fonterra subsidy for Unimed is now \$23.64 per fortnight. Over half of members have currently upgraded to this plan and for those members the subsidy is increased. For members not already on this plan (Dairy Industry Medical Plan) there is an increase in cover by the company. For those members paying for partners and family, the upgrade will mean an increase in costs to cover family to the upgrade. The extent of cover provided for those requiring surgery is greatly enhanced.

[9] Some members expressed displeasure at having to read a four page document and sought a summary. It was drafted the following day. It states the main points of the proposed settlement are:

*Two year deal * 1st year 4.15% for 11 months + Unimed upgrade = **package of 5.01%**.*

- *2nd year CPI (year ending June 2012) 1 September 2012 until 31 August 2013. Because the 1st year only runs for 11 months, the 4.15% equates to 4.53%, which along with the Unimed upgrade value being .48% the package for the 1st year is 5.01%.*

...

Please ensure that you attend the ratification meetings planned for your site as there is a lot to discuss and read as much of the available material as possible – particularly the document headed 2011 Fonterra CEA – Terms of Settlement Summary.

[10] The summary was provided to members at ratification meetings as was a comprehensive 34 page document entitled *Terms of Settlement of the Fonterra Dairy Workers Collective Agreement 2011-2013*. That document is not a complete collective employment agreement but a detailed description of all changes.

[11] Mr Frahm takes issue with the quantification of the wage settlement. He says it is the total of the annualised increase and an assigned value of 0.48% representing a benefit attributable to an increase in the Unimed payment. Unimed is a subsidised insurance scheme. DWU accepts this is an accurate description of the calculation.

[12] Mr Frahm says the figure is false and misled members into accepting the proposed settlement. He goes further and expresses a belief the value of the settlement was deliberately inflated in an attempt to influence the votes' outcome and resulted in an improperly obtained ratification.

[13] He says an annualised increase of 4.53% is (a) mathematically false, and (b) overstates the amount to be received by members. He claims the dollar amount of the Unimed increase could not possibly represent a 0.48% increase for even the most lowly paid member.

[14] Presentations to ratification meetings were conducted in accordance with speaker notes prepared by Union officials. The notes do not cover annualisation of the wage increase but, with respect to the Unimed increase, read:

This is part of the package which makes the headline wage increase look less but includes an important improvement in the social wage. We have an ageing workforce and to upgrade to a plan which covers almost all surgery procedures is a great benefit to our members. Fonterra costed Unimed at an increase of 0.48% of them. It is not worth 0.48% of every member's salary.

[15] With respect to the annualisation the Union claims, through the evidence of its site delegate at Clandeboye (Mr Frahm's workplace), that:

I remember the meeting Nathan Frahm attended. He asked about the annualisation logic. James explained, as he had done at every meeting, that the actual amount on top of the wage was 4.15 but then explained why he thought it was worth more because the increase was for 11 months not 12 and it was then subject to CPI. Nathan Frahm did not challenge the logic at that meeting but certainly had the opportunity to do so.

[16] Mr Frahm denies he raised the issue of annualisation or that it was discussed.

[17] On 17 October, and having been advised of a successful ratification vote, Mr Frahm wrote to the Union's returning officer. His email reads:

Hi Ian

Re: Dairy Workers Union Collective Agreement Ratification Ballot

I hereby formally request that you cancel the recent ratification ballot and secondary ballot for our site. I cite misleading or false information used to influence the vote by a Union leadership as my justification. This information is attached – namely the assertion of a 4.53% benefit to members if there is a yes vote. It is quite clear that the company has offered and will only pay 4.15% ratified.

[18] A significant volume of correspondence then passed between Mr Frahm and various Union officials, some of which was acrimonious. It did not see resolution of the dispute leading to today's investigation meeting.

Determination

[19] As already said, the wage increase as reported to members comprised two elements. They were a pay increase and an amount reflecting an increased Unimed benefit. Mr Frahm claims both were inaccurately portrayed in an attempt to procure ratification by deliberately misleading the union's membership.

[20] There can be no doubt his claim is correct in respect to annualisation of the wage increase. Without going into what was complex and detailed evidence, it can now be said DWU accepts an increase can not be annualised when the term is less than a year. The resulting portrayal is inflated. This acceptance was enunciated by both its expert witness and union officials who subsequently gave evidence.

[21] Turning to the manner in which the Unimed increase was portrayed. Mr Frahm argues it must have been inflated as no single member could possibly attain the stated increase.

[22] I disagree that this element of the settlement was inaccurately portrayed and do so for two reasons. First Mr Frahm's computations are based on the net benefit received by the employee, yet the real benefit is greater as any payment under this head is subject to Fringe Benefit Tax. Perhaps more important is that the evidence makes it clear the presentation notes were spoken to during the meetings and union members were advised *Fonterra costed Unimed at an increase of 0.48% of them. It is not worth 0.48% of every member's salary.* This is an accurate statement which reflects what the number represents and the fact the benefit to individual members will vary. There is, I conclude, nothing misleading the way Unimed was portrayed.

[23] That said, and given the increase was portrayed as a total and DWU now accepts the wage portion is inaccurately portrayed means the total portrayal is inaccurate as Mr Frahm claims.

[24] That means I must address whether or not the statement were a breach of the duty of good faith and deliberately designed to mislead and deceive as claimed by Mr Frahm.

[25] I conclude the answer is no. I reach this conclusion for the following reasons.

[26] First, and if it was as a deliberate attempt to mislead, it was a poor one. The final increase as portrayed fell short of that which the union had originally promised its membership and nothing could have been gained by manipulating a result which could be considered a failure by some of the members who were being asked to vote on its acceptance.

[27] Second, the actual increase to paid rates (4.15%) was also reported. There was no attempt to hide it.

[28] Third, there is the undisturbed evidence from both this union and a witness from NZCTU that the practice adopted by DWU was one commonly used by a number of unions over a number of years in an attempt to provide a comparison between settlements by annualising their effect. I also conclude the evidence shows that when DWU made this representation it understood the portrayal to be accurate and s.4(3) of the Employment Relations Act 2000 would preclude a finding of bad faith. Far from attempting to mislead DWU, simply applied past practice (*AMI Insurance v Finsec (No 2)* [2003] 1 ERNZ 518).

[29] Fourth there is the nature of the evidence required to determine this matter. It was complex and required the use of expert evidence from academics. Indeed one of those gave evidence his analysts originally applied the same approach as DWU before they realised it produced an inaccurate result. In my view, the point academics could be fooled enhances the argument DWU was enunciating what it considered to be an accurate portrayal. This is not the stuff of a deliberate conspiracy to mislead.

[30] Finally I note that there are issues about the validity of this ratification given it was obtained using a *terms of settlement* document as opposed to a full collective agreement and the Court's comments in *Waikato District Health Board v New Zealand Public Service Association* [2008] ERNZ 80 (EmpC). Mr Frahm made it clear however he did not want me to consider such a technicality – he wanted a finding the Union acted in bad faith and asked that remedies be granted on that basis. I have not made such a finding and need not, therefore, consider the issue of remedies.

Costs

[31] Costs are reserved though I note for the parties benefit a preliminary view costs should lie where they fall given the nature of the claim and what I consider a mixed outcome (the DWU did mislead in its portrayal of the settlement yet did not do so deliberately or in bad faith)

MB Loftus
Member of the Employment Relations Authority