

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 41  
5381448

BETWEEN SERVICE FOOD WORKERS'  
UNION NGA RINGA TOTA  
INCORPORATED  
First Applicant

A N D THE PUBLIC SERVICE  
ASSOCIATION TE  
PUKENGĀ HERE TIKANGA  
MAHI INCORPORATED  
Second Applicant

A N D PACT GROUP  
Respondent

Member of Authority: Christine Hickey

Representatives: Timothy Oldfield and Catherine McNamara, Counsel for  
Applicants  
Barry Dorking, Counsel for Respondent

Investigation meeting: 4 October 2012 at Dunedin

Submissions Received 4 October 2012

Date of Determination: 28 February 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Pact Group breached clause 39 of the collective employment agreement and must pay a penalty of \$5,000 by paying \$1250.00 to the first applicant, \$1250.00 to the second applicant and \$2500.00 to the Authority.**
- B. Pact Group conferred a prohibited preference on its non-union member staff in breach of section 9 of the Employment Relations Act 2000. The parties are ordered to attend mediation in order to**

**attempt to resolve what would otherwise be an undesirable outcome under section 10 for the non-union member staff.**

**C. Pact Group breached its duty of good faith under section 4(1)(b) of the Act by indirectly misleading the applicants during bargaining and must pay a penalty of \$5000.00 by paying \$1250.00 to the first applicant, \$1250.00 to the second applicant and \$2500.00 to the Authority.**

**D. Pact Group did not breach its duty of good faith under s.4(6) of the Act.**

### **Employment relationship problem**

[1] Pact is a registered charitable trust. A majority of Pact's workers are support workers caring for people with mental health problems living in the community. The applicants are the unions that represent the majority of Pact's employees.

[2] The parties have had multi-union collective agreements over a number of years. In early 2011 the applicants initiated bargaining to renew the collective agreement. The agreement was due to expire on 30 April 2011. Negotiations began on 11 April 2011. The applicants' claims included a wage increase of 6%.

[3] At the bargaining meetings on 11 and 12 April and 10 May 2011 Pact told the union negotiators that the funding it had received in the last financial year was on average 1% higher than the funding that it had received the previous year; for that reason Pact's offer of a wage increase was 1%.

[4] The next bargaining meeting was on 31 August 2011. At that meeting, Paul Chamberlain, Pact's Director of Corporate Services, presented a paper outlining why Pact believed it could not pay more than 1%. It included the following statements:

*... We receive a fixed amount of money from government contracts ...*

*Over the last 12 months the government gave us an average increase amounting to approx 1% overall, or in dollar terms roughly \$220,000.*

[5] After bargaining on 31 August 2011 union members elected to take industrial action. The union issued strike notices for October 2011.

[6] The industrial action went ahead and Pact locked out some workers. There had not been industrial action in any previous bargaining round. The parties went to mediation on 4 November 2011. At that date Pact was still offering a 1% increase. The unions had reduced their request for an increase to 4.5%.

[7] The mediator conducted shuttle mediation. The Pact representatives were Mr Chamberlain, who has ultimate responsibility for management of human resources, and Donald Shand who is the Director of Operations and a member of the executive management team. It is common ground that Pact's:

*... position vis-à-vis pay increases for staff who are part of the collective agreement process remained the same as it had been throughout bargaining; that affordability of (CEA) wage rates movements is linked to the funding increases via our contracts with government.*

[8] The mediator suggested that Pact offer a 2% increase in wages from that day, 4 November 2011.

[9] Pact and the unions agreed to a 2% increase from 4 November 2011. The CEA for the period 1 May 2011 to 30 April 2012 was signed on 9 December 2011 in a Terms of Settlement document. The clause relating to wages reads:

*Wages: Paid and printed rates shall be increased by two per cent. Such that:*

*The rates in the collective agreement are increased two per cent and the percent increase is passed on. Above agreement rates are therefore increased two per cent.*

*Wage increases to apply from 4 November [2011].*

*Overall wages costs to be increased approximately one per cent over full term of the agreement, and maintained within budgetary increase passed on by the government.*

[10] On 6 January 2012 Pact wrote to its non-union member employees and made an offer of a 2% wage increase back-dated to *the first full pay week in July 2011*.

[11] Pact's individual employment agreements contain provision for an annual performance and wage review. The applicants say that Pact is not entitled to also grant non-union member employees an annual wage increase not linked to their performance.

[12] The applicants allege that in granting its non-union member employees a longer period of back-pay Pact breached clauses 39.1 and 39.2 of the collective employment agreement by automatically passing on to non-union member employees a pay increase that had been agreed in collective bargaining.

[13] The applicants also allege that Pact bestowed a preference on the non-union member employees in breach of s.9 of the Employment Relations Act 2000 by backdating the pay increase for non-union members to an earlier date than the pay increase agreed in the collective agreement.

[14] The applicants further allege that during bargaining Pact breached its duty of good faith under s.4(1)(b) of the Act. The applicants consider that when Pact said it could not afford to pay more than 1% increase it dealt with the applicants in a manner that was misleading or deceptive or likely to mislead or deceive the applicants during the process of bargaining for the collective agreement. The applicants say that is proven by Pact's willingness to offer non-union employees a pay increase that was effectively for more than 1% over a 12-month period.

[15] The applicants say that Pact breached its duty of good faith under s.4(6) by undermining the process of collective bargaining by telling some union members they would get a greater pay increase if they were not union members.

[16] The applicants also allege that Pact breached its duty of good faith under s.4(6) as its grant of a pay increase back-dated for a longer period to non-union member employees was intended to induce them not to be involved with bargaining for a collective agreement.

[17] Pact defends all the allegations and says that it acted in good faith and if there is any finding that it did not it is not a suitable case for penalties to be imposed.

[18] By way of remedies:

- a. The applicants seek a penalty under s.134 of the Act for a breach of clause 39;
- b. If any breach of any of the provisions of s.4 is proved, the applicants seek payment of a penalty or penalties under s.4A of the Act;

- c. If the Authority makes a declaration that Pact has conferred an unlawful preference, the applicants seek a direction that the parties go to mediation to try and work out a suitable resolution.

## Issues

[19] The issues I need to resolve are:

- a. Whether Pact was entitled to grant non-union member employees an annual wage increase not linked to their performance;
- b. Whether Pact breached clause 39 of the of the collective agreement by automatically passing on to non-union employees a pay increase negotiated by the union and/or by not negotiating with individuals through a genuine process entirely separate and independent of collective bargaining:
- (i) What was the term or condition passed on?
- (ii) Whether Pact automatically passed on the union negotiated 2% increase to non-union employees;
- (iii) Whether Pact did so by way of a genuine bargaining process that was independent of and entirely separate from the collective bargaining;
- c. If Pact breached clause 39 whether a penalty should be imposed under s.134 of the Act and if so, how much;
- d. Whether Pact bestowed a preference on non-union employees in breach of s.9 of the Act:
- (i) Was there a preference conferred on non-union member employees;
- (ii) Was the preference conferred because those employees were not members of a union;
- e. If so, what is the appropriate way to resolve a prohibited preference;

- f. Whether Pact breached its duty of good faith under s.4(1)(b) of the Act by dealing with the applicants in a manner that was misleading or deceptive or likely to mislead or deceive while bargaining for a new collective agreement;
- g. Whether Pact breached its duty of good faith under s.4(6) by telling some union members they would get a greater pay increase if they were not union members;
- h. Whether Pact breached its duty of good faith under s.4(6) of the Act by inducing employees not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement;
- i. If Pact breached its duty to act in good faith whether a penalty or penalties should be imposed under s.4A. If so, how much and to whom?

*Was Pact entitled to grant an annual wage increase for non-union member employees which was not linked to their performance?*

[20] The applicants say that employees on individual employment agreements were not entitled to annual pay increases that were not linked to their performance because the individual employment agreements only include a reference to performance pay appraisals and potential consequential pay rises. Therefore, Pact is not entitled to offer an annual wage increase to the non-union member employees at all without going through a performance appraisal with each staff member.

[21] The respondent considers that it is entitled to give its non-union member employees annual pay increases over and above any performance pay increases they may also receive. I agree. Pact is not contractually bound to pay its staff on individual employment agreements any annual pay rise not linked to their performance. However, Pact is entitled to do so and the fact that it does so should be of no consequence to the applicants so long as it is not done in contravention of any provisions of the Act or of the collective agreement.

*Did Pact breach clause 39 of the collective agreement?*

[22] The respondent contends that the bargaining process for individual agreements was a genuine process and that the pay increase was not automatically passed on.

[23] The applicants say that the impetus for the timing of the pay increase offer to the non-union member employees was the settlement of the collective agreement. That was ratified in December 2011 and the offer was made in January 2012. Usually the individual bargaining occurred earlier because the collective bargaining concluded earlier. They say that in previous years they were prepared to accept that Pact had not directly breached clause 39 because although non-union member employees received the same percentage wage increase they did not receive the increase until about 3-4 months after the employees covered by the collective agreement.

[24] In previous years once the collective agreement bargaining had finished Pact made offers to non-union member employees of the same percentage wage increase as it had agreed to for union employees.

[25] Mr Chamberlain says that past wage increases to non-union member employees have been back-dated to July after the conclusion of the collective bargaining. He says that past practice, ease of administration in having only one date, and staff expectation of an annual increase in July, are the reasons that Pact chose to backdate the 2011/2012 pay increase offer to July 2011.

[26] Judge Couch recently stated in the Employment Court case of *Service and Food Workers Union Nga Ringa Tota & Kathleen Page v Sealord Group Limited*<sup>1</sup> that:

*The principles of construction applicable to collective agreements are relatively well settled and are based on those applicable to contracts.*<sup>2</sup>

[27] Judge Couch also said that *the essential starting point*<sup>3</sup> was as stated in the case of *Vector Gas Ltd f Bay of Plenty Energy Ltd*<sup>4</sup> :

*[199] The general principle is that words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.*

[28] The collective agreement for the period 1 May 2011 to 30 April 2012 includes clause 39 which is headed *No freeloading clause*:

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<sup>1</sup> [2012] NZ EmpC 211

<sup>2</sup> As above at para.[12]

<sup>3</sup> At para.[16]

<sup>4</sup> [2010] 2 NZLR 444

- 39.1 *The employer agrees they will not automatically pass on the same terms and conditions of this Collective Employment Agreement to non-union employees who were employed at the time of ratification.*
- 39.2 *The Parties accept that bargaining for individual employment agreements should be treated as a genuine process entirely separate and independent of collective bargaining.*
- 39.3 *The complete form of this CEA shall not be used for any purpose other than a Collective Employment Agreement between the Service and Food Workers Union Nga Ringa Tota, and the Public Service Association and the Pact.<sup>5</sup>*

[29] There is no suggestion that Pact has breached sub-clause 39.3. The plain words of 39.1 and 39.2 must be read in conjunction to ascertain their meaning. Sub-clauses 39.1 and 39.2 give rise to three questions:

- What is the term or condition that is alleged to have been passed on?
- Did Pact automatically pass on the union negotiated 2% pay rise to non-union employees?
- Did Pact do so by way of a genuine bargaining process that was independent of and entirely separate from the collective bargaining?

### **What is the term or condition allegedly passed on?**

[30] There is no dispute that the offer to non-union member employees was for a 2% pay rise, which was backdated. The quantum of a wage increase was the sole term of the collective agreement that had made the collective bargaining so protracted. Pact did not instigate the 2% wage increase. The wage increase was only agreed to during the collective bargaining and became a term of the new collective agreement. I am in no doubt Pact would have offered its non-union member employees whatever increase was negotiated and agreed to during the collective bargaining.

[31] The term of the collective agreement allegedly passed on in contravention of clause 39 is the 2% wage increase.

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<sup>5</sup> Clause 39 has been in the collective agreements in the same form since at least 2009 and was not the subject of bargaining in the 2011 round of bargaining.

**Did Pact *automatically pass on the 2% wage increase to its non-unionised staff?***

**Did Pact bargain *genuinely with its non-union member employees in a process entirely separate from and independent of collective bargaining?***

[32] Out of approximately 363 Pact staff 213 are covered by the collective agreement and the remaining 150 are on individual agreements, most of which have the same terms and conditions. Pact says that bargaining individually with 150 employees was not practical. Therefore they used a standard letter of offer.

[33] Pact says that its non-union member employees were notified of the offer and they had the option of taking independent advice, suggesting any changes and then indicating their acceptance by a specific date or remaining on their existing terms and conditions.

[34] Mr Chamberlain's 6 January 2012 letter of offer to non-union member employees included a 2% wage increase and stated:

*Pact wish to give you an opportunity to enter into a new Individual Employment Agreement (IEA). By entering into a new employment agreement we will be in a position to enhance the existing terms and conditions of your employment and to increase your existing pay rate.*

*...Please read the document carefully as it is very important to you. Before signing it you are entitled to take independent advice and to suggest any amendments you feel are needed. You or your adviser are welcome to discuss this with me ...alternatively if you are happy to accept the proposed changes you can sign both copies of this letter...*

*As part of this review we are proposing to increase your hourly rate ...from \$16.48 to 16.81.*

*This process is to agree on a new IEA. ...The appraisal is a different process ...*

*You need to be aware that if you do not agree on your new employment agreement, the existing IEA will remain in force. That means you would remain on your existing terms and conditions, including your current rate of pay.*

*While we intend that the proposed new IEA will be current for the next year, the proposed wage increase would be backdated from the first full pay week in July 2011 which was the fortnight ended 17 July 2011.*

*These IEA negotiations and any meetings are solely between you and Pact and the information pertaining to this is to be treated as confidential by both parties.*

[35] Mr Chamberlain says:

*Our standard individual employment agreements are renegotiated annually and all have a common start date of 1 July to facilitate ease of administration. For the past five years (and likely longer) we have dealt with increases for IEA employees in the same fashion as we did in 2012, and made a unilateral offer of an increase to apply from 1 July.*

[36] It is incorrect that the standard individual employment agreements have a common start date of 1 July. However, Mr Chamberlain's evidence that they are treated as having a start date of 1 July for ease of administration is accepted.

[37] It is correct that it had been the practice to make a unilateral offer of a pay increase to be backdated to early July. What Mr Chamberlain means by 'unilateral' is that the pay increase itself was non-negotiable. There was a 2% offer backdated to the previous July. If an employee and/or their adviser approached Mr Chamberlain and asked for a higher wage increase Pact would not agree to a higher increase or an earlier backdating of the offer.

[38] Pact argues that the offer of a 2% wage increase was not 'automatic' as some employees did not sign the new agreement and so remained on their old wage rate. However, in the context of clause 39 the word 'automatic' does not refer to whether the 2% wage increase was automatically *imposed on* an individual employee. It is clear that Pact did not impose a 2% wage increase on its non-union member staff. Rather the issue is whether the employer decided to automatically pass-on the wage increase negotiated during collective bargaining in a way that was not entirely separate and independent of collective bargaining.

[39] In addition, the fact that not all non-union member employees accepted the proffered wage increase does not mean that Pact is not in breach of clause 39. Clause 39 does not state that the term of the collective agreement must be passed on to *all* non-union member employees for there to be a breach.

[40] Pact says that a unilateral offer capable of either being accepted or rejected is not "automatic". It relies for that assertion on the case of *National Distribution Union*

*Inc v General Distributors Ltd*<sup>6</sup> in which the Full Court of the Employment Court held:

*This was a very large workforce and individual negotiations about variations may well have been reasonably regarded as impractical. "Bargaining" by unilateral offer intended to be accepted or rejected is a well established and recognised feature of the creation and variation of individual employment agreements and is not unlawful.*

*The minimum legal requirements of bargaining for an individual employment agreement (in s63A) ... were met by GDL in this case.*

*...Allowing individuals to approach their managers over specific concerns was sufficient to meet the expectation of "bargaining".*

[41] That case was concerned with whether General Distributors had *passed on* certain conditions of a collective agreement in contravention of s.59B of the Act. Section 59B is concerned with whether an employer has breached its duty of good faith if it passes on conditions in circumstances that it intends to undermine the collective agreement and that passing on actually does undermine the collective agreement.

[42] Section 59B(6) sets out the kinds of matters that must be considered in deciding whether an employer has breached its duty of good faith. The first consideration is whether an employer bargained with an employee before they agreed on a term or condition. It was with reference to this aspect that the Employment Court in the *General Distributors* case considered s.63A.

[43] In this case the applicants were at pains to point out that they are not claiming that Pact has breached s.59B of the Act. I do not need to consider s.59B but I cannot ignore s.63A. The *Service and Food Workers Union Inc v Sealord Group Ltd*<sup>7</sup> case, relied upon by the applicants, was decided in 2002, before s.63A was enacted. The *Sealord* case dealt with a clause in a collective agreement in almost identical terms to clause 39. In that case the Authority decided that the employer had breached its duty not to automatically pass on terms and conditions from the collective agreement. However, I need to consider how s.63A affects clause 39 of the collective agreement in this case.

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<sup>6</sup> Full Court, [2007] ERNZ 120 at para.[144]  
<sup>7</sup> NZELC 96,927

[44] Sections 63 and 63A were inserted into the Act on 1 December 2004. Amongst other things, s.63A sets out the minimum things an employer must do when bargaining with individual employees for changes to an individual employment agreement. An employer must:

- Provide the employee a copy of the intended agreement,
- Advise the employee s/he is entitled to seek independent advice about the intended agreement,
- Give the employee a reasonable opportunity to seek that advice, and
- Consider any issues the employee raises and respond to them.

[45] In the National *Distribution* case the Court preferred the view that:

*...it should be presumed that where an employee has received a term or condition without bargaining it is more likely to have been passed on in breach of the section than in circumstances where the term has been agreed after genuine individual negotiations.*<sup>8</sup>

[46] However, it went on to decide that the employer had met s.63A's minimum requirements for bargaining for individual agreements and so there had been "bargaining". The type of "bargaining" undertaken in the *National Distribution* case was by the kind of unilateral written offer presented in this case.

[47] Pact did comply with s.63A(2) in making its offer to its non-union member employees. I consider that was sufficient to make it *a genuine* process of bargaining. However, the conclusion that Pact complied with the minimum statutory requirements for bargaining for variation of an individual employment agreement does not mean that Pact complied with clause 39.

[48] There are different considerations in clause 39 to those under s.59B. The parties agreed to be bound by clause 39 which makes passing on of a term prohibited if it has not been passed on through genuine bargaining *entirely separate and independent of collective bargaining*. That is not the same issue the Court needed to decide in the *National Distribution* case.

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<sup>8</sup> Ibid, para.[142].

[49] In the *Sealord* case Member Doyle decided that the bargaining process for individual agreements had to be a *genuine process* that was *entirely separate from and independent of collective bargaining*. She referred to dictionary definitions of *separate* and *independent* to assist her:

*Separate is defined in the Oxford Concise Dictionary as "...distinct, individual or particular" and independent is defined as "...free from control in action; judgment, etc; autonomous. ...not dependent on anything else for function, validity, etc; separate..."*

[50] The concept of *automatically passing-on* in clause 39.1 needs to be read in conjunction with clause 39.2 with its reference to bargaining needing to be *entirely separate and independent of collective bargaining*. The use of dictionary definitions is useful to uncover or confirm the plain meaning of words. I consider that the definitions of *separate* and *independent* as used in the *Sealord* case are useful in interpreting what clause 39 means.

[51] The fact that the offer to non-union member employees was for the same percentage wage increase, and that the timing of the offer was one month after the conclusion of the collective agreement alongside Mr Chamberlain's concession that Pact always intended to offer individual employees whatever pay increase would be agreed to in collective bargaining, and would not agree to individual employees having a greater or different wage increase lends weight to my view that, as in the *Sealord* case, the offer to individual employees:

*...was not a process entirely separate from and independent of collective bargaining as it was a process based on presentation of what came from the collective bargaining to non-union employees.<sup>9</sup>*

[52] I consider that the 2% wage increase, which was a term of the collective agreement, was automatically passed on by Pact to a number of non-union member employees through a bargaining process that was not entirely separate and independent of collective bargaining and so was in breach of clause 39 of the collective agreement.

[53] That leaves open the question of how Pact could ensure that its unionised employees and its non-unionised employees were treated in line with its desire to pay its entire staff that do the same work equitably without breaching clause 39.

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<sup>9</sup> Ibid at para.[28].

[54] This should be an issue for discussion and agreement between the parties and could be the subject of mediation if necessary.

*What penalty should be imposed for the breach of clause 39?*

[55] Section 134 provides that any party to an employment agreement who breaches that agreement is liable to a penalty. Section 135(2)(b) provides that the maximum penalty in the case of a company or other corporation is \$20,000. A charitable trust, such as Pact, is an *other corporation*.

[56] Pact argues that it could not have breached clause 39 as the applicants had never alleged they did in previous years although the same provision was in the collective agreements as far back as 2009. However, whether Pact breached clause 39 in previous years is not the issue. Previous breaches have not been argued or determined.

[57] The applicants properly accepted that in previous years they were aware that Pact was passing on the same percentage wage increase agreed to in collective bargaining to employees on individual agreements but were willing to accept that as it was never for a cumulative amount of more than their members received.

[58] It is possible that Pact may have breached clause 39 in previous years and not been called to account but that does not excuse it from the proven breach of clause 39 in this instance.

[59] The applicants submit that a high penalty is warranted for Pact's breach of clause 39 of the collective agreement. However, I consider the breach to have been not so much deliberate as habitual; that is, Pact was relying on what it had always done and failed to consider whether that would breach clause 39.

[60] Taking all these factors into account I consider a modest penalty of \$5000.00 to be appropriate with 50% to be split equally between the applicants and 50% to be paid to the Authority.

*Did Pact bestow a prohibited preference on non-union employees by granting their wages increase from July 2011?*

[61] Section 9 of the Act says that a contract or agreement cannot confer a preference on a person in relation to their terms of employment because that person is

or is not a member of a union or of a particular union. However, s.9(3) does not prevent a collective agreement containing a term or condition:

*that is intended to recognise the benefits of a collective agreement or arising out of the relationship on which a collective agreement is based.*

[62] Section 10 makes any preference conferred in breach of s.9 of:

*no force or effect to the extent it is inconsistent with section...9.*

### **Was there a preference conferred on the non-union member employees?**

[63] The applicants allege that Pact's non-union member employees received a preference in relation to a term of their employment merely because they *were not* members of the unions and therefore not covered by the collective agreement. That 'preference' was a larger amount of back-pay because the 2% increase was backdated to July 2011 whereas the union members pay increase was only back-dated to November 2011. In other words, the applicants say that the non-union member employees enjoyed the favourable term of effectively being paid more than the unionised employees for a period of 4 months.

[64] The applicants say that in previous years the fact that the non-union member employees received the same percentage increase as the unionised members a few months later does not mean the collective agreement conferred a preference on the union members. That is because, in line with s.9(3), Pact had the advantage of efficiency by being able to bargain with the union about two-thirds of its staff, as union members, and not having to bargain individually with its entire staff.

[65] The Oxford Online Dictionary defines "preference" as:

*favour shown to one person or thing over another or others.*

[66] First I need to consider whether there was a preference, or a favourable term, conferred on non-union member employees. I consider that there was a preference, being a greater amount of back-pay, conferred on the non-union members.

### **Was the preference conferred because those employees were not members of a union?**

[67] Pact says that different terms and conditions conferred on employees employed by the same employer might amount to preference but a preference is not of

itself prohibited by s.9. To be prohibited the preference must be conferred *because the person is or is not a member of a union*<sup>10</sup>. It is clear that is the requirement under s. 9. That gives rise to the second consideration; whether the preference was conferred *because* those employees were not members of the unions.

[68] In *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union*<sup>11</sup> the Court of Appeal upheld Judge Shaw's approach in her Employment Court decision. Judge Shaw made it clear that the *motive* for conferring a preference did not need to be considered. She decided that:

*Section 9 does not refer to motive but uses the word "because" which means "for the reason that". The question is to be determined as a matter of fact. ...The issue is what caused the preference to be conferred. If it was union membership then it is prohibited.*<sup>12</sup>

[69] In this case the question I need to ask is what caused the non-union member employees to receive the preference of a greater amount of back-pay? If it was the fact that they were non-union members then the preference was prohibited.

[70] Pact always intended to offer its non-union member employees the same percentage wage increase that it agreed to in collective bargaining with its union member employees. Pact also always intended to back-date the non-union member employees' pay rise to early July 2011. It did not agree to or offer to back-date the union members' pay increase to July 2011.

[71] The reason that Pact intended to back-date the non-union members' pay increases to early July was because of an established pattern of doing so and its non-union member employees expected it to do so. Pact's rationale, or motive, was that it did not wish to treat its non-unionised staff any less favourably than its unionised staff in relation to pay rates. Pact says because its employees mostly do the same work there is no fair reason for non-union member employees to be paid less.

[72] Therefore it is clear that Pact's intention or motive was good. It considered all its employees undertaking the same kind of work deserved the same pay rates. However, the fact that its intention was a good one is not relevant. The reason Pact back-dated the non-union member employees wage increase to July was simply because it had always done so for its employees that were not covered by the

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<sup>10</sup> *NZ Meat Workers and Related Trades Union v Taylor Preston Ltd* [2009] ERNZ 54

<sup>11</sup> [2009] NZCA 372

<sup>12</sup> *Ibid.*, at para [49]

collective agreement. The only point of difference between those staff and those covered by the collective agreement was that they were not covered by the collective agreement; they did not belong to a union. Therefore, it is possible to say that Pact conferred a preference on them because they were not members of a union.

[73] During the investigation meeting Mr Chamberlain told me that Pact mistakenly sent a union-member employee the January 2012 letter of offer intended for non-union member employees only. The employee signalled her desire to sign an individual employment agreement back-dating her 2% wage increase to July 2011. However, Mr Chamberlain indicated to her that the offer did not relate to her as she was already covered by the collective agreement; that is, she was a member of a union. Therefore, she was not able to have her 2% wage increase back-dated to July 2011.

[74] Mr Chamberlain was bound not to bargain individually with union members and properly told the employee that since she was bound by the collective agreement he could not deal with her. However, the fact that the back-dating of the wage increase to July was dependent on the staff member *not being* a member of a union is clearly illustrated by that situation.

[75] In offering its non-union member employees a larger amount of back-pay because they were *not* members of one of the two unions which were parties to the collective agreement Pact conferred a prohibited preference on those employees in breach of s.9 of the Act.

[76] I wish to make it clear that I do not consider the conferring of a prohibited preference proves that Pact did so with the intention of undermining the union and the collective agreement, although the union considers that it had that effect.

*What is the appropriate way to resolve the problem of the unlawful preference?*

[77] Section 10 means the effect of my finding of a prohibited preference is that the agreement to back-date the pay increase for non-union member employees, and therefore the payment of that back-pay, to July 2011 of no effect.

[78] The applicants accept that would cause an undesirable problem for the non-union member employees. As a consequence they seek a direction that Pact attends mediation with them to seek an agreed resolution to the problem. I consider

mediation to be the appropriate way to resolve this matter in the first instance and I direct the parties to mediation to seek agreement on the most appropriate way to resolve the problem of the prohibited preference.

*Did Pact breach its duty of good faith under s.4(1)(b) during bargaining by acting in a way that mislead or deceived the applicants or in a way that was likely to mislead or deceive them?*

[79] Section 4(1) of the Act provides:

- (1) *The parties to an employment relationship specified in subsection (2)—*
- a. *must deal with each other in good faith; and*
  - b. *without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
    - (i) *to mislead or deceive each other; or*
    - (ii) *that is likely to mislead or deceive each other.*

[80] In addition, in the *National Distribution* case the Employment Court said this about the meaning of good faith:

[60] *Although not doing so exhaustively, the definitions of good faith dealings given in s4 address what might be referred to as the honesty and transparency of dealings between parties so that deceiving or misleading, whether intentional or consequential, are prohibited. Good faith dealings between parties in the specified relationships also require “active and constructive” conduct “in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative” (s4(1A)).*

[61] *Those attributes of good faith dealing address how relationships are to be conducted rather than constraining the substance of them including, for example, the lawfulness of acting in one’s self-interest. So albeit simplistically, s4 does not constrain an employer from engaging in otherwise lawful bargaining tactics with a union but does require the employer to do so transparently and truthfully and to open and maintain channels of communication with the union in so doing*

[81] Section 4(2) confirms that the duties of good faith apply between a union and an employer; they clearly apply between Pact and the applicants.

[82] Section 32 of the Act sets out other good faith requirements that relate specifically to collective bargaining. These apply in addition to s.4. The applicants do not say that Pact failed to comply with s.32. I agree. There is no evidence that Pact failed in its duty of good faith under the s.32 provisions.

[83] To explore the question of whether Pact breached s.4(1) it is important to set out the facts surrounding the bargaining process in a little more detail.

[84] At the bargaining meeting on 31 August 2011 Ann Galloway, who is the Service and Food Workers' Union organiser in Dunedin made notes. Her notes show that Mr Chamberlain said Pact was not prepared to raise its 1% offer and:

*We cannot pass on more than we get. It is the average that we received in 2010.*

[85] On 20 October 2011 Pact sent a memorandum to its staff, including those on individual employment agreements, about the planned strike action. The memo included the following statement:

*Pact has offered 1% which would see us passing on the average increase in our government funding from the past 12 months.*

*We have always passed any funding increases on and always will. We don't like the fact the finding increase averages only 1% for the past 12 months any more than the rest of our staff do; but that is what we are stuck with.*

[86] The memo went on to say that Pact was not prepared to sell assets, dip into its surplus or borrow money to pay a greater wage increase. It also said:

*The only other way to fund the pay rise requested is to make cuts elsewhere and we are already running a very lean operation after two substantial restructures and some minor ones carried out in the past three years – such cuts could not be made without affecting service quality.*

[87] At the 4 November 2011 mediation Mr Chamberlain and Mr Shand spoke to each other in private when considering whether to agree to a 2% wage increase from 4 November 2011. Mr Shand says they discussed that:

*... a 2% for six months could have the effect of setting expectations at 2% in future rounds and this was not a signal that we wished to send. Nevertheless on balance we felt the offer should be accepted and advised Walter that if it was a formal offer we would take it back to the CEO and Board and believe they will accept. ...*

*At no time during any discussions with us was there any mention of backdating, the proposed increase was always presented as taking effect from the day of the mediation.*

[88] However, Ann Galloway, a union organiser for the SFWU in Dunedin who was also involved in the bargaining process and present at the 4 November 2011 mediation, says that:

*... the offer from Pact was increased to 2% but would not be backdated to the expiry date. They did have other options such as 1.25%, two year term which we rejected. They also offered 2% to be paid from 31/12/11 again we rejected.*

*So we were left with a 2% offer and needed to discuss when it would be paid from, they were still at this time telling us they couldn't afford to backdate it to the expiry date so we came up with 2% from 1 November<sup>13</sup> as in our opinion it would be better for our members going forward, and of course Pact telling us they cannot afford any more. We know that funding in this sector is not great and we do generally look at what funding they have received when we are negotiating. We took it out to ratification and although members wanted to see more they accepted that was all Pact could afford to pay them.*

[89] At the investigation meeting, Mr Chamberlain denied that there was any discussion on 4 November 2011 about backdating the 2% to the expiry date of the CEA on 30 April 2011.

[90] Mr Chamberlain told me that the reason that the collective agreement did not contain a term back-dating the pay increase to July 2011 was that the unions never asked Pact to back-date to that date. He said that he always intended to back-date non-union members' pay increase to July 2011 but did not offer to do so for the union members because it was up to the unions to ask Pact to back-date further than 4 November 2011. His attitude at the investigation meeting was that he would have been foolish to suggest paying a greater amount of back pay than he was asked to pay.

[91] It is clear from Mr Chamberlain's evidence even if there had been a request from the unions during mediation on 4 November 2011 to backdate the 2% to 30 April 2011 Pact would not have agreed.

[92] The new collective agreement recording the 2% wage increase reflected Pact's expressed concern that it believed itself to be constrained in its ability to agree on wage increases by the annual increases it received from the government:

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<sup>13</sup> Ms Galloway's evidence about an agreement to backdate to 1 November 2011 must be incorrect as the collective agreement says the backdating would be to 4 November 2011 only.

*Overall wages costs to be increased approximately one per cent over full term of the agreement, and maintained within budgetary increase passed on by the government.*

[93] Mr Chamberlain says that when he was bargaining with the applicants about a wage increase he did not consider what the impact of a particular wage increase would have on Pact's ability to make substantially the same offer to its non-union member employees but back-dated to July 2011. However, Mr Chamberlain also says that during bargaining he knew that Pact would offer its non-union member employees the same wage increase as it agreed to in the collective agreement because that was its established practice.

[94] I find it very hard to accept that during bargaining Mr Chamberlain would not have been considering the overall cost to Pact of both the union members' and the non-union members' pay increases. Pact's position was clear and remained the same during bargaining. It did not want to offer its staff more than the average percentage increase it had received from the government in the relevant year. It did not want to create an expectation that it would give wage increases higher than the percentage of increased funding it received every year. It was steadfast in that approach. Even when the suggestion of a 2% wage increase was made Mr Shand and Mr Chamberlain discussed whether that would:

*set expectations of 2% in future rounds and this was not a signal that we wished to send.*

[95] Before agreeing to the 2% wage increase Mr Chamberlain and Mr Shand also calculated that a 2% increase for half of the year of the collective agreement term was of an equivalent cost to and in line with the 1% increase for the whole year that Pact had always proposed. It considered that the increase was *within the budgetary increase passed on by the government*. Pact considered it so important to emphasise that what they agreed to was an approximate 1% increase over the full 12-month term of the collective agreement that they ensured that was actually recorded in the collective agreement.

[96] Any observer of the bargaining process, whether self-interested as the applicants are, or objective would have concluded that Pact would not agree to any wage increase for its union member staff **or** its non-union member staff that meant it paid any more than an *approximately 1%* wage increase over a 12-month period.

[97] The applicants say that the fact that Pact offered a 2% increase in wages to the 150 non-union member employees for a period of what was likely to be 12 months, from July 2011 to July 2012, is evidence that Pact's representation to the unions that it could only afford to pay an effective 1% annual increase and would pay no more than that was misleading.

[98] The applicants also say that the steadfast and repeated message from Pact that it would not and could not pay more than the equivalent of a 1% increase over a 12-month period led them to believe that and, in good faith, to rely on that.

[99] To the unions the relative position of their members to their non-union member colleagues was an important consideration. Pact would have known that.

[100] I consider that Mr Chamberlain's not offering to back-date the 2% pay increase to July 2011 during collective bargaining was an example of a lawful bargaining tactic and not in breach of good faith. I accept that negotiations during bargaining will be robust. The parties are not required to disclose, for example, the minimum increase they will accept or the maximum increase they will pay. Withholding that kind of 'bottom line' information is not a breach of good faith without more. Negotiations can be, and often are, robust and remain conducted in good faith.

[101] However, in this case Pact knew from the beginning of bargaining that it intended to offer the same percentage increase it would agree to in collective bargaining to its non-union member employees but back-dated to July 2011. It did not disclose that information. Withholding that information at the same time as insisting that any pay increase must be within 1% over a 12-month period, and effectively equating that with the agreed 2% increase for a 6-month period, was likely to mislead the unions into thinking that the non-union member employees would not receive any greater amount of back-pay than the union member employees and did mislead the applicants into believing that. Therefore, I consider that Pact breached s.4(1)(b) by indirectly withholding information that mislead the applicants. I do not go so far as to say that Pact mislead the applicants intentionally.

[102] Pact's withholding of that information also breached its duty of good faith under s.4(1A)(b) by failing to be communicative about the fact that it would pay its

non-union member employees a salary increase of the identical percentage but back-dated to July 2011.

*Did Pact breach its duty of good faith under s.4(6) by telling some union members they would get a greater pay increase if they were not union members?*

[103] Section 4(6) makes it a breach of s.4(1):

*...for an employer to advise, or to do anything with the intention of inducing, an employee—*

- a. not to be involved in bargaining for a collective agreement; or*
- b. not to be covered by a collective agreement*

[104] The statement of problem alleged that Pact, through Mr Chamberlain, had spoken to some union members during the course of bargaining and told them if they left the union they could expect a better deal. Ms Galloway's statement of evidence also included that allegation. Mr Chamberlain denied that this ever happened.

[105] The applicants could show no direct evidence of that having occurred. Nor was there evidence of any member leaving the applicant unions for that reason. Therefore, the applicants have not proved that Pact breached s.4(6) by directly attempting to induce any union members to leave the union.

*Did Pact breach its duty of good faith under s.4(6) by inducing employees not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement?*

[106] There is a further allegation of a breach of s.4(6); that in offering the non-union member staff a greater period of back-pay Pact did so with the intention of inducing those employees (and perhaps future new employees) not to be covered by the collective employment agreement. That is, Pact intended to induce its employees on individual agreements to remain on individual agreements and never to join the applicant unions.

[107] Under s.4(6) if an employer advises, or does anything, with the intention of inducing an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement they have committed a breach of s.4(1) which means the employer is deemed not to have been dealing in good faith.

[108] I consider that breaches of s.4(6)(a)<sup>14</sup> could only occur *before* or *during* collective bargaining. Pact's offer to its employees on individual agreements occurred after the collective bargaining had concluded. Therefore, I do not consider that Pact breached s.4(6)(a).

[109] Breaches of s.4(6)(b)<sup>15</sup> could also occur before or during collective bargaining; for example, it could occur when an employee first starts employment during the term of an existing collective agreement.

[110] Pact denies that in offering and paying a greater period of back pay to its non-union member employees it did so with the intention of inducing an employee, or employees, not to be covered by a collective agreement.

[111] It is difficult to deny that a result of the non-union member employees receiving back pay for a greater period would be to encourage them to remain on individual employment agreements and not to join one of the unions. It is, perhaps, more difficult to conclude that Pact gave greater back-pay to its non-union members employees with that intention, as opposed to its intention to follow its past practice.

[112] The applicants argue that Pact's intention can be inferred from its actions<sup>16</sup>. Pact held a consistent line in collective bargaining. There is no obvious reason<sup>17</sup> that Pact could not have maintained the same strict line with its employees on individual agreements; that it could not afford to pass on more than the average of 1% for the year. Pact was not bound by the individual employment agreements to offer a non-performance related pay increase at all<sup>18</sup> let alone one greater than that it had agreed to after protracted and hard-fought collective bargaining.

[113] However, taking all the circumstances into consideration I conclude that Pact did not intend its offer of a greater period of back-pay to its non-union members to induce them not to be covered by a collective agreement in the future. Therefore, Pact did not breach s.4(6)(b).

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<sup>14</sup> ...do[ing] anything with the intention of inducing an employee not to be involved in bargaining for a collective agreement

<sup>15</sup> ...do[ing] anything with the intention of inducing an employee not to be covered by a collective agreement

<sup>16</sup> As was done in the *Pacific Flight Catering* case, below note 21.

<sup>17</sup> Apart from Mr Chamberlain's erroneous belief that Pact was bound to backdate the non-performance related annual wage increase to 1 July.

<sup>18</sup> Which differentiates this matter from the situation in *Association of University Staff v Vice Chancellor of the University of Auckland* [2005] ERNZ 224. Also in that case bargaining was not completed; no new collective agreement had been agreed.

*Should there be a penalty for the breach of s.4(1) by withholding information?*

[114] Section 4A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1) is liable to a penalty if the failure was deliberate, serious and sustained, or if it was intended to undermine bargaining for a collective agreement or a collective agreement.

[115] In the *Service & Food Workers Union Nga Ringa Tota Inc v Pacific Flight Catering Ltd*<sup>19</sup> case the Chief of the Authority Member Dumbleton said that:

*Evidence that such actions have undermined bargaining will usually be elusive, but it is enough to find a likelihood of that occurring.*<sup>20</sup>

[116] The applicants say the intention to undermine can be inferred because:

*...the process becomes a bit meaningless if union members have to endure industrial action to achieve a very modest pay increase yet non-union employees are rewarded simply for not participating in the bargaining. Similarly, the breach of s4(6) ERA can be inferred because the intent was to induce employees not to participate in collective bargaining because the respondent was making it clear that non-union employees would be rewarded more.*

*...the respondent's intent can be inferred from its actions ...In addition, its actions were deliberate and not inadvertent.*

[117] The applicants say that Pact's intention to undermine the collective bargaining process can be assumed by the evidence that it actually misled them into believing that the non-union member employees would not receive any greater benefit than the employees covered under the collective agreement. They say that undermined their ability to bargain for a similarly back-dated deal for their members.

[118] In the *Pacific Flight Catering* case during collective bargaining the employer had, amongst other things, directly questioned individual employees about their reasons for belonging to the union, communicated directly with union members and not through the union and offered inducements to employees to leave the union. Those breaches were found to have been intended to undermine collective bargaining.

[119] Pact's intention to undermine bargaining for the collective agreement is less easy to infer from its behaviour than was the case in the *Pacific Flight* case.

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<sup>19</sup> [2011] NZERA Auckland 23

<sup>20</sup> As above at para.[46]

[120] Although in withholding from the applicants its intention to back-date non-union member employees pay to July 2011 Pact breached its duty of good faith under s.4(1)(a) I do not consider that it intended to undermine the collective bargaining.

[121] However, I consider that Pact's failure to disclose that it intended to back-date the non-union employees pay rise to July 2011, no matter what percentage increase it agreed to in the collective agreement, was deliberate, serious and sustained. The information was deliberately withheld; its effect was serious for the applicants in that it diminished their standing in their members' eyes and prevented them from negotiating a similarly back-dated pay increase. I also consider that the information was withheld in a sustained way throughout the entire bargaining process.

[122] Therefore, Pact is liable to pay a penalty under s.4A. Taking all the circumstances into account I consider a penalty of \$5,000 should be paid with 50% to be split evenly between the applicants and 50% to be paid to the Authority for payment to the Crown.

### **Costs**

[123] Costs are reserved. The parties are encouraged to agree on costs. If that is not possible the applicants are to file a memorandum on costs within 28 days. The respondent will have a further 14 days to file any response.

Christine Hickey  
Member of the Employment Relations Authority