

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 20
5419492

BETWEEN THE NEW ZEALAND PUBLIC
SERVICE ASSOCIATION
Applicant

AND THE COMMISSIONER OF
INLAND REVENUE
Respondent

Member of Authority: Michele Ryan

Representatives: Catherine McNamara, Counsel for the Applicant
Frances Lear, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 19 November & 19 December for the Applicant
16 December for the Respondent

Determination: 24 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In November 2012 the New Zealand Public Service Association (the PSA) raised a dispute with the Commissioner of Inland Revenue (IRD) about the interpretation and application of an agreed formal review process for employees who do not agree with the outcome of their annual remuneration review.

[2] The background to the dispute began in or about September 2012. A group of IRD's 'Revenue Assessment Officer' (RAO) employees, each of whom had been employed in 2011, became aware that RAOs who had been appointed in the 2012 intake had been offered and employed on a rate of pay that was 6 % higher than that offered in 2011.

[3] The employees say they were told that the pay offer to RAOs appointed in 2012 was in response to a change in the market value of temporary/casual employees.

[4] With assistance from the PSA, a number of RAOs employed in 2011 wrote to IRD. Each employee acknowledged satisfaction with their recent annual performance ratings but advised that the “*remuneration outcome is not satisfactory*”. They requested IRD undertake, pursuant to clause 8.2.9 of the applicable collective agreement¹, a formal review of their respective remuneration as a “*separate item*”.

[5] IRD advised the employees that their concerns appeared to be related to the salary offered and accepted when first employed and therefore their requests for a formal review did not pertain to the outcome of the annual remuneration review. IRD stated in these circumstances the review provisions at cl. 8.2.9 are not applicable.

[6] Although not entirely clear from the information provided to the Authority, it appears that review panels were convened at some point but that reviews were not undertaken.

The disputed provisions

[7] Clause 8.2.9 of the collective agreement provides the following:

8.2.9 Review of individual remuneration decisions

Each employee’s salary will be reviewed annually. If an employee does not agree with the outcome of their remuneration review, the following process will be followed:

Informal review

The employee will indicate verbally to their manager that they do not agree with the manager’s decision regarding their salary level, and state the reason why. The manager and employee will meet again to see if an agreement can be reached.

Formal review

If agreement cannot be reached, the employee will, within one month of the formal advice of the outcome of their remuneration review, notify the manager’s manager in writing that they wish to seek a formal review and state the reasons why. This may involve submitting a formal statement detailing the reasons why the review outcome is being disputed.

A panel comprised of a nominee of the employee, a nominee of the manager’s manager and an agreed independent person will carry out a review and make a recommendation to the manager’s manager.

¹ Inland Revenue – PSA Collective Agreement 029; 8 November 2010 - 30 June 2013

The agreed guidelines for the review process are contained in the HR Manual.

[8] The material portions of the agreed guidelines state:

Formal Review of Performance – Guidelines and Information for Panel

Document purpose

Clause 8.2.9 of the PSA and NUPE collective agreements... outlines the formal review process if an employee does not agree with the outcome of their remuneration review.

...

PSA...and [IRD] have agreed to these guidelines which will be applied for members who wish to review either their remuneration outcome or their performance outcome. ...

1. Purpose of the review meeting

The purpose of the review meeting is for the review panel to gain information so that they can make recommendations to the manager's manager about what action they should take in relation to the person's performance outcome.

[9] Sections 2 to 5 set out the review panel's composition, the duration of the meeting, who may attend, and describes how the meeting will be facilitated. The guidelines then provide:

6. Preparation for the review meeting

The employee and the manager will be required to submit any written information they wish the panel to consider, at least 48 hours prior to the panel convening.

7. Format of the review meeting

The employee (or their representative) and the manager will address the review panel. ...

...

b. The employee (or their representative) outlines the reasons they are seeking a review of the performance.

...

e. The manager outlines how they determined the applicable performance outcome for the staff member.

...

8. Review of the performance outcome

The manager's manager will have 2 weeks to consider the panel's recommendations. At the end of this time they will confirm to the employee and manager in writing the final performance outcome and any resulting salary adjustment. ...

The issue

[10] The PSA seeks a declaration that its members are each entitled to a formal remuneration review that takes into account any information members wish to have the review panel consider. To determine the matter I need to establish what was agreed between the parties in respect of the formal review process.

The Authority's investigation

[11] A case management conference call was held with the parties on 21 October 2013. It was agreed that PSA's members had no expectation that the Authority would determine whether they were entitled to a salary equivalent to employees who commenced in 2012. A meeting date was scheduled to investigate the dispute between the parties although the possibility that the date might be vacated in favour of the matter being dealt with on the papers was canvassed. Counsel each agreed to undertake an assessment as to whether further evidence was required. Their inquiries resulted in each of the parties communicating by email² that neither wished to produce witnesses and they proposed to have the matter heard on the papers. The Authority accepted their request and timetabling for the exchange of submissions was finalised.

The parties' positions

[12] The parties agree that the issue in dispute is about the scope of the formal review rights conferred by cl. 8.2.9.

[13] The PSA refers to broader contractual provisions which concern IRD's remuneration approach and contends that issues including relativity and equitable decision making underpin the basis of the review provisions. The PSA says the link between performance and remuneration is only one of a number of factors that can be considered in a formal review of remuneration. In this respect it says IRD has interpreted and applied the review provisions incorrectly by limiting the subject matter of information an employee can request a review panel to consider.

[14] IRD reports that every employee has their remuneration reviewed annually. It says cl. 8.2.9 and the relevant HR guidelines provide a review process of decisions made in the context of an agreed pay progression matrix system which then culminate in an employee's annual remuneration review. IRD submits that the pay progression

² 7 and 13 November 2013 respectively

matrix system is confined to determining an employee's performance rating and subsequent salary adjustment. It says requests for review of remuneration that are not based on these matters do not meet the criteria for formal review and are declined.

Discussion

[15] The judgement of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*³ is regarded as the leading New Zealand authority on contract interpretation. The Court affirmed that the usual starting point in an exercise involving contract interpretation is to firstly examine the words of the contract. Tipping J observed:

The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. ...

The language used by the parties, appropriately interpreted, is the only source of their intended meaning.

*... The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean*⁴.

[16] More recently, several judgments of the Employment Court have applied the principles set out in *Vector* when interpreting employment agreements.⁵ In *New Zealand Professional Firefighters Union v. New Zealand Fire Service Commission*⁶ Judge Ford endorsed *Vector* in the following way:

In summary it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise of a Court to "cross check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties.

[17] Given the parties in this matter dispute the interpretation and application of provisions contained in the collective agreement and the HR guidelines, the Authority

³ [2010] NZLR 444

⁴ Ibid at [19]

⁵ *White & Ors v Reserve Bank of New Zealand* [2011] NZEmpC 20, *Electrical Union 2001 Incorporated & Cowell v. Mighty River Power Ltd* [2013] NZEmpC 197

⁶ [2011] NZEmpC 149

must first begin by examining the words used in those documents to establish on an objective basis what the parties intended the words of the contract to mean.

What does clause 8.2.9 and the corresponding HR guidelines say?

Clause 8.2.9

[18] The PSA contends that the formal review process is not limited to matters of performance only and says no such limitation is suggested in cl. 8.2.9.

[19] Clause 8.2.9 sets out the process that will be followed if an employee does not agree with their annual remuneration review. On the face of it, the clause appears broad in its scope and I accept the PSA's submission that there are no words contained within cl. 8.2.9 that constrain a formal review to an employee's performance.

[20] However I do not consider the wording contained in cl. 8.2.9 solely concludes the matter. The statement used at the conclusion of cl. 8.2.9 advises; "*The agreed guidelines for the review process are contained in the HR Manual*". The inclusion of these express words demonstrate the parties intended the HR guidelines to govern the operation of the review process. As a matter of contract construction the HR guidelines must be read alongside the content of cl. 8.2.9. I am further persuaded that it was the intention of the parties to have the HR guidelines determine the operation of cl. 8.2.9 when I examine the wording of the guidelines at the '*Document purpose*' section and note it is expressly stated that the parties "*have agreed to these guidelines which will be applied for members who wish to review either their remuneration outcome or their performance outcome.*"

The HR guidelines

[21] It is immediately apparent on review of the guidelines that there is an inconsistency between the wording in the '*Document purpose*' section which appears to allow an employee to have reviewed "*either their remuneration outcome or their performance outcome*" compared to the '*Purpose of the review meeting*' section which asserts that the review panel is to obtain information so as to make recommendations about an employee's "*performance outcome*" (emphasis added).

[22] The PSA submits that the right of an employee to have their annual remuneration outcome reviewed as a matter separate to performance outcome is

confirmed by explicit reference to the *'Document purpose'* section. I accept this argument has some attraction although I do not consider the sentence alone singularly determines whether the parties agreed that the review of remuneration was agreed as a discrete subject. When objectively examining the words used in the context of the sentence they sit within, I find that the primary aim of the statement is to convey the parties' mutual agreement that it is the HR guidelines that will be applied when an employee wishes to engage in a formal review.

[23] Turning to the *'Purpose of the review meeting'* section, I find this section provides the clearest written indication available as to what the parties intended and I consider it important. Firstly, the words used are clear and unambiguous as regards the purpose and functions of the review panel. Secondly, it expressly limits the topics on which the review panel can make recommendations to the performance outcome. Finally, it is notable by its absence that no reference is made to the ability of the review panel to make recommendations about remuneration outcomes.

[24] It is useful to employ Judge Ford's methodology of 'cross-checking' against the remainder of the guidelines to ascertain if the inconsistency can be resolved by the context of the provisions. Sections 7 and 8 provide operative detail about the procedures participants to the review process are required to undertake and I consider these relevant.

[25] Section 7 of the guidelines requires the employee to outline "*the reasons they are seeking a review of the performance*" and for the manager to outline "*how they determined the applicable performance outcome for the staff member*".

[26] Section 8 concludes the agreed process by stating that the manager's manager has two weeks to confirm "*the final performance outcome and any resulting salary adjustment.*"

[27] Reading the operative sections alongside the "*Purpose of review meeting*" it becomes apparent that the focus of the formal review process is clearly aimed at assessing an employee's performance outcome. Reference to performance outcome as either the subject to be addressed by participants in a cl. 8.2.9 review process or as

the topic the review panel and/or manager's manager is to decide occurs on six occasions⁷ within the guidelines.

[28] The significance of this finding is that, with the exception of a referral to an option to review a remuneration outcome within the *'Document purpose'* section, there is no further reference within the remaining guidelines providing for review of remuneration as a discrete ground.

[29] There is a single further instance⁸ in the guidelines (section 8) where remuneration is mentioned (by way of the phrase "salary adjustment") but it is referred to as a corollary of an accepted recommendation to alter a performance outcome. This example tends to illustrate IRD's submission that a review of an annual remuneration outcome stems only as a consequence of an altered annual performance outcome.

[30] I consider then that the inconsistency between the words used in the *"Document Purpose"* and *"Purpose of the review"* is resolved by regarding a *"review of a remuneration outcome"* as available, but only in the context of a review of a performance outcome.

What are the obligations as to information?

[31] Moving to the PSA's application for the Authority to declare that the review panel must take into account any information members wish it to consider, I am cognisant of section 6 of the HR guidelines which provides that an employer (and the manager) will be required to submit *"any written information they wish the panel to consider"*. This passage tends to support PSA's application.

[32] The overall purpose of the review is limited to providing a mechanism for employees who wish to have their annual performance outcome reassessed with a view to having their individual salary adjusted. It follows that an employee's entitlement to provide written information must, as a matter of logic and common sense, be subject to the stated purpose of the review and the functions of the review panel. The information the review panel is obliged to consider needs to be relevant to an assessment of the performance outcome. Information regarding commencing

⁷ Including footnotes

⁸ Clause 8 of the guidelines

salaries of employees employed as RAOs in 2012 does not, on the face of it, appear to be germane to a review of individual performance.

Determination

[33] I consider cl. 8.2.9 and the associated HR guidelines provide for a formal review process but one that is limited to a review of an employee's annual performance outcome and corresponding salary rate. There are no words to indicate that the parties agreed to a process for review of remuneration in the absence of a challenge to a performance outcome.

[34] This finding leads me to conclude that IRD is not contractually obliged to ensure the review panel considers information which does not relate in some way to the annual performance rating.

[35] The PSA's application is dismissed.

[36] For the sake of completeness, both parties referred to various broader contractual provisions within the collective agreement to support their respective submissions and to provide additional context. These assisted me to understand the parties' contrasting positions but I consider the dispute has been able to be determined by examination of the specific provisions drafted to establish and operate the formal review process. I do not consider it necessary to go beyond those material arrangements.

Costs

[37] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority