IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 135
5391334

BETWEEN	ASSOCIATION OF PROFESSIONAL AND EXECUTIVE EMPLOYEES Applicant
A N D	WEST COAST DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Rhys Walters, Counsel for the Applicant Penny Shaw, Counsel for the Respondent
Investigation Meeting:	13 March 2015 at Greymouth
Further evidence received	30 March and 19 May 2015 from respondent
Submissions Received:	3 and 31 July 2015 from the Applicant 23 July 2015 from the Respondent
Date of Determination:	11 September 2015

DETERMINATION OF THE AUTHORITY

A. The respondent did not have an obligation to back date 2012 salary increases for IT professionals to 31 October 2011.

B. The respondent did not comply with clause 6.5 of the 2010 to 2012 collective agreement for IT professionals in respect of the 2012 salary reviews of Mr Crestani and Mr Hope but no remedies are due to either individual for the reasons set out in this determination. Insufficient evidence was available in respect of Mr Flannagan to enable the Authority to make a determination. No breach has occurred in respect of Mr Urban.

C. The respondent did not breach the terms of an open settlement agreement.

D. Costs are reserved.

Employment relationship problem

[1] The applicant claims that the respondent has breached the remuneration provisions of a collective agreement that was in force between it and the respondent between 2010 and 2013, and which covered information technology professionals. APEX also claims that the respondent has breached the terms of a mediated settlement reached between the parties on 20 December 2012. The applicant claims damages on behalf of named employees arising out of the alleged breaches of the collective agreement as well as damages for itself arising out of the alleged breach of the settlement agreement.

[2] The respondent denies that it has breached either the collective agreement or the mediated settlement agreement and/or that any damages arise.

Brief account of the events leading to the dispute

[3] APEX and the respondent were parties to a collective agreement, the expressed term of which was 1 November 2010 to 30 June 2012[1]. The collective agreement applied to seven classes of employee, all of whom were information technology service professionals, although the matter under consideration concerns only four employees, (Andreas Urban, Gavin Hope, Jeremy Crestani and Tom Flannagan). The collective agreement was signed by the parties on 29 February 2012. The following are material terms of the collective agreement:

> *6.0* ***REMUNERATION***
>
> *6.1 The following salaries are for full-time employees. Employees working less than full-time shall be paid on a pro-rata basis. The ordinary hourly rate of pay shall be 1/2080th of a full-time equivalent salary.*

Database Administrator		
	1/11/2010	*16/02/2012*
Max	*$81,180*	*$83,209*
Min	*$54,119*	*$55,472*

[1] The terms of the collective agreement continued in force beyond the expiry date by virtue of s.53 of the Employment Relations Act 2000 (the Act) until 30 June 2013. A new collective agreement then came into force with effect from 1 October 2013 (although it was signed on 25 March 2014).

Citrix Administrator		
	1/11/2010	*16/02/2012*
Max	*$69,365*	*$71,099*
Min	*$46,920*	*$48,093*

Systems Administrator		
	1/11/2010	*16/02/2012*
Max	*$69,365*	*$71,099*
Min	*$46,920*	*$48,093*

Software Support Officer		
	1/11/2010	*16/02/2012*
Max	*$58,046*	*$59,497*
Min	*$47,492*	*$48,679*

Website Administrator/Developer		
	1/11/2010	*16/02/2012*
Max	*$56,056*	*$57,457*
Min	*$45,864*	*$47,011*

IT Helpdesk Operator		
	1/11/2010	*16/02/2012*
Max	*$49,506*	*$50,744*
Min	*$40,504*	*$41,517*

Desktop Support Operator		
	1/11/2010	*16/02/2012*
Max	*$47,604*	*$48,794*
Min	*$38,948*	*$39,922*

6.2 Annual Salaries Scales are expressed in ranges with a minimum salary and a maximum salary. Annual salaries within each range can fall at any dollar amount within the range.

6.3 The salary within the range for all individuals employed prior to 1 January 2011 shall increase by 2.5% with effect 16th February 2012.

6.4 New appointments shall be at any dollar amount within the range as agreed between Employer and Employee. The Employer shall take into account the placement of existing staff within the same range when making an offer.

6.5 Reviews will be conducted annually. Movement within the range shall be at the discretion of the employer, taking into account the following criteria:

- *Job content and complexity above the level expected of a competent employee;*

- *Employee shows initiative or expertise above the level expected of a competent employee.*

- *Employee accepts additional responsibilities above those normally expected of a competent employee.*

- *Employee is willing to undertake additional training to enhance service provision.*

- *Employee has met or exceeded performance targets set during the last 12 months and sets an example for his/her peers.*

- *An experienced and competent individual satisfactorily performing all functions of the position will normally be paid at the middle figure of the range.*

...

31.0 ***Term of agreement***

31.1 This Agreement shall be deemed to come into force on 1 November 2010 and shall continue in force until 30 June 2012.

[4] On 16 February 2012, the automatic 2.5% increases provided for in the collective agreement were made in relation to the salaries of the above named four employees. Performance reviews were performed in respect of these employees between March and June 2012. On 30 June 2012, the collective agreement expired but its provisions remained in force by operation of s.53 of the Act. The date of 30 June 2012 was also the date when pay increases following from the performance reviews took effect, although Mr Flannagan had, by then, resigned from his position at the respondent and so did not receive a pay increase.

[5] On 9 August 2012 the applicant lodged an application in the Authority alleging breaches of the collective agreement in respect of the amount and timing of the pay increases. On 20 December 2012, APEX and the respondent reached an on-the-record agreement in mediation, the terms of which were as follows:

1. *WCDHB will work with APEX towards having more structured salary reviews occurring for APEX members, such that remuneration is set transparently per the agreement and so that APEX members can be clear on specifically what they would need to do in order to progress to a higher rate at their next review. The deliverable from this work is that agreed review forms will be designed in time for use in #2):*

2. *By the end of February* [2013], *WCDHB will re-do the most recently conducted salary reviews (i.e. those from around 30 June 2012) according to the agreed process above. APEX members will have the opportunity to comment on the draft result before it is finalised and WCDHB will take any such comments into*

> *account in the salary calculation in good faith. Any increase resulting from this process will be backdated to 1 July 2012.*
>
> 3. *APEX and WCDHB did not reach agreement as to whether the performance related pay provisions in the collective were deemed to take effect from 1 November 2010 (per APEX); or only after the* [~30 June 2012 reviews] *(per WCDHB). The understanding here is that APEX will submit a revised Statement of Problem to the Authority in the new year, with a view to asking the Authority to make a determination on the correct interpretation of the relevant clauses.*
>
> 4. *This agreement is on the record (as against the usually* [sic] *confidentiality that applies with mediated settlements attaching).*

[6] It was agreed the following day that the respondent would commit to finalising the new review documentation by February 2013, with the reviews to be completed by 31 March 2013.

[7] On 21 February 2013, the respondent provided to APEX its proposed form for carrying out reviews and, for the following month or so, the parties discussed the form by email. APEX put forward to the respondent suggested changes to make to the form and, although most of the changes were accepted by the respondent, there was one change in particular which was not. The disagreement between the parties with respect to the form can be summarised in the following extracts from emails passing between Mr Walters and Ms Kim Hibbs, human resources adviser for the respondent.

[8] On 27 February 2013, Mr Walters suggested the following in an email to Ms Hibbs:

> *Some objectivity and transparency in the way the final $ amount has been arrived at should be demonstrated. Perhaps a score against each criterion could be added up, to suggest a place on the salary scale? (then of course you could always adjust up from there!).*

[9] Ms Hibbs responded by way of an email dated 14 March 2013 which included the following:

> *We can not include any suggestion of final pay increases as this will vary depending on the staff member in question and also affordability.*

[10] Mr Walters responded by way of an email dated 22 March 2013 which stated the following:

> *In the context of the mediated settlement we can accept the form as it now stands, except for the following.*

It may well be that WCDHB doesn't wish to include any suggestion of final pay increases, and that it wishes to consider questions of affordability.

However, in response we say:

1. *The time to consider affordability was when the contract was agreed and the ranges set. Now set, WCDHB is obliged to set salaries in good faith in accordance with the agreed criteria. Affordability is not one of them.*

2. *A suggestion of final pay increases is required – and in fact more than a suggestion too: the form will need it to achieve compliance with our mediated settlement in December 2012:*

   "1. WCDHB will work with APEX towards having more structured salary reviews occurring for APEX members, such that remuneration is set transparently per the agreement and so that APEX members can be clear on specifically what they would need to do in order to progress to a higher rate at the next review. The deliverable from this work is that agreed review forms will be designed in time for use in #2):"

   In order to achieve this we again suggest that a score against each criterion could be added up, to suggest a place in the salary scale (which of course you could always adjust up from there ☺). This would be more helpful than a yes/no response.

[11] On 23 April 2013, Mr Walters emailed Ms Shaw asking whether the respondent intended to have paragraphs 1 and 2 of the mediated settlement agreement actioned by the end of April 2013. Ms Shaw replied to Mr Walters on 30 April 2013 in the following terms:

Dear Rhys,

Thank you for your email. I understand from my client that following significant input from the Union and its members it has taken some time for new review forms to be finalised. WCDHB are of the view that the new forms are ready to be used and would like to commence the review of the salaries reviews from June 2012 within the next few weeks.

I note that the settlement in paragraph 1 refers to "agreed forms".

The work in paragraph 2 cannot commence until the new review forms have been agreed. I have attached a copy of the review form the WCDHB intends to use which it believes fulfils the criteria identified. Once they have your agreement salary reviews can proceed.

[12] Mr Walters responded by email on 15 May 2013 explaining that his delay in replying had been caused by the death of a colleague and then stating that the

respondent's express position was contrary to the mediated agreement entered into in December 2012 and that the union struggled to believe that the DHB could argue otherwise in good faith. Ms Shaw responded stating that there was never any intention on behalf of WCDHB that the settlement agreed at mediation would include a suggestion of pay increases and that that was not specified in the agreement. She stated that the respondent would not have agreed to such a condition. She finished her email by stating that the view of the respondent was that the performance review form was now completed.

[13] Mr Walters' reply on 17 May 2013 appears to be the final communication prior to the applicant's Statement of Problem being lodged with the Authority. This email stated the following:

> *For clarity we are not saying the forms must suggest pay increases. We accept the possibility that some salaries may end up being the same after a proper review in good faith. However the forms proposed are merely performance review forms: not salary review forms. They don't even mention salary/pay/remuneration/rate, let alone allow it to be set in a structured or transparent way per the agreement. The forms don't facilitate the spelling out, specifically, of what a member would need to do to get a higher rate at the next review.*

[14] Further performance reviews were carried out in August 2013 and around October 2013 salary review forms completed. These recommended increases for the three remaining employees named above, which took effect from 1 July 2013.

[15] APEX alleges that there have been a number of breaches of the collective agreement and the settlement agreement, which can be broken down as follows:

a. The increased salaries arising from the reviews carried out in June 2012 should have been backdated to 31 October 2011 at the latest;

b. Mr Crestani should have been put on the 40th percentile (rather than the 25th percentile) of the relevant salary range with effect from 31 October 2011;

c. Messrs Hope, Urban and Crestani should have had the increases they received on 1 July 2013 backdated to 31 October 2012;

d. That the mediated settlement was breached in the following ways:

(i) Remuneration was not set transparently because of the way the form was designed by the respondent and the way the reviews were conducted;

(ii) The respondent did not make clear to the employees what they needed to do to progress to a higher level at the following review;

(iii) That the respondent unreasonably withheld agreement in the negotiations on designing an agreed salary review form;

(iv) That the respondent failed to facilitate agreement by the agreed date (which had been extended to 31 March 2013 by agreement of the parties);

(v) That the members did not have a chance to comment on the "draft result" because no such draft result was known to the employees; and

(vi) The respondent did not take into account comments made by the employees in their salary calculation because they had no consultation with those employees about salary calculations.

[16] During the course of the investigation meeting held on 13 March 2015, it emerged that Mr Hope had not been paid at the minimum level of his range until his pay increase, seemingly because the respondent's payroll department had mistakenly included his on call allowance, which should have been treated separately. The respondent agreed during the investigation meeting that it would investigate that apparent clear breach of the collective agreement and take steps to rectify it.

The issues

[17] The following issues are to be determined by the Authority:

a. Were the terms of the 1 November 2010 to 30 June 2012 collective agreement breached by the respondent?

b. Does the Authority have the jurisdiction to investigate an alleged breach of the mediated settlement?

c. If the answer to the above question is in the affirmative, were the terms of the mediated settlement breached by the respondent?

d. If either agreement was breached, are remedies due to the affected employees and are damages due to APEX?

Were the terms of the 1 November 2010 to 30 June 2012 collective agreement breached by the respondent?

[18] There are two aspects to this question. The first is whether the results of salary reviews conducted in March to June 2012 should have been backdated to 31 October 2011. The second is whether the criteria set out in clause 6.5 of the 2010 collective agreement were applied in good faith. I deal with the backdating issue first.

Backdating

[19] A key issue relevant to determination of this question relates to the obligation on the respondent in clause 6.5 of the collective agreement that salary reviews would be conducted annually on the one hand, and the fact that the agreement did not become binding on the parties until 29 February 2012, four months before its expiry. The respondent says that, as its obligation to carry out salary reviews did not arise until 29 February 2012, by carrying out salary reviews between March and June 2012 it fulfilled its obligation.

[20] APEX on the other hand argues that the terms of the collective agreement require clause 6.5 to be implemented retrospectively. Mr Walters stated his argument succinctly in his extensive (and helpful) written submissions as follows:

> *The review cannot logically be "completed annually", as the collective agreement requires, if the result of the review isn't back-dated along with the rest of the provisions of the collective. To hold otherwise would be to nullify the clear intention in the words of the agreement to backdate, and indeed the intention of Parliament insofar as it anticipated the use of retrospective application of clauses in section 52 of the Employment Relations Act 2000. Where the collective agreement is backdated to 1 November 2010, as this one is, that means that the first review processes under the agreement ought to be given an effective date of no later than 31 October 2011.*

[21] The relevant provision of s.52 of the Act referred to by Mr Walters states:

> ***52 When collective agreement comes into force and expires***
> *(1) A collective agreement comes into force on—*

> *(a) the date specified in the agreement as the date on which it comes into force; or*
> *(b) if no such date is specified, the date on which the last party to the agreement, or its duly authorised representative, signed the agreement.*
>
> *(2) A collective agreement may provide that 1 or more of its provisions have effect from 1 or more dates before or after the date on which the agreement comes into force.*

[22] Mr Walters also relies partly on the terms of the relevant Bargaining Process Agreement entered into between the parties on 13 April 2011, in which clause 3.2 stated:

> *Upon execution of the CA concluded as a result of the negotiations, the employers shall implement the financial settlement as soon as is reasonably practicable and preferably within the two pay periods of the signing of the agreement as provided above.*

[23] Ms Shaw points out, on behalf of the respondent, that the 2010 collective agreement expressly states in clause 6.3 that the 2.5% salary increase would take effect from 16 February 2012, whereas no other specific date had been agreed by which any other pay provisions were to take effect.

[24] Ms Shaw also submits that clause 3.2 of the Bargaining Process Agreement does not relate to clause 6.5 of the 2010 collective agreement, a position with which I agree. I do not accept that the term *the financial settlement* refers to the results of individual employees' salary reviews, a meaning which would be strained. It is my finding that this term more obviously refers to the salary increase referred to in clause 6.3, as it is expressed in the singular (*the financial settlement*) whereas the salary reviews were particular to each employee.

[25] The principles of contractual interpretation to be applied by the Authority in determining the matter before it are well settled. Judge Ford set these principles out in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [2] where, at [29], he cited the five principles of contractual interpretation articulated by Lord Hoffmann in the UK House of Lords case of *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1997] UKHL 28. His Honour stated as follows:

> *There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme*

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[2] [2012] NZEmpC 103

Limited v West Bromwich Building Society which were adopted in New Zealand in Boat Park Ltd v Hutchinson[3] *and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.*[4] *As both counsel relied on the stated principles, I set them out in full:*

> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.*
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:*
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>> *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.".*

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[3] [1999] 2 NZLR 74.
[4] [2012] NZSC 5

Discussion

[26] Taken at its face value, the obligation contained in the clause *reviews will be conducted annually* does not require the outcome of that review to be backdated, as there is clearly a difference between a salary review and a pay increase that may follow from the review. As the applicant accepts, a salary review could legitimately result in no increase at all.

[27] The term *annually* is defined in the New Zealand Oxford Dictionary 2005[5] as the adverb relating to the adjective *annual*, which has three meanings;

> *1. reckoned by the year; 2. occurring every year; 3 living or lasting for one year*

[28] The most appropriate meaning in the context under consideration is *occurring every year.* The expressed term of the relevant collective agreement was 19 months. This means that there would have been an obligation to have conducted only one review during the term of the 2010 collective agreement as it lasted for less than two complete years.

[29] Furthermore, it was clearly impossible for the respondent to have conducted a salary review prior to the date the obligation arose, when the collective agreement was signed on 29 February 2012. This being the case, does that impossibility require an interpretation that the outcome of the salary reviews would have to be backdated?

[30] Having reached this point in the analysis, it is necessary to consider the effect on this question of clause 31.1, which states that the agreement was deemed to come into effect on 1 November 2010. Did this deeming clause alone require the respondent to backdate the effects of the reviews?

[31] In my view, it did not. I do not find that there is any inconsistency between

a. the deemed coming into effect of the 2010 collective agreement from 1 November 2010,

b. an obligation to conduct annual salary reviews (of which the respondent was only required to carry out one during the term of the collective agreement),

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[5] *The New Zealand Oxford Dictionary* Oxford University Press 2005

c. those salary reviews being carried out between March and June 2012; and

d. any salary movement arising out of the reviews being implemented with effect from 30 June 2012.

[32] In the absence of such an inconsistency, I do not accept that clause 31 alone imports any necessity to interpret the words *reviews will be conducted annually*, other than by giving those words their natural and ordinary meaning, without having to include a backdating effect.

[33] However, I note that there is a savings provision in the 2010 collective agreement as follows:

> *30.0 SAVINGS CLAUSE*
> *30.1 Nothing in the agreement shall operate so as to reduce the written conditions of employment applying to any employee at the date of this agreement coming into force unless specifically identified and agreed between the parties.*

[34] Mr Walters makes reference to the terms of the individual employment agreements that some of the IT professionals were employed on before the 2010 collective agreement came into force, and points out that the individual employment agreements referred (in schedule 1) to the employees' base salary being subject to an annual review. The individual agreements stated that annual reviews were to occur on the anniversary of the employee's commencement (at least, it did in Mr Flannagan's, Mr Hope's and Mr Crestani's individual employment agreements; the schedule 1 to Mr Urban's individual employment agreement was missing). This means, of course, that each employee's review was to occur at a different date.

[35] Mr Walters submits that the respondent breached the terms of the individual employment agreements because salary reviews were not carried out annually in accordance with the terms of schedule 1. Whilst the respondent does not deny this, the Authority has no jurisdiction to determine that allegation, as the individual employees are not parties to the current proceedings.

[36] However, clause 30.1 effectively creates a link between the terms of the 2010 collective agreement and those individual terms to which the employees were subject prior to the 2010 collective agreement coming into effect. In the specific case of the salary reviews, each employee had a right under his individual employment

agreement to receive a salary review on an annual basis, no later than the anniversary date of their commencement date. This right was not overridden when the 2010 collective agreement came into force, and this sheds an illuminating light on how clause 6.5 should be interpreted in my view.

[37] There is nothing in the 2010 collective agreement that requires an interpretation that each employee covered by the coverage clause would have to have their salary reviews carried out at the same time. In the context of clause 30.1, each member was entitled to have their salary review carried out no later than the anniversary of their employment commencement date.

[38] How does this impact upon whether salary increases should have been backdated? The 2010 collective agreement and the individual employment agreements are all silent on when the outcome of salary reviews would be implemented. However, whilst the respondent did not have an obligation under the 2010 collective agreement to conduct salary reviews until that agreement came into force, once it did come into force, clause 30.1 required the respondent to ensure that the employees covered by it did not have their written conditions *reduced*. One such written condition was a right to an annual salary review.

[39] However, the 2010 collective agreement did allow for annual salary reviews. In order for Mr Walter's argument to work, I must be persuaded that a salary review is not *conducted* until the outcome of the review is implemented. However, I am not persuaded that this is the case. They are two separate exercises. The review consists of reviewing the performance of the employee over a given period of time (in this case, the preceding 12 months) and assessing how that performance should be rewarded (if appropriate) in terms of a salary increase by reference to a set of criteria (referred to in clause 6.5). The review will include assessing how much the increase should be. However, it is perfectly feasible that an outcome of the review will be no salary movement at all.

[40] Having conducted the review, any salary movement will then be implemented. This then brings us back to the issue of when any salary movement would be implemented. For the reasons examined above, I do not accept that the obligation to conduct annual salary reviews is the same as an obligation to back date the salary review as if the salary review had been conducted annually.

[41] In conclusion, applying the principles of contractual construction to the collective agreement, I do not accept that the Authority is able to conclude that the salary movements resulting from the salary reviews in 2012 had to be backdated to 30 October 2011, or any other date prior to the date chosen by the respondent. For the same reason, there was no obligation to backdate the results of salary reviews received by Messrs Hope, Urban and Crestani on 1 July 2013.

[42] Is it possible to reach a different conclusion by implying a term into the collective agreement? First, it would be necessary to determine the mechanism by which such a term could be implied. A key mechanism is necessity, in order to give business efficacy to the agreement. The Privy Council laid down a five point test for the implication of contractual terms in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[6]

> *In [their Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*

[43] Burrows, Finn and Todd's *Law of Contract in New Zealand*[7] points out that this test, commonly cited in New Zealand, imposes a stringent standard, and makes it apparent that terms will be implied only in the clearest cases; the device is not an invitation to the courts to rewrite contracts.

[44] It is clear that the test is not satisfied in the current case. The terms of the collective agreement are perfectly effective without implying a term that the salary movement resulting from a salary review must be implemented with effect from 31 October 2011, or any other date prior to the date of the salary review in question. Such a term is certainly not so obvious that it goes without saying. Indeed, as Mr Walters acknowledges in his submissions, fixing a date to which the salary movement is to be backdated is by no means clear.

[45] I accept that any salary movement resulting from a salary review must be implemented and that, in the absence of an express term as to when such a salary

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[6] [1977] 16 ALR 363 at 376

[7] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th edition), LexisNexis, Wellington, 2012, at 6.3.3(b)(ii), page 220

movement would take effect, it is necessary to imply a term; however, nothing compels such a term to be *at a date prior to the salary review taking place*.

[46] In conclusion, I do not find that there has been a breach of the 1 November 2010 to 30 June 2012 collective agreement by the respondent failing to backdate the results of the 2012 salary reviews. For the same reason, there was no obligation to backdate the results of salary reviews received by Messrs Hope, Urban and Crestani on 1 July 2013.

Were the criteria set out in clause 6.5 of the collective agreement applied in good faith?

[47] First, I accept the submission of Mr Walters that the reference in clause 6.5 to movement being at the discretion of the employer must be read in the light of the criteria that follow, which must be taken into account by the respondent. In other words, the discretion is not unfettered.

[48] Second, this question can only be examined by consideration of how clause 6.5 was applied in specific cases. Only Mr Crestani and Mr Hope gave evidence and so I am only able to consider the question in relation to these two individuals.

Mr Crestani

[49] Mr Crestani was placed on the 25th percentile of the salary scale as a result of the salary review in June 2012. Having considered the evidence of Mr Roper, whose memory was understandably hazy nearly three years later, I find on a balance of probabilities that he did not assiduously apply the criteria set out in clause 6.5 of the collective agreement in assessing Mr Crestani's salary. I do not believe that this failure was as a result of a lack of good faith, but was rather a result of either confusion or lack of clarity on Mr Roper's part as to the extent of his responsibility in conducting the salary review.

[50] However, there was a breach of the collective agreement as a result of Mr Roper's failing. Having made this finding, it is necessary to consider whether Mr Crestani suffered a loss as a result of that breach. Mr Walters makes reference in his submissions to the Hudson Salary Guide for 2011 which indicated that the rate for a systems administrator of Mr Crestani's level was in the order of $75,000 per annum. However, there was no obligation upon the respondent to pay market rates for IT staff

under the collective agreement. I do not accept, therefore, that this is a criterion that is relevant.

[51] Mr Crestani's evidence was that he accepted that, prior to the 2012 salary review, he had not been performing at a level that justified placing him on the mid-line salary. He felt, however, that placing him on the 25th percentile was harsh and that the 40th percentile would have been fair.

[52] The correct approach to adopt in assessing Mr Crestani's loss, if any, is to assess on what point of the salary scale he would have been placed had the respondent followed its obligations in clause 6.5, by taking into account the criteria. This assessment requires some degree of speculation.

[53] When I consider the criteria that Mr Roper should have applied when assessing Mr Crestani's salary movement, I note in particular the final bullet point, which states that an experienced and competent individual satisfactorily performing all functions of the position would normally be paid at the middle figure of the range. Mr Crestani admits that he did not fulfil that criterion at the time. By necessity, therefore, it must be the case that he would have been placed at a point below the mid-point.

[54] It is particularly hard to contemplate how the mix of the remaining factors would have interrelated, as the witnesses at the Authority's investigation meeting did not explain how the 2012 review exercise should have been carried out by reference to the criteria. Mr Walters submits that the *contra proferentem rule* should be applied when considering the criteria. This is a rule of interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

[55] It appears from the evidence presented by the respondent that the first five bullet points setting out the criteria in clause 6.5 were in the original draft collective agreement, and so were provided by the respondent. The final bullet point, however, was not, and it is not clear whose wording this was. It is more likely than not that it was suggested by the union in my view.

[56] In any event, whilst the wording for first five criteria was provided by the respondent, and there is an argument that they are ambiguous, in the sense of uncertain in meaning (if not in the sense of having more than one possible meaning) I

am not convinced that the contra proferentem rule assists in assessing where on the salary scale Mr Crestani should have been placed. This is because there were 29 possible salary points upon which Mr Crestani could have been placed between the 25th and the 50th percentiles.

[57] In truth, the Authority simply did not hear enough cogent evidence to persuade it, even on a balance of probabilities, that Mr Crestani should have been placed on the 40th percentile, or some other specific percentile above the 25th percentile of the salary scale. To attempt to guess where between the 26th and the 50th percentile Mr Crestani should have been placed would be pure guess work, which is not an appropriate way to assess remedies.

[58] In conclusion, I decline to award any remedies in respect of the respondent's failure to follow the criteria in clause 6.5 as I do not have sufficient evidence to persuade me that, if it had done so, the outcome would have been any different.

Mr Hope

[59] Mr Hope's position was different to Mr Crestani's as he received very positive feedback from Mr Roper. In particular, the manager's summary on the *Performance Review and Individual Development Plan* for Mr Hope dated 8 March 2012 stated

> *You have achieved a great deal in the last 12 months. Performance has again been constantly at a high level. You have also demonstrated adaptability, leadership, initiative, outside the box thinking, a high quality output and willingness to pickup a variety of tasks. Well done.*

[60] In this case, it is less clear that Mr Roper did not take into account the five criteria set out in clause 6.5, as elements of the five sets of criteria are clearly referred to by Mr Roper. However, the criteria have not been addressed separately, and on the balance of probabilities I conclude that he did not expressly take them into account when setting movement within the salary scale in Mr Hope's case.

[61] Mr Hope was placed on the 50th percentile. However, it would appear that he was not only an experienced and competent individual satisfactorily performing all functions of the position, but that he had been assessed as exceeding that characterisation. Unlike in Mr Crestani's case, where I could not conclude on a balance of probabilities that he would have achieved a higher position than the 25th percentile had the criteria been taken into account, in Mr Hope's case, I am able to

make the finding that, had they been taken into account, Mr Hope would have achieved a higher position than the middle figure of the range. However, Mr Walters has indicated in his submissions that Mr Hope does not seek any remedies by reference to what point on the salary scale he may have been placed on had the criteria been properly taken into account. Therefore, I can take the matter no further.

[62] However, the respondent has admitted that Mr Hope had been inadvertently placed on a salary lower than the minimum point on the relevant salary scale, and so is owed arrears of salary in respect of that error. It is understood that this error has been rectified by the respondent.

Mr Flannagan

[63] Mr Walters submits that, apart from being owed salary payments because of a failure to backdate his pay (which I have rejected was a requirement upon the respondent) Mr Flannagan was also placed on the incorrect point in the salary scale on 31 October 2011; namely the 7th percentile, which he says is *far too low*. Mr Flannagan resigned from his position on 31 March 2012 and so no pay review was carried out for him in 2012. I do not accept that this decision not to carry out a pay review constituted a breach of contract by the respondent.

[64] However, absolutely no evidence was heard in respect of Mr Flannagan's performance and why he was placed on that percentile. It is not appropriate to guess, and so I decline to find that the respondent has breached any statutory or contractual duty towards Mr Flannagan.

Mr Urban

[65] The only loss claimed for Mr Urban results from the backdating argument, which I have rejected.

Does the Authority have the jurisdiction to investigate an alleged breach of the mediated settlement?

[66] Ms Shaw for the respondent asserts that the settlement agreement is not a s.149 settlement agreement, nor a variation of the collective agreement, and that no consideration was given for it. Accordingly, the respondent asserts, the settlement

agreement has no status and is not enforceable, being essentially an agreement to agree.

[67] The Court of Appeal, in *JP Morgan Chase Bank NA v Robert Lewis*[8] has recently examined the issue of the enforceability in the Authority and the Employment Court of a settlement agreement that is not a settlement agreement that satisfies the requirements of s.149 of the Act. The Court of Appeal discussed[9] the difference between the rescission of an employment agreement and the variation of one. In the first case, there is the complete extinguishment of all the rights and obligations under the employment agreement by way of a bilateral discharge (which can be effected orally or in writing). In the second case, whilst some rights and obligations may be discharged, others will continue to exist, so that the original agreement can be said to have been varied.

[68] The Court of Appeal referred in *Lewis* [10] to a statement of Lord Dunedin given in the UK House of Lords case *Morris v Baron & Co*[11]

> *... The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.*

[69] The judgement in *Lewis* also cited Lord Sumner in *British and Beningtons Ltd v North Western Cachar Tea Co Ltd*[12] as follows

> *... The question is whether the common intention of the parties ... was to "abrogate," "rescind," "supersede" or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement ... .*

[70] Adopting these statements of the law, the Court of Appeal in *Lewis* found that the settlement agreement under consideration, which provided that Mr Lewis would

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[8] [2015] NZCA 255
[9] At [59] et seq.
[10] At [63]
[11] [1918] AC1 (HL) at 19
[12] [1923] AC 48 (HL) at 62

resign from his employment with the bank the following day, was a new agreement, as its purpose was to bring Mr Lewis' employment to an end. Secondly, the agreement contained provisions that were plainly intended not to operate as terms of employment, but as terms that were to apply once the employment agreement was ended. Third, the settlement agreement could be *sued upon* alone. Finally, once the settlement agreement had been executed, it could not be said that it was possible for both agreements to be performed.

[71] These findings amounted to the conclusion that the settlement agreement entered into by Mr Lewis was not a variation of his employment agreement, but replaced it, governing, on its own, the relationship of the parties after the cessation of Mr Lewis' employment. Having reached this conclusion, the Court of Appeal found that the settlement agreement therefore could not be regarded as an employment agreement for the purposes of s.5 of the Act. In turn, this meant that the Authority did not have the jurisdiction to deal with the dispute under s.161(1)(a) or (b) of the Act.

[72] The Court went on to find that the Authority also did not have jurisdiction under s.161(1)(n) of the Act, as it could not have issued a compliance order under s.137(2) or any other provision of s.137.

[73] Turning to the present case, it is necessary to consider whether the settlement agreement entered into by the parties on 20 December 2012 amounted to a variation of the collective agreement, so that it was operative only by reference to the collective agreement, or was a stand-alone agreement which could be sued upon in its own right.

[74] First, and obviously, the text of the agreement does not expressly or impliedly bring the collective agreement to an end, and so the test stated by Lord Sumner above does not apply. Abrogation, rescission, supersedence or extinguishment were not its purpose. Its purpose was to set out a process for changing, or refining the way that the respondent carried out its salary reviews. This purpose is set out in the bulk of the first paragraph of the settlement agreement.

[75] The way that purpose was to be achieved is set out in the second paragraph. The third paragraph carves out of the settlement the remaining outstanding issue of whether pay provisions were to be backdated or not, which was to be referred to the Authority. The final paragraph records that the settlement is open, and not confidential.

[76] The text of the settlement agreement appears to refer expressly to the collective agreement. I believe that the word *agreement* in the first paragraph refers to the collective agreement and, more expressly, the set of criteria in clause 6.5 of the collective, as it is the application of those criteria that would enable the remuneration to be set transparently. The end of the first paragraph records that the outcome will be *agreed review forms* and the second paragraph of the settlement agreement creates a new obligation on the respondent to *re-do the most recently conducted salary reviews.*

[77] I do not believe that this settlement agreement is a stand-alone agreement. Whilst it could possibly be sued upon alone, with the criteria at clause 6.5 of the collective agreement being available as reference, the test is that *it is impossible that the two* [agreements] *should be both performed.* That is clearly not the case here.

[78] In conclusion, I find that the settlement agreement was a variation of the collective agreement by the parties. As such, the Authority does have the jurisdiction to consider whether its terms have been breached.

[79] Having reached that conclusion, I must address the submission of Ms Shaw that the settlement agreement was unenforceable because there was no consideration and because it was an agreement to agree.

Consideration

[80] The settlement agreement was entered into after the applicant had lodged an application with the Authority on 9 August 2012 seeking orders in relation to both the amount and timing of salary adjustments. The settlement agreement settled part of that application. Therefore, there was legal consideration for the settlement agreement.

Agreement to agree

[81] This objection by the respondent is based upon the fundamental principle that binding agreements must be expressed in terms that define with a sufficient degree of certainty the parties' respective obligations. An *agreement to agree*, or as more comprehensively characterised in *Law of Contract of New Zealand*[13] an agreement where the parties have provided that some matter will be decided by agreement at some point in the future, raises a question of contractual certainty.

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[13] Ibid., at section [3.7.2] page 94.

[82] The principle is explained by *Law of Contract of New Zealand* as follows:

> *The critical question of the court is whether the parties intended that there be no binding agreement until that reserved matter was decided by the parties themselves – in effect a case where the parties are considered not to have concluded the process of offer and acceptance because there was no contractual intent at this stage - or whether, despite the reservation of the matter for determination later, the parties intended the agreement to be binding and contemplated that the reserved matter be decided by some set process (such as arbitration) or by reference to some external matter either instead of seeking accord between the parties or after such accord had been unsuccessfully sought.*
>
> *If a matter is expressly or impliedly reserved for determination by the later agreement of the parties and by no other means[14], the courts cannot complete a bargain which the parties have themselves determined to delay concluding.*

[83] Mr Walters addresses the issue of whether the settlement agreement is an agreement to agree by reference to the Court of Appeal case of *Wellington City Council v Body Corporate 51702 (Wellington)*[15] in which the Court held that an agreement to negotiate sales of leasehold interests in good faith was unenforceable as the term was of insufficient certainty. However, the Court distinguished employment relationships in which a statutory concept of good faith is imposed on the parties, where the good faith obligation must be regarded as having sufficient general certainty.

[84] Mr Walters refers me to the statutory duty of good faith in s.4 of the Act, the duty of the Authority to consider mediation under s.159 of the Act, the objects of the Act at s.3, and the Code of Good Faith applicable to the Health Service, in Schedule 1B of the Act, and in particular, clause 4, which provides:

> ***4 General requirements***
> *(1) In all aspects of their employment relationship, the parties must—*
> > *(a) engage constructively; and*
> > *(b) participate fully and effectively.*
>
> *(2) In their employment relationship, the parties must—*
> > *(a) behave openly and with courtesy and respect towards each other; and*
> > *(b) create and maintain open, effective, and clear lines of communication, including providing information in a timely manner; and*
> > *(c) recognise the role of health professionals as advocates for patients; and*

[14] Emphasis in the original
[15] [2002] 3 NZLR 486 (CA)

> *(d) make time to meet as and when required—*
>
> *(i) to address not only the industrial issues between the parties but also issues facing the public health sector, the employer, and the employees; and*
>
> *(ii) to search for solutions that will result in productive employment relationships and the enhanced delivery of services; and*
>
> *(iii) to ensure that any change is managed effectively; and*
>
> *(e) recognise the time and resource constraints that may affect their ability to participate fully, and make allowances for those constraints.*
>
> *(3) To enable employees and their unions to comply with subclause (1), employers must ensure that appropriate steps are taken in their workplaces to encourage, enable, and facilitate employee and union involvement.*
>
> *(4) The parties must use their best endeavours to resolve, in a constructive manner, any differences between them.*
>
> *(5) Subclauses (2) to (4) do not limit subclause (1).*

[85] Mr Walters also refers to clause 5, which states that every employer must be a good employer.

[86] Mr Walters argues that the good faith framework set out in the Act is to be read into the terms of the settlement agreement, which in turn creates certainty in accordance with the obiter comments of Tipping J in the W*ellington City Council* judgement. In addition, this was an agreement reached within the statutory dispute resolution framework, in pursuance of a direction to mediation ordered by the Authority, which gives the agreement an additional statutory character not found in ordinary commercial contracts.

[87] Ms Shaw's objection relates in particular to the reference to the sentence that states

> *WCDHB will work with APEX towards having more structured salary reviews occurring for APEX members….*

[88] Ms Shaw submits that this was not an agreement to negotiate in good faith, which she concedes would have certainty by means of the legislative definition of good faith that underpins employment relationships, but was rather a reference to a process which was not capable of objective assessment or a certain outcome.

[89] I have some sympathy with Ms Shaw's argument that the obligation provided for in the first paragraph of the settlement agreement is not an obligation to negotiate in good faith. However, this does not mean in turn that the obligation in paragraph

one of the settlement agreement is unenforceable. My interpretation of the obligation in paragraph one is that it can be broken down as follows:

a. The respondent will co-operate with APEX

b. with a view to conducting future salary reviews

c. which are more *structured* than hitherto

d. by transparently reflecting the criteria set out in clause 6.5 of the collective agreement

e. which will enable the members to understand what they would need to do to progress to a higher rate at their next review.

[90] When one analyses the obligation in this way, I do not accept that it is sufficiently uncertain to render it unenforceable. Whilst it is an *agreement to agree* in the sense that the parties have to work together to achieve the desired outcome, that desired outcome is, I believe, sufficiently well-defined to satisfy the requirement of certainty. The most uncertain term is the concept of having *more structured* reviews. This however, is explained by reference to the collective agreement (specifically the criteria in clause 6.5).

[91] In short, I do not believe that the obligation to work together to achieve more structured salary reviews is void for uncertainty.

[92] However, there is another element of the agreement which needs further analysis. That is the *deliverable* of *agreed review forms.* My interpretation of the agreement between the parties in respect of this element of the agreement is that:

a. a new review form would be agreed between the parties, which would

b. be used in the forthcoming salary reviews, and which would

c. have assisted the parties in achieving the more structured salary reviews, which in turn would

d. have required the forms to have referred to the collective agreement and the criteria in clause 6.5.

[93] This is clearly another agreement to agree. Ms Shaw points out that the agreement created only an obligation to *work …towards having more structured salary reviews* and submits that the agreement does not cover what would happen if no agreement was reached on the new form, which makes it incapable of being enforced.

[94] It may seem clear that the new forms would have had to have referred to the five criteria in order to satisfy the obligation set out in the settlement agreement to achieve the objectives set out in paragraph [89] (a) to (e) above. This was requested expressly by Mr Walters in his negotiations with Ms Hibbs, who agreed to that request. However, it is also clear from those negotiations that Mr Walters wanted other issues to be included, such as a score against each criterion, and a mechanism to review progress part way through. The parties then became side tracked due to a miscommunication between them, and agreement was never achieved.

[95] This demonstrates that Ms Shaw must be right, if only in respect of the agreement to agree a form. At the time the settlement agreement was entered into, it was impossible to know exactly what the parties would, in the future, respectively want and not want to be included in the salary review form and what they would eventually agree to. This, as Ms Shaw points out, makes that part of the settlement agreement incapable of being enforced.

[96] This must lead me to conclude that the respondent did not breach the settlement agreement in so far as the failure to agree a salary review form was concerned.

Did the respondent breach the settlement agreement in other ways?

WCDHB working with APEX

[97] The operative term of the first paragraph of the mediated settlement was for the respondent to *work with APEX towards having more structured salary reviews occurring for APEX members….* The following exchanges took place between the respondent and APEX:

a. On 21 February 2013 Ms Hibbs sent to Mr Walters an amended *Performance Review Form*, seeking feedback early the following week;

b. On 27 February 2013 Mr Walters replied with three suggestions prior to obtaining feedback from the members of APEX. He sent further feedback on 6 March 2013.

c. On 14 March 2013 Ms Hibbs responded to say that the respondent had adopted three of the suggestions made by Mr Walters, rejected one of the suggestions and taking issue with *any suggestion of final pay increases.* This was where the parties ended up misunderstanding one another.

[98] Analysing this exchange, I believe that the respondent did work with APEX towards having more structured salary reviews by seeking to agree the *deliverable* of a new form. Mr Walters criticises the approach taken by Ms Hibbs in respect of the form that was eventually used by the respondent, once it became clear that they could not agree, by saying that it remained a performance review form and not a salary review form. However, as the parties had never expressly defined what a *salary review form* would comprise within the terms of the settlement agreement, the parties were entitled to hold different views as to what would satisfactorily achieve the purpose set out in the first paragraph of the settlement agreement.

[99] I cannot, therefore, find that the respondent failed to comply with the terms of the settlement agreement in this respect.

The redoing of the 2012 reviews

[100] The respondent had agreed in the second paragraph of the mediated settlement agreement that it would *re-do the most recently conducted salary reviews…according to the agreed process above.* Ms Shaw stated in an email to Mr Walters dated 30 April 2013 that the work in paragraph 2 of the agreement could not commence until the new review forms had been agreed. Mr Walters' response dated 15 May showed that the form was still not agreed, and agreement never was reached between the parties.

[101] I have already found that the respondent was not in breach by that failure, as the agreement to agree the contents of the form was void for uncertainty. The consequence of this, however, is as Ms Shaw stated in her email to Mr Walters. The terms of the second paragraph of the settlement agreement clearly required the form to be agreed before the respondent had to re-do the 2012 salary reviews. This is what

was meant by the words *according to the agreed process above*. That process not having been achieved (because the *deliverable* had not been agreed) there was no obligation on the respondent to re-do the 2012 reviews.

The 2013 reviews

[102] The respondent went on to conduct the reviews for 2013 without having agreed the exact contents of the form with the applicant. However, the respondent did use the amended form which was the result of the negotiations between Ms Hibbs and Mr Walters. Although Mr Walters says that it was not a salary review form, as I have said above, the exact contents of such a form was a matter of dispute between the parties. The respondent was not in breach of the settlement agreement by not agreeing to everything that Mr Walters believed would make the form a salary review form.

[103] Furthermore, the fact that the respondent used that amended form demonstrates that the respondent was not acting in bad faith when it carried out the 2013 reviews.

Conclusion

[104] Drawing all of the above together, I find the following:

a. There was no breach of the 1 November 2010 to 30 June 2012 collective agreement by the respondent when it failed to backdate the results of the 2012 salary reviews to 31 October 2011.

b. There was a breach of the collective agreement by the respondent by not fully applying the criteria set out in clause 6.5 in the reviews of Mr Crestani and Mr Hope. However, insufficient evidence has been adduced to enable the Authority to conclude that this breach led to any loss by Mr Crestani, and no loss is sought by Mr Hope.

c. No evidence has been presented to enable the Authority to make any substantive findings in respect of Mr Flannagan.

d. No breach occurred in respect of Mr Urban.

e. The respondent did not breach the terms of the settlement agreement by failing to agree the exact content of the salary review form, as the requirement to do so was void for uncertainty.

f. The respondent did not breach the terms of the settlement agreement by failing to work with APEX *towards having more structured salary reviews occurring for APEX members*, as it did work with APEX to achieve that goal.

g. The respondent did not breach the terms of the settlement agreement by not re-doing the 2012 salary reviews.

h. The respondent did not act in bad faith by the way it carried out either the 2012 or the 2013 reviews.

[105] Having made these findings, no remedies are due to the members of the applicant union, nor to the applicant itself.

Costs

[106] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them but if they are unable to do so within 21 days of the date of this determination, then any party seeking a contribution towards its costs must serve and lodge a memorandum of counsel within a further 14 days, and any memorandum in reply must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority