



board salary increase for its members. It also alleges a breach of good faith arising from NZTA's conduct in the annual remuneration forum. E tū claims the Agency attends the forum with a predetermined position and a closed mind. The Union seeks remedies including declarations, a compliance order, a penalty and costs.

[3] NZTA asks the Authority to dismiss the Union's claims. It denies it has failed to comply with the provisions of the collective agreement or that it has breached good faith in any of its actions relating to collective bargaining or the Remuneration Forum.

### **The parties**

[4] The statement of problem in this matter was lodged by the New Zealand Amalgamated Engineering and Manufacturing Union Incorporated (EPMU) which has since merged with the Service and Food Workers Union to form E tū Incorporated. E tū represents approximately 200 Union members employed at the New Zealand Transport Agency's Palmerston North premises.

[5] NZTA is a Crown entity established in 2008 as the result of a merger between Land Transport New Zealand and Transit New Zealand. Amongst its responsibilities are managing the state highway system; contributing to an efficient, effective and safe land transport system; managing regulatory requirements for transport on land, including rail and investigating and reviewing accidents involving land transport. NZTA has approximately 1,400 employees.

### **The Authority's investigation**

[6] Evidence for the Union was given by Bruce Burnette, a former Union employee, Laurel Reid, Lead Organiser, and Ged O'Connell, National Director of Industries. Robyn Elston, National Manager of Delivery, Access and Use, and Katrina Leather, Employment Relations and Human Resources Policy Manager, gave evidence on behalf of the Agency. I will refer to some of the evidence heard and submissions made by the parties in this determination. I am not required to set out a record of all of the evidence heard, and submissions received, during the course of my investigation and will not do so<sup>1</sup>.

[7] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. I record that

---

<sup>1</sup> s. 174E of the Employment Relations Act 2000

when I advised the Chief of the Authority this would occur he decided, as he is permitted by s174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3) of the Act.

### **Issues**

[8] The issues for determination are:

- a. Whether the provisions of the 2013-2014 collective agreement between the parties required NZTA:
  - i. to give an across the board salary increase to Union members relative to movement in the mid-point of remuneration bands; and
  - ii. to award salary increases to Union members who met or exceeded their performance requirements.
- b. Whether NZTA failed to deal with the Union in good faith during bargaining for the current collective agreement by not genuinely considering the Union's claim for an across the board salary increase.
- c. Whether NZTA failed to deal in good faith with the Union in the context of the remuneration forum in 2014 and 2015.

### **The collective agreement**

[9] The Collective Employment Agreement 1 July 2013 – 30 June 2014 between the parties (the collective agreement) comprises a number of sections alphabetised from A to P. Section L deals with remuneration. It includes a remuneration protocol and the high level and detailed principles that are to apply to it; provisions for job evaluation, a remuneration forum, remuneration levels, and details of payment.

[10] The high level principles are stated as follows:

- L3 The protocol applies principles that are consistent with the NZ Transport Agency's overall remuneration policies.
- L4 The affordability of the total cost of remuneration changes will be openly discussed between the parties to this Agreement as part of the annual remuneration forum:

- the parties recognise that the Employer faces constraints with respect to annual changes in remuneration costs, and need to be mindful of this, while also seeking to genuinely reward the efforts and contribution of its Employees,
  - this protocol is designed to provide flexibility that allows the parties to determine and agree the level of reward for performance.
- L5 Market-based evaluations of the value of individual positions form the basis of how remuneration rates will be established.
- L6 Employees can generally expect to move quickly, that is within two years of the time of appointment, to a rate of fixed remuneration established for achieving the requirements of the job.
- L7 Maintaining parity with the remuneration midpoint should not be regarded as automatic. Any movement will be based on affordability and performance.
- L8 The rate for doing the job satisfactorily is synonymous with a performance rating of achieving or similar.
- L9 Employees remunerated below the rate for doing the job satisfactorily may receive larger increases than those remunerated at, or higher than, the rate for doing the job satisfactorily.
- L10 Consideration of qualifications and work experience will be taken into account in determining starting rates for individuals.
- L11 Job evaluations for all positions covered by this Agreement are used as a basis for determining the remuneration range.

[11] The detailed principles include the following:

- L12 All employees are remunerated with a base salary. Any benefits and ongoing annual allowances are given a monetary value and expressed together with a base salary as fixed remuneration.
- L15 Job evaluations for all positions covered by this Agreement are used as a basis for determining the remuneration range.
- L16 Fixed remuneration ranges will be established to reflect minimum starting rates, the rate for doing the job satisfactorily, and the maximum remuneration range:
- Ninety percent (90%) of the midpoint will be the minimum starting rate for a position,
  - the midpoint value will be equivalent to the rate for doing the job satisfactorily,

- an Employee who is assessed as doing the job satisfactorily, may have their remuneration moved over time towards and/or reach a maximum of one hundred and fifteen percent (115%) of the midpoint,
  - one hundred and fifteen percent (115%) of the midpoint will be the maximum remuneration rate for a position.
- L17 The Employer will review the Employee's performance at least twice each year around June and December. An Employee will be awarded a grading for their overall performance throughout the year. The Employer will indicate to Employees, at the commencement of the review year, the range of grades that will be used to assess their performance. The range will include, at least, provision for those whose performance is not satisfactory, those who are meeting the requirements of the role and those who have sustained a superior level of performance.
- L18 Any increase in remuneration, or entitlement to a lump-sum payment, is dependent on an Employee's performance. Specifically:
- an Employee must at least achieve the requirements of the role to be eligible for either an increase in remuneration or a lump-sum payment,
  - an Employee who surpasses the requirements for the role on an on-going basis can expect a higher level of reward than an Employee who is achieving the requirements,
  - an Employee whose performance is not satisfactory is not entitled to any increase in remuneration or lump-sum payment.
- L19 An Employee who is at the maximum fixed remuneration may be entitled to a lump-sum payment, depending on their performance.
- L20 An Employee's performance appraisal will follow the processes laid out in various manuals and guides periodically published by the NZ Transport Agency. It is an Employee's responsibility to ensure that if they have any concerns about the fairness of a performance assessment, those issues are escalated to either a senior manager within the NZ Transport Agency or their Union delegate.
- L21 Changes in remuneration for Employees at or above the rate for doing the job satisfactorily are based on performance. The percentage rates to be applied will be negotiated annually between the parties. Two rates may be established:
- one for doing the job satisfactorily,
  - a minimum rate for any result better than this.

[12] The provisions relating to the remuneration forum provide:

- L31 There will be a NZ Transport Agency forum that will meet annually to agree annual movements in remuneration bands. Decisions on movements for individual staff are outside the scope of this forum. The forum will consider a range of information including market survey information, affordability, recruitment and retention, consumer price index, labour costs index, and any relevant expectations from the government.
- L32 The parties will use their best efforts to agree on appropriate band movements. Where the remuneration forum cannot agree on revised remuneration bands then each party will submit their position and recommendation to the Chief Executive who shall make the final decision.

[13] Section P contains two schedules, the first of which lists positions excluded from coverage and employees who were grand-parented. The second schedule sets out the fixed remuneration ranges for positions covered by the collective agreement. There are seven salary bands covering named positions, each with the midpoint of the band; 90% of the band; and 95% specified in the schedule.

**Was NZTA required to give an across the board salary increase to Union members relative to movement in the mid-point of remuneration bands?**

[14] The annual review of the remuneration bands undertaken in 2014 by the remuneration forum resulted in increases of between 0.97% and either 3.15% or 3.47% to the midpoints of the bands.<sup>2</sup> The Union's view is that all affected employees should have had a salary increase because their positions on the relevant bands were determined by the midpoints.

[15] It says the result of the Agency insisting that increases would be dependent on individual performance assessments was that some employees had a relative salary decrease. This occurred when their remuneration, which was set at a percentage of the midpoint, was not increased in line with the increase to the midpoint in their remuneration band.

[16] NZTA denies this is a breach of the collective agreement and says it is in accordance with the remuneration provisions agreed between the parties. In its view an increase in band movements agreed between the parties did not automatically translate into increases for individuals. The Agency says the 2013-2014 collective agreement reflected the parties' agreement to separate individual outcomes from band movements.

---

<sup>2</sup> The parties disagree on the upper percentage relevant to members

[17] The Agency says the purpose of the remuneration forum, in which it and the Union participate, is to agree annual movements in remuneration bands. Decisions on salary movements for individual employees is explicitly out of its scope and is determined by a different process involving their respective managers and a moderation process involving team and group management.

[18] Counsel for both parties referred to the principles of interpretation relating to collective agreements as summarised by Chief Judge Colgan in *New Zealand Air Line Pilots' Association Incorporated v Air New Zealand Limited*.<sup>3</sup> Those principles are well-known and often quoted and it is unnecessary to repeat them here. While there was agreement on the relevant principles, counsel for each party reached a different conclusion when applying them to the current dispute.

[19] The Union submits historic practice supports its view that salaries should automatically increase when movements occur to the midpoint of bands. In his submissions Mr Lloyd says this was one of the two accepted mechanisms for increasing remuneration, with the other being through the performance assessment process. He submits that, although the process for achieving band movement has changed because of the remuneration forum, the effect of band movement, which was to give corresponding salary increases across the board, should not be affected.

[20] The Union rejects evidence given by the Agency that band movement has nothing to do with salary increases. It notes clause L16 of the collective agreement is explicit that an individual employee's salary is determined by the midpoint and expressed as a percentage of the midpoint. It notes that 90% of the midpoint is set as the minimum starting rate for a position in a remuneration range and 115% is the maximum. Once an employee attains that maximum, his or her only salary increases will be by means of performance-based lump sum payments as provided for in clause L19.

[21] In oral evidence Ms Reid acknowledged there was no specific provision in the collective agreement stating that employees' remuneration would increase in line with increases to the midpoint. However, she said that was the intention. In Mr Lloyd's submission, the employer is not able to reduce the position of an employee whose performance has been assessed at a particular percentage of the relevant salary band:

---

<sup>3</sup> [2014] NZEmpC 168

if the midpoint increases, the employee's salary must accordingly increase to reflect the new amount the percentage represents.

[22] The Union, citing *NZALPA v Air New Zealand*, submits background knowledge will aid the interpretation of the collective agreement.<sup>4</sup> It says the only person who gave evidence to the Authority who had background (historic) knowledge of how the collective agreement applied was Mr Burnette. His evidence supported the Union view that across the board salary increases for all workers in a salary band, the midpoint of which had been increased through collective bargaining, were an automatic consequence of that bargaining.

[23] NZTA's view is that the salary bands generally moved up each year as they tracked market movements but this did not directly result in increases for individuals. NZTA would consider the new band midpoint together with performance and affordability factors. The Agency points to clause L7 of the collective agreement which specifically provides that maintaining parity with the midpoint should not be regarded as automatic and that any movement would be based on performance and affordability.

[24] In submissions for NZTA Mr Cain notes the historical evidence provided by Mr Burnette related to collective bargaining undertaken between the Union and Land Transport New Zealand, not NZTA. As this concerned events predating the Agency's formation in 2008, it was not relevant to an understanding of the collective bargaining undertaken between the parties since then.

[25] I accept that submission. Mr Burnette's evidence was that he had finished working for the Agency's predecessor in 2007. His evidence relating to practices

predating NZTA's formation is of limited assistance in understanding the obligations of the parties to subsequent and current bargaining. While prior instruments between the parties or their predecessors may be considered in interpreting a document,<sup>5</sup> in this instance I find the passage of time and subsequent collective agreements made between NZTA and the Union have significantly diminished the value to be gleaned

---

<sup>4</sup> n2 at [21]

<sup>5</sup> n2 at [21]

from evidence of any earlier arrangements made between the Union and the Agency's predecessor.

[26] I find there was no requirement, on a natural and ordinary reading of the 2013-2014 collective agreement, for an individual's remuneration to increase relative to any increase in the midpoint of remuneration bands that were agreed in the remuneration forum. Clause L7 of the high level guiding principles states plainly that maintaining parity with the midpoint is not to be regarded as automatic and that affordability and performance factors will be taken into account.

[27] I am not persuaded by the Union's submission that clause L7, taken in the context of its immediately surrounding clauses L6 and L8, "*...only relates to the performance related percentage of the midpoint and how new employees reach it*". That interpretation ignores the reference in clause L7 to affordability being a factor to be taken into account in any (salary) movement to maintain parity with the midpoint.

[28] I find there is no provision in the collective agreement that guarantees employees an automatic increase in remuneration following an increase to the midpoint of their salary range. There is, however, an explicit provision that maintaining parity with the midpoint should not be regarded as automatic and that factors of performance and affordability will be relevant to any considerations of movement.

[29] Accordingly I find NZTA did not breach the 2013-2014 collective agreement in not awarding Union members an across the board salary increase relative to movement in the mid-point of remuneration bands.

**Was NZTA required to award salary increases to Union members who met or exceeded their performance requirements?**

[30] The Union submits from its analysis of clauses L16, L18 and L9 of the collective agreement that increases to remuneration are available to employees who achieve or exceed the requirements of the role. In its view the collective agreement equates satisfactory performance with a steady move through the salary range to the maximum 115%. Satisfactory performance, or meeting the requirements of the job, is denoted by the midpoint. The Union views the performance assessment process as

being intended to provide a pathway for employees to reach the maximum of the range, which can be reached by at least satisfactory performance.

[31] I agree the pathway for progression is potentially available to employees. The language of clauses 16 and 18, however, makes progression discretionary rather than mandatory. Clause 16 provides that an employee assessed as performing the job satisfactorily "*may*" have their remuneration moved over time towards 115% of the midpoint. It does not provide their remuneration will progress in that manner.

[32] Clause 18 provides that an employee must "*at least*" achieve the requirements of the role to be "*eligible*" for an increase in remuneration or a lump sum payment. The inclusion of "*at least*" suggests a discretion to require a higher standard and establishing eligibility for an increase is not the same as establishing an entitlement to the increase.

[33] The wording around the rate for doing the job satisfactorily differs in that it uses prescriptive language. It provides that the midpoint value will be equivalent to the rate for doing the job satisfactorily. NZTA says this does not state or imply that those who have met expectations must be remunerated at the midpoint of the range. The Agency has referred to situations in which employees who have met expectations could be remunerated at a level above the midpoint, for example if the midpoint dropped, or below the midpoint if finances were insufficient.

[34] I have considered the views of the parties and the principles, both high level and detailed, of the remuneration provisions. I note the principles acknowledge affordability as a factor in remuneration discussions between the parties (L4). They also refer to affordability and performance in the context of remuneration movement in relation to maintaining parity with the midpoint (L7). Changes in fixed remuneration for employees at or above the rate for doing the job satisfactorily are based on performance (clause L21). Employees have no entitlement to remuneration increases if they are simply meeting the requirements of their roles (clause L18). That will establish their eligibility for an increase in remuneration or for a lump sum payment, but does not confer an entitlement.

[35] Having considered these factors I do not find any requirement in the 2013-2014 collective agreement for NZTA to award salary increases to those Union members who met or exceeded expectations. It would be reasonable to expect salary

increases would have been awarded subject to the affordability and performance factors referred to above being met. However, that does not entail an unconditional obligation on NZTA to award salary increases to Union members who met or exceeded performance requirements.

**Did NZTA breach good faith by failing genuinely to consider the Union's claim for a negotiated wage increase?**

[36] The Union, which was in bargaining with NZTA at the time of lodging its statement of problem in June 2015, says the Agency refused to consider or discuss its claim for an across the board salary increase for Union members. It claims NZTA breached its general statutory obligation of good faith to be responsive and communicative<sup>6</sup> and its specific good faith obligations in relation to collective bargaining under s. 32(1)(c) of the Act.

[37] NZTA denies that it refused to discuss or consider the Union's claim and says the claim was the subject of most of the discussion over several days of bargaining for the 2014-2015 collective agreement. I have reviewed the handwritten notes taken by NZTA of its bargaining. It is clear to me from those notes the Union's claim for a 5% across the board remuneration increase for members was indeed discussed at each of the bargaining sessions and at the mediation in which the parties participated.

[38] There is a fundamental difference of opinion between the parties over across the board increases. The Union seeks the same percentage pay increase for all its members as well as the opportunity for performance-related increases. NZTA's preference is to pay employees in line with the market and to increase remuneration on the basis of individual performance and position in the range.

[39] The Agency tabled a document explaining its position in the course of bargaining in February 2015. It noted that position in the range was not a measure of an employee's performance or pay, but was an indicator used to compare employees' pay with the market. I note the evidence shows parties continued to discuss the Union's pay claim after that date.

[40] I am satisfied from the documentary and oral evidence that the Agency acknowledges the right of the Union to raise claims for across the board pay increases

---

<sup>6</sup> Section 4(1A)(b) of the Act

for its members as part of the collective bargaining process. The Union has not been successful in persuading the Agency to its view. However, the failure to agree in bargaining cannot be equated with a breach of good faith by either party. I find the evidence does not support the Union's claim.

**Has NZTA failed to deal in good faith with the Union in the context of the remuneration forum?**

[41] The remuneration forum provision at L31 was introduced in the 2011–2013 collective agreement. It provides that the parties will meet annually to agree annual movements in remuneration bands. It also specifically provides that decisions on movements for individual staff are outside the scope of the forum. Where they are unable to agree on appropriate band movements, each party is to "*submit their position and recommendation to the Chief Executive who shall make the final decision.*"

[42] The Union claims NZTA attends the remuneration forum with a predetermined position and a closed mind. It says the "*proposal*" the Agency presents to the forum is in fact its final position and this is the approach the Agency has adopted in both 2014 and 2015.

[43] Additionally the Union says when the parties cannot agree on appropriate band movements and refer their positions and recommendations to the Chief Executive (CE), he (the CE) does not genuinely consider the Union's position and refuses to meet the Union to discuss any unresolved issues arising from the forum. The Union describes the CE's conduct as misleading and deceptive and say he has failed to be responsive and communicative.

[44] Mr O'Connell's evidence is that the remuneration forum is a sham. It is not, as it should be, a genuinely collaborative process in which information is compiled, considered and discussed by the parties ending ultimately with agreement on appropriate band movements. As an example of the criticism he levels at the way the forum operates Mr O'Connell noted the March 2015 forum meeting in which the Agency presented a document which summarised discussions that had already occurred, and decisions already taken, within NZTA by people who did not appear at the forum to engage in discussion.

[45] Ms Elston attended the Remuneration Forum in 2013 and 2015. Ms Leather attended in 2013, 2014 and 2015. Their evidence rejects the Union's assertions of predetermination and closed minds. They say proposed changes to remuneration bands the Agency puts forward are a starting point for discussion.

[46] In relation to the 2014 Remuneration Forum Ms Leather's evidence is that, while the Union representatives raised two specific issues and expressed concern about the remuneration process generally, they did not express any concern with the band movement proposed by the Agency. Two weeks after the forum, however, Mr O'Connell had emailed her stating the Union would take the opportunity to submit to the CE setting out its alternative proposal. He noted the Union wished to submit their proposal in person to the CE and sought Ms Leather's advice on how to arrange that.

[47] Ms Leather's response advised Mr O'Connell to either write a letter to the CE or, alternatively, email her and she would pass it on to him, whichever he felt most comfortable doing. She noted the matter the CE would be considering would be restricted to the proposed salary band movement as provided for in the collective agreement.

[48] Further correspondence between the parties ensued in which Mr O'Connell reiterated the Union's wish to put its position in person to the CE and Ms Leather noted the issues he raised were potentially wider than the remuneration band movement and related more to matters under discussion in the current bargaining. She repeated her advice that the Union's remuneration band concerns should be put in writing and that any matters relating to bargaining should be addressed between the Union and NZTA bargaining teams.

[49] Mr O'Connell responded by saying the suggestion that the Union put its position in writing to the CE was unacceptable. He said the *"failure to be able to meet and bargain with the decision maker leads us to the conclusion that the process you are using is in our view a breach of Good Faith."* He also said it was a waste of time for the Union to engage in the Remuneration Forum process as NZTA went ahead with its own process of distribution regardless of any submission the Union made. Mr O'Connell stated the Union's view that there should be a negotiated across the board wage payment and that it wished to meet the CE and the Senior Leadership Team to discuss paying Union members a 2% pay increase and to review the Agency's remuneration process.

[50] In her evidence Ms Leather noted that the Union appeared to be attempting to circumvent the collective bargaining process by bargaining directly with the CE.

[51] The CE's response to Mr O'Connell rejected the request for a meeting, noting the collective agreement did not require a submission to be made in person. He also noted Mr O'Connell's submission did not address the proposed band movements, instead reiterating the Union's position in relation to the collective bargaining that was currently under way. The CE encouraged the Union to re-engage with the bargaining process.

[52] The 2015 remuneration forum appears to have followed a similar path to 2014 forum with the Union claiming it had no ability to influence the proposals for remuneration band movement put forward by NZTA, and again seeking a meeting with the CE.

[53] The Union is obviously frustrated by the process but in my view its frustration stems from the provisions of the collective agreement to which it is a party. The problem lies in the restrictions regarding the scope of the remuneration forum. Clause L31 states the purpose of the forum as being to agree annual movements in remuneration bands. The correspondence between the parties referred to above makes it clear the Union does not wish to be restricted to making submissions on band movement but wishes to engage with the CE on its wider concerns, in particular its view that its members should receive across the board pay increases.

[54] E tū is entitled to make submissions to the CE in accordance with clause L32 in relation to its position on remuneration band movement, arising from the parties' inability to agree on those movements in the remuneration forum. The Union is, however, going beyond the scope of the collective agreement provisions in trying to bargain directly with the CE. In doing so it lays itself open to the accusation that it has breached good faith in failing to recognise the role and authority of the Agency's appointed bargaining team.

[55] I note that clause L32 places no restriction on the method a party must follow in submitting its position and recommendation to the CE. It is unhelpful and overly prescriptive for NZTA to restrict such communications from the Union to a written presentation. The Agency may believe it is justified in doing so because the Union has indicated it wishes to have discussions ranging wider than remuneration band

movement. However, there is no evidence that its own representatives at the Remuneration Forum are similarly restricted in the manner in which they put forward their position and recommendation to the CE.

[56] I do not find NZTA has breached good faith in relation to the remuneration forum. In my view the parties would be best served by trying to resolve the concerns the Union has raised in bargaining.

### **Determination**

[57] For the reasons given above I do not uphold E tū's claims regarding the application of the collective agreement or its claimed breaches of good faith by the New Zealand Transport Agency.

### **Costs**

[58] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**