

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 56
5569240

BETWEEN CORRECTIONS ASSOCIATION
 OF NEW ZEALAND INC
 Applicant

AND CHIEF EXECUTIVE OF THE
 DEPARTMENT OF
 CORRECTIONS
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Jim Roberts and Jodi Sharman, Counsel for Applicant
 Karen Radich, Counsel for Respondent

Investigation Meeting: 23 and 24 February 2016 at Wellington

Submissions Received: 24 February 2016 from the Applicant
 24 February 2016 from the Respondent

Determination: 23 May 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Corrections Association of New Zealand Inc. (CANZ) and the respondent (the Department) are parties to the Department of Corrections Frontline Staff (Prisons Based) Collective Agreement (the collective agreement).

[2] CANZ claims the Department breached a number of provisions of the collective agreement when it decided to rename, and effectively disestablish, all Senior Case Manager positions in 2015. It says the parties are in dispute about the interpretation, application or operation of the collective agreement.

[3] CANZ also asserts that the restructure undertaken by the Department in 2015, which resulted in the decision to rename the position of Senior Case Manager,

undermined an agreement made between the parties in bargaining to review the duties and responsibilities of the Case Manager and Senior Case Manager positions. This, in CANZ's view, is a breach of good faith pursuant to s.4(1)(a) and (b) of the Employment Relations Act 2000 (the Act).

[4] CANZ seeks remedies including findings with regard to the Senior Case Manager position; findings regarding breaches by the Department of specified clauses of the collective agreement; and compliance orders with respect to each of those findings. It also seeks a finding that the Department's restructure undermines an agreement made in bargaining and is a breach of good faith.

[5] The Department denies it has breached any provisions of the collective agreement or the good faith provisions of the Act and asserts its right to implement change and improvement as sanctioned by the collective agreement. It says the part of its restructuring that related to Senior Case Manager and Case Manager roles resulted in one role title being replaced. Instead of employing Case Managers and Senior Case Managers, the Department now employs Case Managers. It says there is still a salary scale and opportunity to progress. Furthermore, it says the former Senior Case Managers have had their terms and conditions of employment "*grandparented*" so they suffer no disadvantage.

[6] The Department says nothing in the collective agreement precludes this change from occurring. It also asserts it followed a lengthy and thorough consultation process between the date of circulating the proposal for comment on 9 April 2015 and the decision being made on 14 May 2015 to retitle the Senior Case Manager position.

The collective agreement

[7] The current collective agreement was signed on 7 April 2015 and, as noted above, came into effect on 20 March 2015 and expires on 1 March 2017. Clauses of the collective agreement that are relevant to this dispute are reproduced below:

1.3 Coverage and classifications

1.3.1 The agreement covers all staff of the Department who are employed in custodial positions listed in schedules A1 and A2 and non custodial positions in schedules A3 to A4 and also to such staff of the Department in positions agreed by the parties as falling within the scope of the term "Frontline staff" (Prison Based) who are employed by the Department in the employment classifications listed in the

schedules to this agreement during the term of the agreement and who become members of CANZ.

1.3.2 *Other employment classifications may be added to this agreement as agreed in writing by the Department and CANZ during the term of the agreement consistent with the provisions of 1.3.3 below.*

1.3.3 *Coverage is restricted to any position listed in Schedules A1-A4 or any other similar agreed position which has a maximum salary equal to or below the maximum salary of the position of PCO. There may, however, be positions classified under Administration which the parties agree fall outside of coverage. Similarly if a union member is engaged in a position for which there is no appropriate classification provided in Schedules A1 to A4 the parties may agree to vary the agreement to include such a role in accordance with 1.4 of this agreement.*

1.3.4 and 1.3.5 N/A

1.4 **Variations**

1.4.1 *This agreement may be varied during its term by agreement between the parties. The process for bargaining for a variation will be:*

- a) *The variation proposal will be provided in writing to the other party; and*
- b) *The other party will consider and respond to the variation proposal; and*
- c) *If either party requests, the parties will meet to negotiate the variation proposal.*

1.4.2 *To be effective, any variation must be recorded in writing; agreed and signed by the Department; and agreed and signed by CANZ following a ratifying vote of its members directly affected by the proposed changes.*

1.5 **Good employer**

1.5.1 *In accordance the State Sector Act 1988, the Department will act as a good employer in all aspects of its dealings with its employees and with CANZ as their union.*

1.5.2 *The Department is committed to fair treatment of employees and equality of employment opportunities. All employees will have equal opportunity in the Department for recruitment, training and promotion regardless of gender, marital status, family responsibilities, ethnicity, disabilities, sexual orientation or age.*

2.1 Working together

2.1.1 *The Department aims to have effective communication so that discussions on matters relating to employment can be initiated by CANZ with the appropriate manager and by the Department with the nominated CANZ representative.*

2.2 Consultation

2.2.1 *The process of change is ongoing and should form part of the organisation's continuous improvement. The parties recognise that consultation is an essential part of that process and are committed to effective consultation.*

2.2.2 *Where proposals being considered by the Department may result in significant changes to the organisational structure, staffing or work practices affecting staff, the Department will notify the National Secretary of CANZ and will provide CANZ and staff with a meaningful opportunity to be involved in considering those proposals. In doing so, the Department will:*

- (a) Ensure that effective consultation occurs; and*
- (b) Provide CANZ with all relevant information to enable constructive consideration of what is being proposed and the reasons for the proposal; and*
- (c) Allow a reasonable timeframe for CANZ and staff to respond; and*
- (d) Keep an open mind and listen to any suggestions; and*
- (e) Make a genuine effort to accommodate CANZ views.*

2.2.3 *N/A*

2.2.4 *The Department has the right to plan, manage, organise and finally decide on the operations and policies of the Department, subject to the provisions of this Agreement. In doing so however, the Department accepts its responsibility to deal with CANZ and its members in good faith in accordance with the Employment Relations Act 2000. This duty of good faith includes the requirement for the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

2.2.5 *The Department recognises that employment conditions referred to within this Agreement may only be changed by negotiation and agreement.*

10.1 Organisational change

10.1.1 *The process of change is continuous and forms part of the Department's continuous improvement.*

10.1.2 *Where organisational change is being considered that may result in positions no longer existing, consultation with CANZ shall take place in accordance with the consultation provisions of this Agreement, prior to a decision being made.*

10.1.3 ...

Schedules for occupational classifications covered by the CANZ Frontline Agreement

In accordance with clause 1.3 of this agreement, the schedules in this part of the agreement (Schedule A) record the rates of pay and, where applicable, specific allowances and the specific terms and conditions of employment that apply to union members who work in specific occupational areas, and whose positions (other than the positions listed in the Schedule for Prisoner Employment and Training positions) are part of the organisational structure of one of the institutions listed in Schedule B1.

Schedule A

A4.1 Salary scales

Case Manager	1/3/15 (2%)	1/3/16 (2%)
Level 4	\$64,785	\$66,081
Level 3	\$60,467	\$61,676
Level 2	\$56,148	\$57,271
Level 1	\$51,828	\$52,865

Senior Case Manager	1/3/15 (2%)	1/3/16 (2%)
Level 4	\$73,424	\$74,892
Level 3	\$69,646	\$71,039
Level 2	\$66,407	\$67,735
Level 1	\$62,627	\$63,880

Note: *Level 4 Case Managers who are appointed to a Senior Case Manager position shall be appointed at Step 2 of the Senior Case Manager salary scale.*

A4.2 Progression for Case Managers

Progression will be in accordance with the progression criteria in the Department's performance management system.

Employees attain the position of Senior Case Manager by appointment by the Department.

A4.3 Higher Duties Allowance

A higher duties allowance is payable where an employee is required to undertake the duties and responsibilities of a higher level position for five consecutive working days or more. The employee shall be paid for such time at the applicable salary rate.

Issues

[8] The issues for determination are:

- (a) Whether the Department has breached clauses 1.4.1 and 1.4.2 of the collective agreement by effectively removing the Senior Case Manager position;
- (b) Whether the Department has breached clause 1.5.1 of the collective agreement by not acting as a good employer in all aspects of its dealings with its employees and with CANZ as their union;
- (c) Whether the Department has breached Schedule A4.1 of the collective agreement
- (d) Whether the Department has breached Schedule A4.2 of the collective agreement by removing a Case Manager's ability to progress to the position of Senior Case Manager;
- (e) Whether the Department has breached Schedule A4.3 of the collective agreement by removing a Case Manager's ability to receive a higher duties allowance when performing the duties and responsibilities of a Senior Case Manager;
- (f) Whether the parties agreed in bargaining for the collective agreement to review the duties and responsibilities performed by the Case Manager and Senior Case Manager positions and, if so, whether the Department's restructure undermines that agreement made in bargaining and is a breach of good faith under s.4(1)(a) and (b) of the Act.

Evidence of the parties

[9] Evidence for CANZ was provided by Alan Whitley, President of CANZ, and Beven Hanlon, National Organiser of CANZ. Evidence for the Department was given

by Vince Arbuckle, Deputy Chief Executive Corporate Services; Fiona Fitzpatrick, National HR Operations Manager; David Kettley, Principal Adviser – Employment Relations; Dubravka Kralj, Senior OD Adviser in the HR team; Lynn O'Connor, currently Acting Prison Director at Tongariro Prison; and Maree Chetwin, Manager, Regional HR for Central Region.

[10] 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 of this matter and will not do so¹.

Breaches of Collective Agreement?

A Clauses 1.41 and 1.42

[11] CANZ submits the Case Manager and Senior Case Manager roles are positions that were bargained for and included in the collective agreement by agreement between the parties. The Department cannot act unilaterally to remove a position without negotiation and the agreement of the union. Mr Roberts, in submissions on behalf of CANZ, refers to the process specified in the collective agreement for varying the agreement during its term and says this was not followed by the Department when it removed the position of Senior Case Manager in 2015.

[12] He submits the Department's view, put forward in Mr Kettley's evidence, that the Case Manager and Senior Case Manager roles are not "*in*" the collective agreement is wrong. He says the collective agreement relies on the classifications and positions contained in Schedules A1 to A4 to establish coverage. The classifications and positions of both Senior Case Manager and Case Manager are in Schedule A4.

[13] Mr Roberts submits that, as a coverage clause is one of the limited number of required components of a collective agreement, the absence of such a clause would throw the validity of the collective agreement in doubt. He cites Judge Shaw's conclusion in *NZ Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Cityline (NZ) Ltd T/A Cityline Hutt Valley*² that:

¹ s. 174E of the Act

² [2007] ERNZ 667

*Either it is a collective agreement in terms of the Act or it is not. If it is not then it is void and of no effect.*³

[14] He further submits that, if Mr Kettley was correct that there were salary scales for those roles in the collective agreement but the roles themselves were not “inside” the agreement, the consequence for the parties would be that the collective agreement was not valid. He cites Judge Shaw in *Cityline* where she stated that:

*...a collective agreement must comply with statutory requirements in order to come into force and is only then binding and enforceable.*⁴

[15] Submissions for the union cite the Chief Judge of the Employment Court who, in *Aviation & Marine Engineers Association Inc v. Air New Zealand Ltd*⁵ stressed the importance of compliance with a collective agreement in the same way as a party would comply with the Act:

*The essential questions in the case are ones of compliance with the statute but also with these collective agreements that are statutory instruments. Principles of commercial contractual interpretation cannot divert the Court from that task and cannot override the principles applicable to the interpretation of statutory provisions and of collective agreements as statutory instruments.*⁶

[16] Submissions made by Ms Radich for the Department are that the employer is able to change the titles of roles in the organisational structure. It is also able to implement new structures, subject to contractual and legislative provisions. She submits it is clear, from an examination of the series of events leading to the creation of the Senior Case Manager role in 2011, that the position was neither “agreed” nor “bargained for” between the parties.

[17] Evidence given by Ms Fitzpatrick reiterated that view. She said the roles of Senior Case Manager and Case Manager were established by the Department in a restructuring process for which appointments were made and a salary scale established. The restructuring proposal had been circulated for consultation in October 2010 and resulted in a decision document being released in October 2011. A number of positions had been disestablished in the restructure and new positions

³ n2 at [30]

⁴ n2 at [20]

⁵ [2013] NZEmpC 172

⁶ n5 at [67]

established including those of Case Manager, Senior Case Manager and Principal Case Manager.

[18] Ms Fitzpatrick said the collective agreement with CANZ that was in force at the time did not expire until December 2011 and the union did not seek to vary the agreement to include the new positions. Offers of appointment to the new roles were made on the basis of employees' existing terms and conditions of employment, with their salaries noted in the offer letter. The salary scales for the case management roles were included in a schedule to the new collective agreement during bargaining. Ms Fitzpatrick insisted that no bargaining or negotiation had taken place with CANZ about the creation and establishment of these roles.

[19] I am not persuaded by the Department's submissions. The position of Senior Case Manager and its accompanying salary scale could not have been included in the collective agreement without the agreement of the union. Neither the Department nor CANZ can introduce a new position into the collective agreement without the agreement of the other party.

[20] The decision document referred to by Ms Fitzpatrick recorded the generally positive reception given to the structural change proposals that were introduced in April 2011. This may explain the lack of bargaining over their introduction into the next collective agreement. However, the lack of opposition by the union to a provision proposed by the employer does not diminish the "*agreed*" status of that provision.

[21] Ms Radich also submits the positions of Senior Case Manager have been "*retitled*" not disestablished. In her view the Department has the right to do that under clauses 2.2.4. and Part 10 of the collective agreement. She submits that Part 10 of the collective agreement, which concerns Management of Change provisions, envisages structural change and provides that this "*may result in positions no longer existing*". In this situation the Department is required to consult with CANZ before a decision is made. Ms Radich submits that consultation took place.

[22] I reject the submission that the Senior Case Manager position has been "*retitled*" not disestablished. The removal of the description of "*Senior*" from a position title, and of the salary scale that accompanied that position, is not simply a retitling. While the incumbents of the Senior Case Manager positions as at 30 June

2015 have retained their salary provisions under a grandparenting arrangement, the position of Senior Case Manager and the salary scale for the position has otherwise ceased to exist. I find it is more accurate to describe this as a disestablishment of the position than as a retitling.

[23] Case Managers who did not have "*Senior*" preceding their titles at 30 June 2015 no longer have the possibility of appointment to a Senior Case Manager position. This curtails one significant avenue of progression for them. The Department's proposal to add one salary step to the Case Manager salary scale is unlikely to resolve this. Those who were Senior Case Managers at 30 June 2015 may not have not lost financially because they have retained the salary scale for their former positions but they have arguably lost status as a result of the Department's action.

[24] It is inconsistent for the Department to assert, four years after the establishment of the Senior Case Manager positions, it could dispense with the positions by simply removing the "*Senior*" descriptor. Its submissions in relation to the coverage clause of the collective agreement are unconvincing. They seek to minimise the reference in that clause to the positions listed in the Schedules to the agreement. The inference is that the employer has the right to "*retitle*" any position referred to in the Schedules. I disagree with that view and find it is necessary to vary the collective agreement to remove a position included in the coverage provisions of the agreement.

[25] Nor do I accept the Department's submission that clauses 2.2.4 and 10.1 allow it to disestablish the Senior Case Manager positions without the agreement of the union. Clause 2.2.4 permits the Department "*to plan, manage, organise and finally decide on the operations and policies of the Department*". However, that permission is tempered by the words immediately following which are "*subject to the provisions of this Agreement*". I find the Department's ability is subject to the variation clause of the collective agreement which makes it clear that a variation must be agreed between the parties.

[26] Clause 10.1 provides for a "*continuous process of change*" which forms "*part of the Department's continuous improvement*". The clause refers to the possibility of organisational change being considered that could result in positions no longer existing. In that situation the Department will undertake consultation in accordance

with the consultation provisions of the collective agreement before any decision is made. Those provisions are at clause 2.2 of the agreement and include 2.2.4 which, as noted above, makes the Department's ability to "*plan...and finally decide.*" subject to the provisions of the collective agreement. That again brings the variation clause into sharp focus.

[27] For these reasons I find the Department was not entitled to remove the position of Senior Case Manager without agreement from CANZ to a variation of the collective agreement. In not following that process the Department has breached clause 1.4 of the collective agreement.

B Clause 1.5

[28] CANZ submits the Department breached its good employer obligations as set out in clause 1.5 of the collective agreement. That clause refers to the State Sector Act 1988 obligations pertaining to Public Service departments. The good employer obligations are set out at s. 56 of that Act. They require the Chief Executive of a department to operate a personnel policy that complies with the principle of being a good employer.

[29] A good employer for the purposes of the State Sector Act is one who "*operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment...*". Section 56(2) specifies a number of provisions departments must have in their personnel policies. These include good and safe working conditions; an equal opportunities programme; impartial selection of suitably qualified personnel; and recognition of the aspirations and employment of Maori, cultural and ethnic groups and women.

[30] I find no evidence that the Department breached any of these provisions in the removal of the Senior Case Manager position and I therefore find that it did not breach clause 1.5 of the collective agreement.

C Schedule A4.1

[31] CANZ claims the Department has breached Schedule A4.1 by unilaterally removing the Senior Case Manager position and salary scale. I have found the Department was not entitled to remove the position of Senior Case Manager without

the agreement of CANZ to a variation of the collective agreement. It follows that the Department was not entitled to remove the salary scale for the Senior Case Manager position as specified in Schedule A4.1.

[32] Although the salary scale has been grandparented for those employees who held the designation of Senior Case Manager at 30 June 2015, it has effectively been removed for any other purpose. This is not in accordance with the collective agreement which provides for the designation of Senior Case Manager and an agreed salary scale for that position. It also provides for the step in the scale to which Case Managers are to be appointed when they successfully apply for a Senior Case Manager position.

[33] I find the Department has breached the provisions of Schedule A4.1.

D Schedule A4.2

[34] CANZ asserts that the Department has breached the provisions of Schedule A4.2 by removing a Case Manager's ability to progress to the position of Senior Case Manager.

[35] The Schedule provides that employees attain the position of Senior Case Manager by appointment by the Department. While there is no provision for automatic progression to a Senior Case Manager position, it is clear that the removal of that position has limited opportunities for advancement for Case Managers.

[36] I accept the Department's evidence that there are other opportunities for career progression for Case Managers. However, I find that in removing the Senior Case Manager position the Department has removed a specific opportunity for advancement identified in the collective agreement for Case Managers. The removal of that opportunity constitutes a breach of the provisions of Schedule A4.2 of the collective agreement.

E Schedule A4.3

[37] CANZ claims the Department has breached this provision by removing a Case Manager's ability to receive a Higher Duties Allowance when performing the duties of a Senior Case Manager.

[38] Schedule A4.3 applies to other positions in the schedule as well as Case Managers. It applies to the Rehabilitation and Reintegration positions which, in addition to Case Managers and Senior Case Managers, includes Scheduler Coordinators/Schedulers, Programme Coordinators and Pou Ariki. Librarians and Tutors are also referred to in this Schedule.

[39] The clause does not specify the positions for which any employee covered by Schedule A4 may qualify for the receipt of a Higher Duties Allowance: it refers to an employee who is required to undertake the duties of a higher level position for five consecutive working days or more. It may be that the greatest opportunity for a Case Manager to qualify for a Higher Duties Allowance before 30 June 2015 was filling the position of a Senior Case Manager on a temporary basis. However, on the evidence before me I am not able to say that was the only avenue by which a Case Manager might receive a Higher Duties Allowance.

[40] I find the Department has not breached Schedule A4.3 of the collective agreement.

Breach of Good Faith?

[41] CANZ claims that during the bargaining for the collective agreement an agreement was reached between it and the Department to review the responsibilities and duties performed by the Case Manager and Senior Case Manager positions. It was Mr Whitley's evidence that this agreement resulted from complaints by the union about the excessive work loads of both Case Managers and Senior Case Managers.

[42] The union says the Department's subsequent restructure undermines what was agreed in bargaining and breaches good faith in terms of s. 4(1)(a) and (b) of the Act. Those provisions require the parties to an employment relationship⁷ to deal with each other in good faith and not, directly or indirectly, to do anything to mislead or deceive each other, or anything that is likely to mislead or deceive each other.

[43] Ms Fitzpatrick denied that the parties had reached an agreement in bargaining to review the responsibilities and duties of the Case Manager and Senior Case Manager positions. She referred to her own notes taken during bargaining and said

⁷ Section 4(2)(a) provides that this includes the relationship between a union and an employer

she had checked the notes of another of the bargaining team members to support her evidence.

[44] Mr Kettley, who was also a member of the bargaining team, supported Ms Fitzpatrick's evidence. He had no recollection of the agreement claimed by Mr Whitley. His evidence was that, if such an agreement had been reached in bargaining, it would have been recorded in the agreed terms of settlement. There was no reference to that agreement in the terms of settlement letter.

[45] I accept the Department's evidence and am not satisfied there was an agreement made between the parties during bargaining for the current collective agreement to review the duties and responsibilities of the Case Manager and Senior Case Manager positions. That being so I find no basis for the union's claim that the Department breached good faith and undermined what was agreed in bargaining by embarking on the restructure that led to its decision to "*retitle*" Senior Case Managers' positions.

Findings

[46] The Department is not able to remove the Senior Case Manager position under the guise of retitling it without the agreement of CANZ. An agreed variation to the collective agreement is required to achieve this.

[47] The Department has breached clauses 1.4.1 and 1.4.2 of the collective agreement by not obtaining the agreement of CANZ to such a variation before effectively removing the position of Senior Case Manager.

[48] The Department has breached the provisions of Schedule A4.1 of the collective agreement by removing the salary scale for Senior Case Managers, other than as a grandparented provision for those employees designated as Senior Case Managers as at 30 June 2015. It has breached the provisions of Schedule A4.2 by removing an opportunity for advancement for Case Managers.

[49] The Department has not breached clause 1.5 of the collective agreement or the provisions of Schedule A4.3.

[50] There was no agreement made between the Department and CANZ in bargaining to review the duties and responsibilities of Case Managers and Senior Case

Managers. Accordingly the claim for a breach of good faith for undermining such an agreement fails.

Remedies

[51] I have considered CANZ's application for compliance orders against the Department for those breaches I have upheld but am not persuaded this is an appropriate case for exercising my discretion to make such orders under s. 137 of the Act.

[52] On 14 May 2015, immediately after the Department had made its decision regarding Senior Case Manager positions, CANZ proposed a variation to the collective agreement. The variation entailed the removal of the Senior Case Manager position, and the creation of two additional salary steps for the Case Manager position. Specific salary steps were proposed for Case Managers who were assigned the type of work that Senior Case Managers were allocated at that time, including the mentoring and supervision duties.

[53] The proposal was not rejected by the Department, and there appeared to be some willingness by both parties to engage constructively on the matter. However, that did not occur, possibly because of misunderstandings or miscommunication. In light of the findings I have made I believe it appropriate that the parties resume that dialogue and attempt to reach agreement on the matter.

[54] In the event they are unable to do so, CANZ has leave to apply for the appropriate compliance orders relevant to the findings made in this determination.

Costs

[55] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority