IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 95
3003912

	BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION - TE PUKENGA HERE TIKANGA MAHI Applicant
	AND	LIEUTENANT GENERAL TIM KEATING – CHIEF OF NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranny and Catherine McNamara, Counsel for Applicant Joanna Holden and Nigel Lucie-Smith, Counsel for Respondent
Investigation Meeting:	29 June 2017 at Wellington
Submissions Received:	At the investigation meeting
Determination:	29 September 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, New Zealand Public Service Association Te Pukenga Here Tikanga Mahi (PSA), claims the respondent, the New Zealand Defence Force (NZDF), has breached the obligation of good faith[1] by not bargaining about the wages

[1] Reference is made to ss 4 and 32 of the Employment Relations Act 2000

payable to some PSA members covered by a collective employment agreement (CEA) between the two.[2] PSA seeks a compliance order requiring NZDF bargain wages.[3]

[2] NZDF refutes the claim it has not bargained in good faith and/or is breach of its obligations under ss 4 and 32 of the Employment Relations Act 2000 (the ER Act). It says the parties have *actively negotiated* and as a result have resolved all but two issues.[4] Remuneration is one of them with NZDF saying this is due to the fact the remuneration table applicable to the employees to whom this claim applies does not form part of the CEA and is not a negotiable condition of the agreement.[5]

Background

[3] PSA has a number of members employed by NZDF. Their terms and conditions of employment are governed by a CEA, the most recent of which had a term spanning the period 1 July 2014 to 30 June 2016. Subject to s 53 of the Act its terms remain enforceable for a further year to 30 June 2017.

[4] Contained therein and pertinent to this dispute is provision which reads:

> 142. The total remuneration table and package applicable to employees covered by Part B of the CEA do not form part of, and are not negotiable terms and conditions, of this agreement …

[5] That is followed by clauses which advise an employee's remuneration should be reviewed at least annually and reflect the value of the employee's contribution, performance, and the requirements of their position. The clause also advises the outcome of any review would be *subject to organisational financial constraints, affordability and prudent expenditure of public money* and an employee should have no expectation an increase would result. There is a right of review.

[6] This is commonly referred to as a *remuneration forum* approach in the New Zealand Public Service.

[7] It appears the approach reflected by the above provisions was initially adopted by NZDF in approximately 2006. At that time it reviewed its form individual

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[2] Statement of Problem at [1]
[3] n 1 at [3.2]
[4] Statement in reply at [2.2]
[5] n 4 at [2.5]

employment agreements (IEAs) with a key change being a move toward a total remuneration approach.

[8] It is NZDF's view these changes were greeted with a level of approval by staff and that led to the PSA raising concerns about its ability to retain members during negotiations for the renewal of the CEA in 2010. NZDF is of the view PSA thought the IEAs created a perception that staff so covered got more due to the higher published salary levels though claims this of course ignored the fact deductions then occurred.

[9] The PSA goes on to say pressures emanating from NZDF's approach left it with no alternative but to enter into a CEA which split its membership between what are identified as Parts B and C of the resulting 2010 CEA. Part B members could keep the IEA pay-rates they had agreed to upon joining under the pay scheme controlled by the employer. Part C members would have lower salaries but would retain additional terms and conditions. It is the Part B members to whom this application applies.

[10] Notwithstanding the above agreement it would be fair to say the PSA is dissatisfied. It sees such process as undermining collective agreements, collective bargaining and unions. It says a new employee takes the higher rate and no collective agreement. It says that over time many non-salary conditions diminish in scope or are destroyed and unions reduce in size and are weakened.

[11] The PSA goes on to say:

> By the time bargaining began in 2016, the newer union members covered by Part B were well aware that the pay system so tightly controlled by the employer was not delivering adequate pay outcomes. They also wanted the right to bargain collectively about wages.

[12] Accordingly the claims lodged by the union when bargaining was initiated on 2 May 2016 include one which sought to abandon the remuneration forum approach and bargain pay for all members covered by the CEA. NZDF counterclaimed by seeking an extension of the Part B approach to Part C workers and the total elimination of collective bargaining about wages.

[13] Since that time there have been numerous meetings but the issue has not been resolved.

[14] On 20 January 2017, PSA wrote to NZDF. The letter alleges PSA wishes to *negotiate and agree salary and salary fixing arrangements* for its members at NZDF but the employer *refused to bargain pay* and *intends to determine pay without negotiation.* The PSA took issue with that approach, asserted NZDF was, as a matter of law, required to bargain pay and sought confirmation it would do so.

[15] NZDF replied on 31 January 2017 but the letter only talks about Part C employees. It also raises the content of a Defence Force Order which the PSA says:

> It purports to establish a power to determine unilaterally the wages all workers, wage movement arrangements for each of them, subject only to an obligation to "consult" with unions and the State Services Commission.
>
> The union considers DFO3 is unlawful as outside of the Chief of Defence's statutory powers conferred by s.27.

[16] The PSA is of the view that while a unilateral defence force order might appropriate for members of the armed forces it is not a proper process for determining the wages of civilians. That is because unlike members of the armed forces who are expressly excluded[6] civilian workers are covered by the Employment Relations Act 2000 and have the right to bargain collectively and periodically about all matters including wages.

[17] On 21 February 2017 PSA filed a Statement of Problem with the Authority. That led to a letter from NZDF to PSA dated 15 March 2017. The letter seeks further particulars; appears to express some confusion about the claim and expresses the view that for various reasons the current arrangement should remain.

[18] The letter closes by asserting NZDF's position is not an exhibition of bad faith but a legitimate position it can justify. The letter closes by asking that the PSA withdraw the Statement of Problem.

[19] Obviously it hasn't which has led to the current investigation.

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[6] Section 45(5) of the Defence Act 1990

Determination

[20] Both parties gave fulsome submissions which canvassed a wide range of issues including, for example, the legality of promulgating wages for civilian staff via Defence Force Orders. The submissions will not be recorded or summarised[7] but the parties can be assured they have been considered.

[21] Similarly not all the issues canvassed will be determined with a prime example being the legality or otherwise of the present system of promulgating wage rises though Defence Force Orders. That is because it is not an issue which needs to be addressed in order to reach a conclusion on the application as pleaded. That said I do observe that I have significant reservations about current process. Section 45 of the Defence Act allows the Chief of Defence Force to prescribe the conditions of service for members of the Armed Forces. It does not state that power extends to civilian staff who are, as the PSA has said, covered by the ER Act and to whom that Act applies.[8]

[22] The PSA seeks a bargained outcome in respect to wages. It is entitled to do so. A bargained approach requires an agreed consensus before a conclusion is reached and adopted. That implies somewhat more than the current process under which NZDF's obligation is limited to seeking consultative input from the PSA. The two processes are quite different with consultation implying agreement need not be reached. Having considered the PSA's input NZDF remains free to impose an outcome. That is not a power the Defence Act bestows in respect to the terms of employment for civilian staff.

[23] As already said the pleadings are very narrow. What is sought is an order requiring NZDF bargain about wages in accordance with ss 4 and 32 of the ER Act.

[24] Those sections require, amidst other things, that good faith be exercised when bargaining for a collective agreement. That means each party is required to consider and respond to proposals made by the other.[9]

[25] The PSA seeks to include an agreed salary scale in its CEA with NZDF.

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[7] Section 174E(b)(ii) of the Employment Relations Act 2000
[8] Section 69 of the Defence Act 1990
[9] Section 32(1)(c) of the Employment Relations Act 2000

[26] While NZDF has made various responses it states it position is essentially that enunciated in an e-mail from Karamea Dorset, NZDF's principle employee relations advisor, to a PSA organiser dated 19 August 2016.[10] Amidst other things, and having referred to the present system introduced in 2010, the e-mail advises:

> NZDF will not therefore agree to have the Rem bands which pertain to its wider civilian workforce, the subject of negotiations by the PSA as part of CEA negotiations, which will therefore require the PSA's agreement. To do so would put the PSA in the position of negotiating the Rem bands for all of NZDFs civilian employees. That is not acceptable to the NZDF, when the PSA's own membership has been declining for the last 10 years partly because the PSA does not reflect what the majority of NZDF civilian personnel want on the way of employment conditions.
>
> However, the NZDF is prepared to give the PSA the opportunity, outside of CEA negotiations, to be consulted on the Rem bands …

[27] That that remains the position was confirmed by Ms Karamea when giving evidence. Her answers to various questions included advice NZDF placed reliance on the 2010 provision and that led to a view salary scales were excluded from bargaining and would not be discussed.

[28] This approach is, in my view, fundamentally flawed. It ignores the fact that even if the 2010 provision has been confirmed at subsequent negotiations it does not have an indefinite life. There is simply no way NZDF can say, as it appears to here, that once agreed a provision will continue indefinitely. Indeed no provision in a collective agreement can have a life which exceeds four years.[11] Furthermore the very nature of bargaining means the PSA is entitled to propose either a change or the complete removal of a clause.

[29] That the PSA has now done and once NZDF was faced with a salary scale the PSA sought to have included in the CEA s 32(1)(c) of the ER Act requires its consideration and a response. NZDF cannot simply say it will not agree to the inclusion of a scale as the e-mail of 19 August states.

[30] Here I also comment on some of the reasons tendered. For example NZDF expresses a concern that bargaining wages would mean the PSA is negotiating for non-members. That is not correct. The PSA has no ability to agree Rem bands for non-members and those that may be included in a collective cannot apply to such

[10] Letter McCall to McNamara dated 15 March 2017 at [4]

staff. They two might influence outcomes for the other but they do not apply. NZDF might well take the approach its research means the bands proposed for non-PSA employees are reasonable and there is no viable reason to offer anything different but that requires a different conversation from that which is currently occurring. It requires a consideration of the numbers and not a blanket refusal to even contemplate such a discussion.

[31] Finally I note that at its simplest, employment is about an exchange of labour for remuneration. Notwithstanding s 54(2) of the ER Act which says the content of a CEA is determined by what the parties agree I struggle to see how an agreement covering an employment relationship can ignore the essential element of consideration from an employee's perspective. In this regard I note the Court's comments in *First Union v Jacks Hardware and Timber Ltd*.[12] At [147] the Court observes:

> Remuneration is a fundamental element of an employment relationship. Individual employment agreements must contain, statutorily, information about the remuneration to be paid to the employee. There is, however, no such statutory requirement of a collective agreement. That is perhaps because it is so obvious that collective agreements will deal with remuneration, or at least minimum remuneration, that it has always been assumed that a collective agreement will contain such a term or condition. So, too, is it a fundamental underlying assumption of employment relations that remuneration will be the subject of agreement between the parties and not by unilateral imposition by the employer based on its own assessment of the employee's performance of his or her job…

[32] This last point again brings into focus the concerns I have about consultation as opposed to bargaining and indicates the Court would frown upon NZDF's approach.

[33] For the above reasons I conclude the order sought should be granted. The PSA is entitled to more than a blanket refusal to discuss any form of salary scale having proposed one. It is at least entitled to a rational discussion about how wages are to be agreed and recorded that extends beyond blind reliance on a provision whose existence the PSA is entitled to challenge.

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[11] Sections 52(3)(c) and 53of the Employment Relations Act 2000
[12] [2015] NZEmpC 230

[34] The PSA must also be reminded this does not necessarily mean a scale will ultimately be included in any resulting CEA or even that a CEA will be concluded. It may simply mean the parties cannot agree on an appropriate scale for inclusion.

Conclusion and Costs

[35] The PSA is successful and NZDF is ordered to negotiate meaningfully on the PSA's proposal a wage scale be included in the CEA. It must do more than simply say it will not agree to ones inclusion on the basis of a dated and arguably irrelevant clause as it has done to date.

[36] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority