

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 502
3062912

BETWEEN

THE BAY OF PLENTY
REGIONAL COUNCIL
Applicant

AND

BAY OF PLENTY REGIONAL
COUNCIL STAFF
ASSOCIATION
INCORPORATED
First Respondent

NEW ZEALAND PUBLIC
SERVICE ASSOCIATION TE
PUKENGĀ HERE TIKANGA
MAHI INCORPORATED
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Peter Crombie & Tania Waikato, Counsel for the Applicant
Bill Lawson & Gabrielle Coleman, Counsel for the First
Respondent
Peter Cranney & Catherine McNamara, Counsel for the
Second Respondent

Investigation Meeting: 17 July 2019 at Whakatane

Determination: 27 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, The Bay of Plenty Regional Council, (the Council), and the First Respondent, Bay of Plenty Regional Council Staff Association Incorporated (the Staff Association), and the Second Respondent, New Zealand Public Service Association Te Pukenga Here Tikanga Mahi Incorporated, (PSA), (the Unions), are parties to a collective agreement, the Bay of Plenty Regional Council Collective Employment Agreement 2017/2018 (the Current CEA). The parties have been engaged in collective bargaining since November 2018.

[2] A dispute has arisen between the Council and the First and Second Respondents about whether or not the Council is entitled to consult and engage with its employees who are not members of the Unions (the Individual Employees) about a new remuneration policy (REM 2020) that the Council wishes to introduce to the Individual Employees.

[3] The Unions are not opposed to the Council carrying out performance and remuneration reviews on the Individual Employees but are opposed to the Council consulting with the Individual Employees on the proposed REM 2020 while collective bargaining continues.

[4] This matter is proceeding on an urgent basis and this determination deals solely with the issue in dispute between the parties.

Issues

[5] The issues for determination are whether or not the Council:

- Has breached its good faith obligations in s 4 of the Employment Relations Act 2000 (the Act) by engaging with the Individual Employees about the REM 2020 offer at the Information Workshops held during April 2019.
- Will not be in breach of its good faith obligations under the Act if it makes an offer to its individual Employees including the terms set out in the REM 2020 Offer.
- Will not be in breach of its implied duty of good faith in Current CEA if it makes an offer to its Individual Employees including the same terms as the REM 2020 Offer.

Background

[6] The Council employs approximately 420 employees, approximately 11 of whom are members of the PSA and 255 of whom are members of the Staff Association (the Union Employees). The remaining employees numbering approximately 154 are not members of any union and are covered by individual employment agreements (the Individual Employees).

[7] The Current CEA expired on 30 September 2018 and a bargaining process agreement was signed in November 2018 (the BPA). Therefore the Current CEA continues pursuant to s 53(3) of the Act.

[8] Collective bargaining for a new CEA commenced between the parties on 21 November 2018 and is continuing.

[9] The Current CEA include the following clauses:

8.9 Policy Consultation

The following Bay of Plenty Regional Council policies can only be changed by agreement between the Employer and the Unions

- Performance and Remuneration Policy [2012]
- Breach of Policy or Employment Obligations (A2606900)

Information on these policies and their application is available on the staff intranet site ...

10.5 'Working relationship acknowledgment fee':

In recognition of the on-going working relationship the Bay of Plenty Regional Council has [agreed] with the Bay of Plenty Regional Council Staff Association Inc and the PSA, and for the ability to pass on any negotiated terms and conditions, each employee covered by this agreement shall receive a lump sum one-off payment ... per annum ...

[10] The parties entered into the Bargaining Process Agreement in November 2018 (the BPA) which included the following clauses:

The parties agree to work constructively to improve relationships between BOPRC and the Unions and their respective members.

d. If the parties conclude that they have exhausted their efforts under those provisions, and accept that they have a serious disagreement, they will identify a process in an effort to overcome the disagreement which may include a request for mediation in the first instance.

Either party may make a request for information under Section 34 of the Employment Relations Act.

The parties shall act in accordance with s 32(1)(d) of the Act.

If either party considers the other is not acting in good faith they should inform the other party as early as practicable to afford the opportunity for explanation or modification of the behaviours complained about.

[11] The Performance and Remuneration Policy known as REM 2012 applies to all employees both the Union Employees and the Individual Employees, and has two components:

- a. Adjustments for market movement (calculated by an agreed formula to ensure staff retained market relativity); and
- b. Adjustments for performance (the ability to offer additional financial incentive to employees who are performing in their role through a performance appraisal process.

Background

[12] Whilst REM 2012 had initially worked well following its introduction, Mr Murdoch, advocate for the Staff Association, said that a significant discontent had grown over later years due to pay inequity. This was because some employees considered to be ‘fully effective’ in their roles were placed at the 95% level of their salary grades and paid less compared to other ‘fully effective’ employees placed at a higher percentage of their grade.

[13] The Unions had acknowledged that the performance pay aspect of REM 2012 had not worked effectively in the past and had indicated that they were prepared to remove this aspect of the remuneration policy, and see the introduction of a new framework developed by the Council in return for the Council addressing the pay equity issue.

[14] Ms Karen Astley, People & Capability Manager, said that in reliance on clause 10.5 of the Current CEA which contains a ‘passing-on’ provision, the Council had previously implemented REM 2012, a joint Performance and Remuneration Policy, that covered its employees who are members of the Unions and its individual Employees. Ms Astley said that parts of REM 2012 were identical to the remuneration provisions in the previous and current CEAs.

[15] During the process of bargaining for a new CEA in 2019 the Council tabled an offer on 3 April 2019 (the Pay Equity Offer) which included:

- i. A move from the existing performance based pay scheme to a pay equity scheme;
- ii. Removal of the 2% uplift currently added to the average of the market salary surveys when setting annual salary grades (the Formula);
- iii. Provision of 3 additional days of paid leave each year;
- iv. An \$80 SmartCard each year for bus travel;
- v. A one-off ‘wellness payment’ of \$250 gross;

- vi. The option of a change to hours of work to enable employees to work their current hours in a 9 day fortnight; and
- vii. Removal of the current Performance Appraisal Process and a move to the Performance Development Process developed as part of the REM 2020 project.).

[16] The Council also offered to roll over the Current CEA in full for a further 12 months as an alternative (the Rollover Option). The Council asked that the Unions put both the REM 2020 Offer and the Rollover Option to their members for their consideration.

[17] The Unions state that REM 2020 was presented to them as the Council's 'best offer' with the Council presenting the Rollover Option as the only alternative.

[18] Mr Murdoch said that the Unions informed the Council that they would not be recommending the REM 2020 offer to their memberships due to the removal of the 2% uplift for market movement.

[19] The REM 2020 Offer was rejected by the Unions memberships in a meeting held on 11 April 2019. Following the meeting the Staff Association's solicitors wrote to the Council on 17 April 2019 advising:

We are instructed that at the negotiation session on 3 April 2019 you posed what was described as your best and final offer to conclude bargaining. ...

The delegates presented the Council's offer to the membership on 11 April 2019. The members present at the meeting (172 members) unanimously rejected the Council's proposal. ..

... The Staff Association considers that it has now been left in a position where it has no option but to roll-over the collective agreement. ...

This letter provides notice to the Council that if this occurs, the collective agreement will only be ratified on the basis that:

- (a) The collective agreement is re-instated in its entirety, including the provisions around performance remuneration; and
- (b) The issue of remuneration is addressed at a later stage. (the Counter-Offer)

It seems to us that rolling-over the collective agreement will not address the underlying issue of the correct interpretation and application of the remuneration scheme, particularly around performance-based pay. Our client is committed to resolving this issue

[20] On 15 April 2019, prior to receiving the letter dated 17 April 2019, the Council commenced a series of Information Workshops with the Individual Employees to provide them with survey results, data on salary positions and the options that the Council was considering for their pay reviews.

[21] The Council proposed to make the REM 2020 Offer to its Individual Employees in June as part of their salary review process and informed the Individual Employees of this.

[22] In a letter dated 7 May 2019 the Council advised that it withdrew its proposal that the Current Collective Agreement be rolled over until September 2019 and confirmed that it had decided to withdraw the Rollover Option on the basis that the parties should attend mediation to try and conclude a new CEA.

[23] In a letter dated 10 May 2019 the Council advised the Staff Association that it wished to progress to formally consulting with the Individual Employees on REM 2020. The letter stated:

Council wishes to inform the Staff Association of its intended approach to the new remuneration policy for those employees on IEAs in accordance with its good faith obligations in the bargaining for a new collective agreement. Council wishes to give the Staff Association an opportunity to comment on its proposed approach to the new remuneration policy with its other employees before it commits to that process and begins consulting with its other employees. ...

Because the terms of this offer have been rejected by the Staff Association members, Council now intends to offer these terms, or similar terms, to its employees on IEAs through the proposal of a new remuneration policy that would include these terms.

[24] The Staff Association responded by letter dated 21 May 2019 advising that it refused to consent to the Council's proposed negotiations with its individual Employees on REM 2020. The letter noted that the Council had already commenced a consultation process with the Individual Employees regarding a new remuneration policy and options for replacing the 2% uplift for market growth. The letter stated:

We consider that approaching the employees on individual employment agreements in this way, while the parties are still in negotiation on these

matters, breaches the Council's good faith obligations on the basis that it amounts to an attempt to influence bargaining and has the effect of undermining bargaining.

[25] The Council responded by letter dated 22 May 2019, in which it set out that it did not agree that it had already commenced consultation with the Individual Employees regarding a new remuneration policy.

[26] The letter noted that informal discussions and Information Workshops had been held with the Individual Employees at which they had been informed that the Council wished to start consulting with them formally on a new remuneration policy. The letter stated: "Council gave them information that could be considered in a new information policy as an example, but it did not consult with them over it."

[27] The letter noted that the Council had obligations to consult with all employees to carry out annual remuneration and performance reviews and stated:

Your client in refusing to consent to the commencement of the consultation process with IEA employees, and by alleging that if Council does so it would be a breach of good faith and undermine the collective bargaining, appears to be saying that Council cannot discharge its legal obligations to its other staff until agreement with your client on a new collective agreement has been achieved. ...

This position is untenable ..

[28] The Staff Association responded on 11 June 2019 noting that the Staff Association did not oppose the Council: "immediately commencing remuneration and performance reviews in accordance with all the applicable employment agreements and policies".

[29] The letter also stated that the Staff Association did not agree that in so doing the Council was required to negotiate with the Individual Employees about a new remuneration policy.

Has the Council breached its good faith by engaging with the Individual Employees about the REM 2020 Offer at the Information Workshops held during April 2019?

[30] Section 4 of the Act sets out the duty of good faith:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—
 - (a) must deal with each other in good faith; ...
- (2) The duty of good faith in subsection (1) applies to the following matters:
 - (a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:
 - (b) any matter arising under or in relation to a collective agreement while the agreement is in force:
 - (ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:
 - (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:
 - (c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business: ...

[31] Section 32(1)(d) of the Act states:

The union and the employer-

- (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
- (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
- (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.

[32] Section 59B of the Act states:

59B Breach of duty of good faith to pass on, in certain circumstances, individual employment terms and conditions agreed in collective bargaining or in collective agreement

- (1) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee who is not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer.

(2) However it is a breach of the duty of good faith in section 4 for an employer to do so if –

(a) the employer does so with the intention of undermining the collective agreement, and

(b) the effect of the doing so is to undermine the collective agreement

[33] As set out in s 4 of the Act the duty of the employer to deal in good faith is a statutory requirement which applies equally to a duty to deal in good faith with unions and with individual employees. The duty of good faith dealing is underlined in s 32 of the Act which applies to good faith bargaining for collective agreements and s60A of the Act which applies to good faith bargaining for individual employment agreements.

[34] Clause 8.9 of the Current CEA states that the Council can only change the Performance and Remuneration Policy [2012] by agreement with the Unions. The clause applies to both union and individual employees within the Council.

[35] Good faith applies during collective bargaining and I conclude that this clause was agreed between the Council and the Unions in good faith and with the full knowledge on the part of the Council that it would apply to the Individual Employees.

[36] The ‘Working relationship acknowledgement fee’ set out in clause 10.5 of the Current CEA further enforces the fact that clause 8.9 applied to the Individual Employees.

[37] Accordingly, in the present situation, the contractual term has ramifications regarding the Council’s statutory good faith duty as regards its Individual Employees who are also affected by the Performance and Remuneration Policy [2012].

[38] As the Current CEA remains in force, the Performance and Remuneration Policy [2012] applies to all employees within the Council. The offer to move to REM 2020, if accepted by the individual Employees, would mean that the Performance and Remuneration Policy [2012] would no longer apply to the Individual Employees from the date of implementation.

[39] The Council submits that as it has only held Information Workshops and not made an offer to the Individual Employees to date; offering REM 2020 to the Individual Employees would not be a breach of clause 8.9 of the Collective Agreement. This is on the basis that it would continue to apply

to the Unions members and that the Individual Employees are not parties to, and did not agree to be covered by, the terms of the Current Collective Agreement.

[40] I consider that removing coverage of REM 2012 from one section of Council employees would be a fundamental change to the policy and there is no evidence in the wording of the current CEA to support an intention between the parties to such a change at the time when clause 8.9 was included in the current CEA.

[41] I find that the 'Working relationship acknowledgement fee' arrangement in clause 10.5 whereby there is an ability to pass-on any negotiated terms and conditions supports the fact that it was intended that clause 8.9 of the Current CEA which refers to a Council policy would apply to the Individual Employees..

Undermining the bargaining

[42] The Unions submit that the Council's actions in holding the Information Workshops have undermined the bargaining, which is ongoing. It is submitted that many Individual Employees stand to gain by accepting the REM 2020 offer and that permitting the Council to engage in further consultation with the Individual Employees will undermine REM 2020 and the Union's stance on that issue.

[43] The Council submits that it has not breached the good faith duty and submits that the information workshop communications were not inconsistent with s 32(d) of the Act because the Individual Employees had not chosen any representative or advocate.

[44] I observe that the Council commenced the Information Workshops before the Unions confirmed that the REM 2020 offer had been rejected by the Unions membership. I find this to have been premature on the part of the Council and not to have been acting in good faith.

[45] The Council notes the increase in Union membership which has occurred since the Information Workshops as evidence that they did not undermine the bargaining pursuant to s 32(d) of the Act.

[46] The Unions submit that whilst Union Membership may have increased since the Council's Information Workshops, this may be attributable to the recent change in legislation which requires new employees to be covered by the terms of the collective agreement when they commence work.

[47] Mr Murdoch's evidence was that consultation will affect the psyche of the workplace and create uncertainty amongst the workforce.

[48] Two Union Employees also gave evidence. One said that he considered making the REM 2020 offer to the Individual Employees would divide the workforce, weaken the Unions and make the union members uncertain about the offer.

[49] The other Union Employee gave evidence that making the offer to the Individual Employees would worsen the pay inequity within the Council which was the issue that the Staff Association was seeking to address in bargaining.

[50] Both Union Employees said that since the Information Workshops have been held there is concern and confusion among the workforce, and that they have been challenged in the workplace as to why the Unions are being ‘unreasonable’.

[51] I find that whilst the Unions membership may not have been affected by the Information Workshops being held, this is not determinative since the increase in union membership numbers may be attributable to the recent change in legislation.

[52] I find that holding the Information Workshops presenting options for consideration and for the potential introduction of REM 2020 may have created a reasonable expectation in the Individual Employees regarding the introduction of REM 2020. Accordingly any lack of progress in the matter may be perceived by the individual employees as being hampered by the attitude of the Unions, thereby creating uncertainty in the work place.

[53] The evidence of the two employees is that the Information Workshops have adversely influenced the attitude of some Individual Employees towards Union Employees who are seen as being unreasonable in regard to the delay in the Council introduction of REM 2020.

[54] I find that communicating with the Individual Employees has affected the ongoing bargaining by creating pressure upon the Unions member employees about REM 2020. This may well have the potential to influence membership voting in the bargaining.

[55] I find that by holding the Information Workshops the Council has, whether deliberately or not, undermined the bargaining process pursuant to s 32(d)(iii) of the Act.

[56] I determine that the Council did breach good faith by consulting with the Individual Employees by holding the Information Workshops and providing information about REM 2020.

[57] Having found that the Council breached its duty of good faith by holding the Information Workshops I see no merit in considering the further two issues for determination.

Costs

[58] Costs are reserved. I consider that given the degree of success and the subject nature of the matters for determination it may be appropriate for costs to lie where they fall.

[59] However in the event that costs are sought, the parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondents would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Eleanor Robinson
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].