IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 538
3112335

	BETWEEN	ASSOCIATION OF PROFESSIONAL AND EXECUTIVE EMPLOYEES INCORPORATED Applicant
	AND	AUCKLAND DISTRCIT HEALTH BOARD AND THE DISTRICT HEALTH BOARDS LISTED IN SCHEDULE ONE Respondent

Member of Authority:	Peter van Keulen
Representatives:	W Manning and G Bowker, counsel for the Applicant S Hornsby-Geluk, counsel for the Respondents
Investigation Meeting:	14 and 15 July 2021
Submissions Received:	15 July 2021 and 5, 12 and 19 November 2021 from the Applicant 15 July 2021 and 5, 11 and 18 November 2021 from the Respondent
Date of Determination:	01 December 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Association of Professional and Executive Employees Association Incorporated (APEX) claims the Auckland District Health Board and six other DHBs (the DHBs) conferred a preference on members of the New Zealand Public Service Association (PSA) who are employed by them as medical laboratory workers. APEX says the DHBs have given preferential terms of employment relating to salary and penal rates for weekend work to laboratory workers who are members of PSA as opposed to non-PSA members.

[2] APEX claims this preference is unlawful and in breach of s 9 of the Employment Relations Act 2000 (the Act) and the DHBs actions in granting the preference to PSA members and not advising APEX of this preference whilst bargaining with it over the same terms and conditions amount to breaches of good faith.[1]

[3] APEX lodged a statement of problem based on these claims. It seeks declarations as to the alleged breaches, wage arrears for its members who are medical laboratory technicians employed at the DHBs - based on the difference between their rates and the preferential rates of the members of the PSA who are medical laboratory technicians employed at the DHBs - and a penalty for each breach of good faith.

[4] The DHBs deny any wrongdoing in relation to the underlying benefits conferred on PSA members, which are the basis of the preference claim. At its simplest, the DHBs say they have not conferred a prohibited preference nor have they breached the duty of good faith.

The Authority's investigation

[5] It is APEX's claims that the DHBs have conferred a prohibited preference and breached of duty of good faith that I investigated. I did this by receiving written evidence and documents, holding an investigation meeting on 14 and 15 July 2021 and assessing the oral and written submissions of counsel.

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[1] Section 4 of the Employment Relations Act 2000.

[6] I received witness statements from David Munro and Deborah Powell for APEX and Aaron Crawford and Daniel Parkman for the DHBs. In my investigation meeting, under oath or affirmation, each witness confirmed their statement and gave oral evidence in answer to questions from me and counsel. Counsel then provided oral and written submissions.

[7] As permitted by 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The issues to be determined in this case

A prohibited preference

[8] Section 9 of the Act provides:

> (1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,-
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> (a) any preference in obtaining or retaining employment; or
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> (b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.
>
> (2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.
>
> (3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits-
>
> (a) of a collective agreement:
>
> (b) arising out of the relationship on which a collective agreement is based.

[9] The starting point for a preference is that it is some advantage in the terms or conditions of employment conferred on a person (s 9(1)(b) of the Act).[2]

[10] However, it is not enough that there is a difference in employment terms and conditions between employees for a preference to be prohibited – sections 9(2) and 9(3) of the Act recognise this. This was confirmed by Judge Shaw in *New Zealand Meat Workers and Related Trades Union v Taylor Preston Limited*:[3]

> [43] Although s9 prohibits a preference where it is conferred because a person is or is not a member of a union, s9(2) acknowledges that mere difference in employment terms in a workplace does not make preference unlawful. Section 9(3) licences collective agreements to contain terms and conditions that recognise benefits. Different terms and conditions conferred on employees employed by the same employer may amount to preference but of itself this is not prohibited by s9.

[11] Something more than the mere difference of terms and conditions of employment between employees is required. The something more is the cause of the preference being conferred. Judge Shaw considered this aspect in *Taylor Preston Ltd* and after considering previous case law on this aspect, concluded:[4]

> [49] Although the full Court referred to motive in its discussion of s9, I do not read the *NUPE* decision as requiring an examination of the employer's subjective motives for conferring a preference to the extent urged on me by counsel. Motive is defined as "a factor inducing a person to act in a particular way." Section 9 does not refer to motive but uses the word "because" which means "for the reason that." The question is to be determined as a matter of fact. In both *NUPE* and *ABB* the Court inquired into the real substance of the preferential payments, that is, the reason why they were conferred. The issue is what caused the preference to be conferred. If it was union membership then it is prohibited
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> [Footnotes omitted.]

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[2] *Air New Zealand Ltd v Kippenberger* [1999] 1 ERNZ 390.
[3] *New Zealand Meat Workers and Related Trades Union v Taylor Preston Limited* (2009) 6 NZELR 470.
[4] *New Zealand Meat Workers and Related Trades Union v Taylor Preston Limited New Zealand Meat Workers and Related Trades Union v Taylor Preston Limited,* above n 3.

[12] So, where there is a preference – a difference in terms and conditions of employment between employees – then the key issue is, what caused the preference. If the cause of the preference being conferred is union membership (or not) then the preference is prohibited.

Issues for preference claim

[13] Based on this analysis of the applicable law the issues are:

(a) Did the DHBs confer a preference on laboratory workers who are members of PSA?

(b) If so, what caused the preference to be conferred, and based on this was the preference prohibited?

(c) If the preference was prohibited, what remedies are available to APEX and based on this, what should I award?

A breach of good faith

[14] The duty of good faith is an obligation in all employment relationships. The obligation is identified and expounded in s 4 of the Act. Section 4A of the Act then sets out the basis on which a penalty may be imposed for a breach of the duty.

[15] In *Morgan v Tranzit Coaches Wairarapa Ltd*, Chief Judge Inglis set out a five step approach to determining if a penalty should be imposed for an alleged breach of the duty of good faith. [5] I will use these five steps to determine if APEX's claim for a penalty based on the alleged breaches of good faith.

[5] *Morgan v Tranzit Coaches Wairarapa Ltd* [2021] NZEmpC 106.

Issues for breach of duty of good faith

[16] Based on ss 4 and 4A of the Act, and *Tranzit Coaches Wairarapa Ltd*, the issues for assessing whether a penalty should be imposed for an alleged breach of the duty of good faith are:

(a) Step 1 – what is the alleged breach?

(b) Step 2 – do the circumstances in which the alleged breach has occurred attract the duty of good faith?

(c) Step 3 – does the alleged breach amount to a breach of good faith?

(d) Step 4 - should a penalty for breach of good faith be imposed?

(e) Step 5 - should a finding of breach be made in the absence of a penalty?

The relevant facts

The APEX collective agreement with various DHBs and the corresponding collective agreements between PSA and the DHBs

[17] APEX had a multi-employer collective agreement with the DHBs as well as Northland and Counties Manukau District Health Boards and the New Zealand Blood Service (the APEX DHB parties). This MECA covered all APEX members employed by the APEX DHB parties as medical laboratory workers, with a term running from 7 September 2016 until 6 September 2019 (the APEX MECA).

[18] PSA had multi-employer collective agreements with all 20 of New Zealand's District Health Boards, covering its members employed in the DHBs as medical laboratory workers. PSA had two different MECAs, one with Auckland DHB, Waitematā District Health Board and Counties Manukau District Health Board with a term running from 7 December 2018 until 31 October 2020 (the Auckland PSA MECA) and one with the other 17 District Health

Boards with a term running from 7 December 2018 until 31 October 2020 (the RONZ PSA MECA).

[19] At that time, the Auckland PSA MECA and the RONZ PSA MECA had superior terms in relation to salary scales and penal rates for weekend work to those under the APEX MECA. But the two PSA MECAs were different:

(a) The Auckland PSA MECA had a salary scale that was 6.5% higher than the APEX MECA and penal rates for weekend work that were the same as the APEX MECA, being T1.5 for the first three hours worked before midday Saturday and then T2 for all other weekend hours.

(b) The RONZ PSA MECA had a salary scale that was 7.5% higher than the APEX MECA (and 1% higher than the Auckland PSA MECA) and penal rates that were T1.5 for all weekend hours.

[20] The difference between the two PSA MECAs arose because of a decision made in bargaining in 2016 when the medical laboratory workers under the Auckland PSA MECA accepted a salary scale increase of 1% less than those covered by the RONZ PSA MECA in order to keep the higher penal rates for weekend work. That is under the Auckland PSA MECA members accepted a lower salary scale but kept higher penal rates for weekend work and under the RONZ PSA MECA members accepted a higher salary scale but lower penal rates for weekend work.

APEX and the APEX DHB parties bargain over a new APEX MECA

[21] In July 2019 APEX initiated bargaining with the APEX DHB parties for the renewal of the APEX MECA. In the course of collective bargaining APEX raised two claims (amongst others) relating to salary scales and penal rates for weekend work.

[22] The APEX claims in 2019 reflected the higher salary position under the RONZ PSA MECA and the better penal rates for weekend work under the Auckland PSA MECA. APEX

sought a 7.5% increase to their members' salary scales whilst maintaining the weekend penal rates, being T1.5 for the first three hours worked before midday Saturday and then T2 thereafter.

[23] The APEX DHB parties rejected APEX's salary and penal rate claims on the basis that it was too expensive for the DHBs to pay both the higher salary scale and the higher penal rates for weekend work.

[24] After a reasonably protracted period of bargaining APEX and the APEX DHB parties applied for and were referred to facilitation. The parties attended facilitation on 26 and 27 March 2020. A facilitator's recommendation was issued on 27 March 2020 and on the basis of this the APEX DHB parties made a formal offer to APEX on 31 March 2020. A new APEX MECA based on this offer was ratified on 6 April 2020 and signed on 7 April 2020.

[25] In relation to salary and weekend penal rates the new APEX MECA provided:

(a) a salary scale increase so that all APEX members covered by the new APEX MECA were on the same scale as the Auckland PSA MECA (i.e. the lower salary scale).

(b) weekend penal rates for all APEX members covered by the new APEX MECA, except those employed by the Auckland and Waitematā District Health Boards, of T1.5 for the first three hours of work on Saturday morning and T2 for all other hours worked in the weekend (i.e. the higher penal rates).

(c) weekend penal rates for APEX members employed by the Auckland and Waitematā District Health Boards, of T2 for any hours worked on Saturday morning up until 6:00 am (for Auckland DHB) or 8:00 am (for Waitematā DHB), T1.5 for the first three hours of work between 6:00 am or 8:00 am and 12:00 midday on Saturday and T2 for all hours worked from 12:00 midday on

Saturday through Sunday (i.e. the higher penal rates with the addition of better rates for early Saturday morning work).

The COVID-19 pandemic in New Zealand and a national lockdown implemented

[26] In early 2020 the Covid-19 pandemic was taking hold internationally; at this time there were serious and dire reports, as well as confronting images, of numerous countries' health care systems being overrun with Covid-19 patients.

[27] It was against this backdrop that the first case of Covid-19 in New Zealand was reported on 28 February 2020.

[28] In response to the increasing numbers of Covid-19 infections in New Zealand, Prime Minister Jacinda Ardern announced the country wide alert level system on Saturday, 21 March 2020, with New Zealand being at Alert Level 2 at that time.

[29] Then, on Monday 23 March 2020, Prime Minister Ardern announced that New Zealand would move into nationwide lockdown being placed in Alert Level 3 immediately and then Alert Level 4 from 26 March 2020. New Zealand remained in Alert Level 4 or Alert Level 3 lockdown until 14 May 2020, shifting to Alert Level 2 on that day.

[30] Aaron Crawford, an ER Specialist with Central Region's Technical Advisory Services Limited (TAS)[6], gave evidence that the uncertainty about the impact of the Covid-19 pandemic permeated and influenced the decisions made within healthcare. As that related to medical laboratory workers the focus of the New Zealand Government on testing even in the early stages of Level 4 Lockdown meant that TAS believed there would be a significant increase in the testing volumes required and medical laboratories would need to "ramp up" their capacity.

[6] TAS is a shared services organisation that provides national workforce and employment relations services to all 20 District Health Boards in New Zealand and is a representative in relation to bargaining for multi-employer collective agreements for those 20 DHBs.

[31] To put this into context with the bargaining being undertaken at the time for medical laboratory workers, the Level 4 Lockdown was announced just after APEX and the APEX DHB parties were referred to facilitation, and facilitation was conducted during the first few days of Lockdown. The new APEX MECA was signed two weeks into Level 4 Lockdown.

PSA seek to vary the terms of the RONZ PSA MECA

[32] It was just prior to the announcement of the Level 4 Lockdown, on 20 March 2020 that a National Health Organiser for the PSA contacted Daniel Parkman, an ER Specialist with TAS, and discussed a concern raised by PSA members employed as medical laboratory workers under the RONZ PSA MECA. The concern was that as testing for Covid-19 increased more weekend work would be required and they would be paid less for this extra work than their APEX colleagues (who had higher penal rates for weekend work). In an email follow up on 23 March 2020 the PSA Organiser stated:

> Further to our discussion on Friday afternoon attached please find the relevant clauses from the NZBS SECA that we are seeking to include in the [RONZ PSA MECA]. The need for this as discussed has arisen from a number of contacts that we have had from our Laboratory Services members concerned that as testing for COVID-19 ramps up they may/will be required to work weekends and longer hours to provide the necessary cover.
>
> They are rightly, also concerned that if they were to work weekends they would be doing so alongside their colleagues who are APEX members and who are paid T2 for working all hours between midday Saturday to Midnight Sunday at T2. We also think this would be unfair. The NZBS SECA provides 2 salary scales, A (scale A) for those employees who are required to work weekends during their ordinary hours and the other (scale B) for those that work Monday to Friday. Scale A mimics the [Auckland PSA MECA] scales, where the weekend penal rates is higher in comparison to the [RONZ PSA MECA].

[33] Effectively the PSA Organiser was seeking a variation to the RONZ PSA MECA to align it with the NZBS SECA, whereby a worker could chose a lower salary rate but higher weekend penal rates or a higher salary rate but lower weekend penal rates. The effect of the proposal was to give PSA members employed as medical laboratory workers the opportunity to paid higher penal rates for weekend work but at the sacrifice of a lower salary rate.

[34] Mr Parkman was, at that time, involved in the bargaining for the new APEX MECA so he raised the issue internally with Mr Crawford and others and there was some internal TAS consideration of the proposal. From Mr Parkman's evidence and Mr Crawford's evidence it appears that TAS was interested in the proposal insofar as it addressed the disparity of weekend penal rates across the APEX MECA, the two PSA MECAs and the NZBS SECA. But they saw difficulties arising with then aligning salary scales as this required a reduction in salary under the PSA RONZ MECA, which could not be done and they saw potential difficulties with an amendment to either PSA MECA as that would require a ratification process.

[35] In an email of 23 March 2020 Mr Parkman stated – *Have you considered using a side letter per site, then re-examine in Oct, therefore sidestepping the ratification process?*

[36] Then in another email of 23 March 2020 Mr Parkman stated - *If this is a temporary arrangement linked to COVID-19 then it needs to be temporary. If it's a permanent change then there needs to be better rationale and more robust process.*

[37] And, in an email of 27 March 2020 Mr Crawford stated – *The idea is not to vary (reduce) salary and increase penal but provide that the current DHB staff have penal rate not less than their Auckland PSA colleagues.*

[38] So, by 27 March 2020 Mr Crawford and Mr Parkman had reached a point where they tentatively saw the proposal from the PSA Organiser as being workable on the basis it was captured in a side letter rather than an amendment, was temporary and linked to Covid-19 or future bargaining and was based on increasing weekend penal rates for PSA members on the RONZ PSA MECA and the Auckland PSA MECA to align those rates with the weekend penal rates in the APEX MECA.

[39] Mr Crawford then engaged with the PSA Organiser to progress the discussion over aligning weekend penal rates. On 31 March 2020 the PSA Organiser sent Mr Crawford draft side letters. These letters addressed the weekend penal rates but also included other matters

that had not been raised previously including night allowances, remote call arrangements and a varying scale for one-off payments. In an email of 2 April 2020 Mr Crawford responded to this pointing out that there were other differences between the PSA MECAs and what was then the proposed terms of settlement for the new APEX MECA, some superior for APEX and some superior for PSA but TAS was focussed on weekend penal rates as that was the main issue.

[40] Internal communications between Mr Crawford and Mr Parkman about the 31 March 2020 email from the PSA Organiser show they were acutely aware that the PSA Organiser was trying to extend the negotiation over weekend penal rates to include other aspects to match some of the terms of settlement for the new APEX MECA. And they were not prepared to entertain that:

(a) In an email of 3 April 2020 Mr Parkman wrote – *I think [the PSA Organiser's] asking to pick the eyes out of the APEX deal with none of the trade-offs.*

(b) And in an email in reply on 3 April 2020 Mr Crawford wrote – *[The PSA Organiser] must have had a minor knock on the head if he thinks PSA can pick up one end of the stick and not the other.*

[41] After some further internal communication and discussion TAS responded to the PSA Organiser in a comprehensive email from Mr Crawford on 6 April 2020. This email stated:

> In our view it remains the case that the side letters need to be time limited to the current expiry of the MECAs, in part this is about the recognition of the current demands on Labs (those involved in the COVID-testing especially) but also any enduring amendment to the terms and conditions needs to be reflected and accounted for in any MECA settlement(s).

[42] TAS had decided to tie the term of the side letter to the expiry of the PSA MECAs as at that time if Covid-19 demands meant the payment of weekend penal rates remained in issue then it would be subject to substantive negotiations in bargaining; as there was still a large amount of uncertainty at that time as to how any Covid-19 demands on testing might develop

in terms of the requirements for weekend testing, so it made more sense to tie the term to the next round of bargaining.

[43] Then the email went on to set out the effect of the side letters in terms of aligning the weekend penal rates for PSA members employed as medical laboratory workers under the PSA RONZ MECA and the Auckland PSA MECA, with the rates in the new APEX MECA. The email then addressed the other differences in the relevant MECAs concluding that some favoured APEX members and some favoured PSA members. The concluded by proposing to align only the weekend penal rates, setting out what would be implemented in each of the DHBs.

[44] This proposal was accepted by the PSA, with the PSA only raising a query around timing of the side letters being presented to the DHBs to approve and sign.

[45] TAS then sent the draft side letters to the DHBs with an explanation of the proposal inviting each DHB's chief executive to sign the side letter if their DHB accepted the proposal.

[46] Side letters were signed and returned to TAS for Taranaki DHB, Hawkes Bay DHB, Waikato DHB, Auckland DHB and Waitematā DHB.

[47] The effect of the signed side letters for Taranaki DHB, Hawkes Bay DHB, and Waikato DHB was to provide that PSA members employed in those DHBs as medical laboratory workers would be paid no less for weekend work than their colleagues – that is, they would be paid the greater amount for weekend work from applying either their current (lower) penal rate using their (higher) salary rate or the Auckland PSA MECA (higher) penal rate but at the Auckland (lower) salary rate.

[48] The effect of the signed side letters for Auckland DHB and Waitematā DHB was to provide a small change to the way in which the penal rates were calculated to align the rate with the new APEX MECA (see paragraph [25](c) above).

Prohibited preference

Is there a preference?

[49] Counsel for the DHBs submits that the side letters do not create a preference as they do not confer any advantage to the terms or conditions of employment for the PSA members employed as medical laboratory workers as opposed to non-PSA members employed as medical laboratory workers; the side letters simply grant relevant PSA members parity with other employees in relation to penal rates for weekend work.

[50] Counsel for APEX says this is the wrong approach to ascertaining if a preference has been conferred; focusing on the side letters alone fails to take into account the context of the overall package of terms and conditions that PSA members received as a result of the side letters and the Auckland PSA MECA or the RONZ PSA MECA.

[51] Counsel says the key point is that PSA members employed as medical laboratory workers under the RONZ PSA MECA with the relevant side letter had an overall arrangement that provided them with the benefit of both the higher salary rate and the higher penal rates for weekend work. In comparison APEX members employed as medical laboratory workers in the same DHBs under the APEX MECA had a lower salary rate aligned with the higher penal rates for weekend work.

[52] I accept counsel for APEX's submissions. It is artificial to simply focus on the side letters rather than the overall effect of the side letters. And, section 9 of the Act refers to a contract, agreement or other arrangement – in this case the arrangement is the MECA and the side letters.

[53] However, the side letter are an essential part of the arrangement. In the case of Canterbury DHB and the West Coast DHB the side letters were not signed nor were they implemented. Therefore there is no preference relating to the medical laboratory workers employed at Canterbury DHB or West Coast DHB.

[54] And in the case of Auckland DHB and Waitematā DHB the effect of the side letters was to align penal rates with the APEX rates. As the underlying salary rate remained the same as the APEX rate the overall effect of the arrangement was not to provide a preference; there was no advantage to PSA members employed as medical laboratory workers in the Auckland DHB or Waitematā DHB as their penal rates and salary rates were the same as APEX members employed as medical laboratory workers in the Auckland DHB or Waitematā DHB.

[55] In conclusion the effect of the side letters was to confer a preference for PSA members employed as medical laboratory workers in Taranaki DHB, Hawkes Bay DHB, and Waikato DHB.

What caused the preference to be conferred?

[56] As discussed the question of whether these preferences are prohibited turns on the reason for the preference being conferred.

[57] Counsel for APEX submits that the preferences were conferred because of union membership; in essence, the relevant DHBs conferred the preferences in order to make union membership with PSA more favourable by nullifying any gains that APEX had obtained in bargaining and giving PSA members an advantage or to simply favour PSA members over APEX members.

[58] Counsel for APEX submits there was no demonstrable reason for conferring the preferences other than union membership; in particular the reasons for conferring the preferences advanced by the DHBs do not withstand scrutiny.

[59] Counsel submits that the argument that side letters were necessary to incentivise medical laboratory workers to undertake additional work with the increased demand for Covid-19 testing is not supported by the actions undertaken or the realities of what was occurring. And that this expected increase in demand would raise issues of fairness between

workers working weekends and being paid different rates was not a credible argument. Counsel says:

(a) There was no basis initially to conclude that Covid-19 testing demand would cause increased demand for weekend work that would in turn impact on medical laboratory workers and there was no subsequent analysis undertaken to verify the assertion.

(b) The focus on weekend penal rates having an impact on medical laboratory workers' willingness to do weekend work lacks credibility as most weekend work was rostered and medical laboratory workers were obliged to work weekends.

(c) If there was to be any additional testing required this could be accommodated by overtime applying the existing separate and equal penal rates.

(d) If the increase to weekend penal rates was tied to anticipated increase in testing demand then it logically made sense to review that demand regularly, such as bi-monthly and not put any increase in weekend penal rates in place to end of the RONZ PSA MECA.

[60] I have considered the submissions of counsel for APEX and counsel for the DHBs and have considered the evidence. Based on this I am satisfied that the side letters for Taranaki DHB, Hawkes Bay DHB, and Waikato DHB were to align penal rates pending an anticipated increase in demand for testing due to Covid-19 and therefore a need to align rates to incentivise employees and reflect fairness in pay for weekend work. Therefore the preference for the PSA members employed as medical laboratory workers at these DHBs was conferred for this reason.

[61] My conclusion is based on the following:

(a) PSA originally approached TAS on this basis. This may have been opportunistic but the approach was premised on Covid-19 increasing demand for testing and a consequential need to align weekend penal rates in response to anticipated additional weekend work being required.

(b) TAS accepted this and proceeded on this basis as its rationale for advancing the negotiation. I accept there was limited evidence to support the position advanced and then limited analysis but this was adequately explained by the frantic, fast moving changing environment as the Covid-19 pandemic took hold worldwide and people were unsure about the impact in New Zealand. There was also limited means to assess at that time and anecdotal and/or subjective analysis of what TAS and PSA expected could happen was the best that could be used.

(c) TAS did not offer additional terms to give parity or some advantage to PSA terms over other APEX terms as requested; TAS was aware of this and shut it down.

(d) The agreement set out in the side letters was concluded and presented to the DHBs on the basis of weekend penal rate parity for increased work due to anticipated increase in demand for testing due to Covid-19. There was no ability for TAS or the DHBs to counter this preference by reducing the salary rates for PSA members, it was in many respects just a consequence of the timing of the negotiations and the circumstances prevailing at that time.

(e) There was no attempt to provide some other advantage to members of PSA employed as medical laboratory workers at other DHBs. If granting a preference was in order to favour PSA members then that might well have carried over into offering some other additional increase or benefits to those

members. This did not occur and in fact, nothing was offered to PSA members working at Counties DHB as they were already on higher penal rates and higher salary rates. And as I have already concluded there was no advantage (and therefore preference) for PSA members working at Auckland DHB or Waitematā DHB.

Conclusion - is the preference prohibited by s 9 of the Act?

[62] The reason for conferring the preference to PSA members employed as medical laboratory workers at Taranaki DHB, Hawkes Bay DHB, and Waikato DHB was to align weekend penal rates to incentivise employees and reflect fairness in pay for weekend work in light of an anticipated increase in demand for testing due to the Covid-19 pandemic. The preference was not conferred because of union memberships.

[63] The preference conferred on members of the PSA employed as medical laboratory workers at Taranaki DHB, Hawkes Bay DHB, and Waikato DHB was not a prohibited preference pursuant to s 9 of the Act.

Breach of good faith

Step 1 – what is the alleged breach?

[64] APEX says the DHBs have breached the duty of good faith by:

(a) Deliberately conferring a prohibited preference or at least being wilfully indifferent to conferring a prohibited preference, for relevant PSA members.

(b) Not disclosing to APEX that PSA members were seeking increases to weekend penal rates and the consequence of granting the increase would be relevant PSA members receiving the higher penal rates and the higher salary rates – this being a claim advanced by APEX in bargaining that had been rejected as being too expensive.

(c) If the purpose of the side letters was to incentivise PSA members employed as medical laboratory workers at relevant DHBs, to work weekends in response to an expected increase in testing for Covid-19, then that incentive should have been passed on to APEX members or at the very least should have been discussed with all relevant stakeholders and the DHBs (through TAS) did not do this.

Step 2 – do the circumstances in which the alleged breach has occurred attract the duty of good faith?

[65] The duty of good faith applies to parties engaged in collective bargaining, as Apex and the DHBs were.

Step 3 – does the alleged breach amount to a breach of good faith?

[66] I have already determined that the preference conferred was not prohibited so for the first alleged breach of good faith, the action giving rise to the alleged breach did not occur and there is no breach of good faith.

[67] Turning to the other two alleged breaches, the actions complained of did occur. The question therefore is whether the failure by the DHBs to disclose to APEX what was being negotiated with PSA in terms of the side letters, in the two circumstances outlined, amount to a breach of the duty of good faith.

[68] The duty of good faith is set out in s 4 of the Act; the obligation on the parties is not to mislead or deceive each other and to be active and constructive in maintaining a relationship in which each is responsive and communicative.

[69] Misleading and deceptive behaviour in bargaining is about a party advancing and/or holding a position that is not arguable or cannot be substantiated.[7]

[70] A failure to be active and constructive in maintaining a bargaining relationship, in which a party is responsive and communicative, is more than one party acting badly or behaving tactically, it is positioning or behaviour that frustrates the process and impedes bargaining taking place effectively. [8]

[71] Applying those two aspects broadly to the alleged breaches of good faith I am satisfied there was no breach by the DHBs. By not disclosing to APEX that PSA members were seeking increases to weekend penal rates the DHBs were not being misleading or deceptive nor were the DHBs failing to be active in constructive, insofar as they were not frustrating bargaining. There is no obligation on an employer to disclose to one union what its negotiations with another union are.[9]

[72] The DHBs position, in terms of not disclosing its negotiations with PSA was also entirely consistent with the history of bargaining in that there was always some level of disparity between members of different unions. In this case the side letters were no exception to that, the agreement for increased penal rates for weekend work was in response to issues raised by PSA and was a product of negotiation, that may have temporarily provided some advantage to PSA members in certain DHBs over APEX members but that reflected to normal fluctuations of advantage and disadvantage in terms of any competing collective agreements. The cycle of bargaining and the differing emphasis and focus of negotiation at any given time produces differing terms and conditions.

[73] I do accept that the particular circumstances advanced by Counsel for APEX add an extra element to this assessment, but, that said, I am not persuaded that the circumstances mean the DHBs breached the duty of good faith.

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[7] *Toll New Zealand Consolidated Limited v Rail & Maritime Union Inc* [2004] 1 ERNZ 392 at [81]; and *Auckland District Health Board v New Zealand Resident Doctors' Assn Inc* [2010] ERNZ 358.
[8] *Jacks Hardware and Timber Ltd v First Union Inc* [2018] NZEmpC 94.
[9] *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ537.

[74] Firstly, the DHB's rejection of APEX's claim for higher level salary and higher penal rates for weekend work because it was unaffordable is questionable in light of that very deal being given to PSA members employed at Taranaki DHB, Hawkes Bay DHB and Waikato DHB. The key difference here is the difference in cost. The evidence from TAS was that the cost of the high salary and high penal rate deal for APEX was significantly more than the additional cost anticipated by giving penal rate parity to PSA members in the relevant DHBs. In short, the DHB's position that the APEX claim was not affordable was made honestly and consistently through the bargaining and was one that could be substantiated.

[75] Secondly, if the side letters were in response to a perceived need to incentivise medical laboratory workers to work weekend shifts then that incentive should have been passed on to all workers or at least discussed with all stakeholders does not follow. The side letter arrangement was about incentivising a small group of workers who would be earning less for weekend work, it was not about incentivising everyone to work weekends. Also the incentive was not giving extra above what APEX members had in terms of weekend work. The reality was there was no incentive to pass on and no need to create some incentive for others. The side letters were just adjusting a variance in rates to create equality amongst PSA and APEX members working weekends; it was about ensuring workers were treated fairly compared to colleagues when additional weekend work might be required.

Conclusion on breach of good faith

[76] In conclusion the DHBs did not breach the duty of good faith as alleged; they were not misleading or deceptive nor did they fail to be active and constructive in maintaining the bargaining relationship.

Outcome

[77] There is no unlawful preference and DHBs have not breached the duty of good faith. APEX's claims are dismissed.

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
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