

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 139
3124454

BETWEEN	REUNITED EMPLOYEES ASSOCIATION INCORPORATED Applicant
AND	NELMAC LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	John Drummond for the Applicant Nick Mason, counsel for the Respondent
Investigation Meeting:	6 and 7 October 2022
Submissions and further information received:	Up to 27 January 2023 from the Applicant Up to 24 January 2023 from the Respondent
Date of Determination:	21 March 2023

THIRD DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Reunited Employees Association Incorporated (REA) is a union whose members are employees of Nelmac Limited, a council-controlled trading organisation that provides environmental management services.

[2] From 2017 the relationship between REA and Nelmac has been problematic and there have been various claims in the Authority relating to bargaining and compliance with the collective agreement between the parties. A summary of the relevant claims and the progress was set out in my determination dated 26 November 2021.¹ My determination of 26 November 2021 resolved the claims relating to bargaining.

[3] The claims that remain to be resolved between the parties arise because REA says:

(a) Nelmac has failed to implement and apply some of the terms of the collective agreements between REA and Nelmac. REA says Nelmac's actions amount to breaches of the relevant collective agreements.

(b) Nelmac has failed to comply with obligations under the Employment Relations Act 2000 (the Act) relating to bargaining and undue influence on REA members to leave the union.

(c) Nelmac has failed to implement agreements reached in facilitation relating to regular meetings between REA and Nelmac and the use of the job title "Green Spaces Operator".

[4] Nelmac says it has not breached the collective agreements, has not breached the Act as alleged and does not accept there were agreements reached on the matters raised.

The Authority's investigation

[5] It is REA's claims of various breaches of the collective agreement that I have now investigated and this determination resolves. I did this by receiving written evidence from John Drummond and Kathleen Drummond of REA and Abby Kuyk for Nelmac. I also received documents from both parties. I then held an investigation meeting on 6 and 7 October 2022 in which I received oral evidence from Mr and Mrs Drummond and Ms Kuyk

¹ *Reunited Employees Association Incorporated v Nelmac Limited* [2021] NZERA 530.

as well as additional oral evidence from members of REA. After my investigation meeting I received some further written evidence and submission from both parties.

[6] As permitted by 174E of the Act I have not recorded all of 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 claims

[7] The claims advanced by REA that relate to alleged breaches of the relevant collective agreements between the parties cover the period from 2017 until 2022.

[8] The relevant collective agreements between the parties that were in force from 2017 until 2022 are:

- (a) From the start of 2017 until 30 June 2017 there was a collective agreement in force (CEA1). The term of CEA1 was until 30 June 2017.
- (b) As of 1 July 2017, the parties had not settled the terms of a new collective agreement so CEA1 carried over and remained in force for 12 months pursuant to s 53 of the Act.
- (c) As of 1 July 2018, the parties had still not settled the terms of a collective agreement – this was not settled until 1 July 2019, so for this period of time there was no collective agreement in force.
- (d) From 1 July 2019 until 31 August 2020 a collective agreement was in force (CEA2).
- (e) As of 1 September 2020, the parties had not settled a new collective agreement so CEA2 remained in force pursuant to s 53 of the Act and the Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining)

Immediate Modification Order 2020. CEA2 remained in force until I fixed the terms of a new collective agreement in my determination dated 26 November 2021.

- (f) The new collective agreement (fixed by me) was for a term covering 1 September 2020 until 31 August 2022 (CEA3).

[9] The allegations relate to several different aspects of CEA1, CEA2 and CEA3, but the relevant clauses remained the same in each collective agreement. The alleged breaches are of:

- (a) Clauses 15.1 – 15.7 of the collective agreements, relating to the wage and grading criteria.
- (b) Clause 42 of the collective agreements relating to drug and alcohol testing.
- (c) Clause 34 of the collective agreements relating to annual holiday entitlement.
- (d) Clause 11.2 relating to hours of work and availability.

[10] The claims advanced by REA alleging breaches of the Act concern:

- (a) Sections 32 and 34 of the Act relating to the duty of good faith in bargaining for a collective agreement and the obligation to provide information in bargaining.
- (b) Section 11 of the Act relating to the obligation not to exert undue influence on a person to induce them to cease to be a member of a union.

[11] The claims advanced by REA alleging failure to implement agreements reached in facilitation are:

- (a) A failure by Nelmac to meet with REA on a quarterly basis when this had been agreed in facilitation and was recorded in a recommendation made by the Authority.
- (b) A failure by Nelmac to amend the category used in the collective agreement of “Green Spaces Operator” to the correct trade description.

[12] I will now consider each of these claims in turn.

Wage and grading criteria

[13] Section 5 of CEA1, CEA2 and CEA3 deals with remuneration and clause 15 specifically addresses the wages and grading criteria. This is a system of 5 grades, each with a pay range or steps, used to set employees’ wages.

[14] The wage range or step for each grade is set in each collective agreement and includes increases, that have been bargained and agreed, for each year of the term of the collective agreement.

[15] Grades 1 and 2 are entry level grades for employees with no previous experience or basic level of experience. Each has two wage rates set out as step 1 and step 2. Grades 3, 4 and 5 are higher grades for particular types of work or for employees who have recognised skills or qualifications. Each of these grades has a wage range and employees in that grade are, generally, paid within that wage range.

[16] The wage steps (for grades 1 and 2) and the wage ranges (for grades 3, 4 and 5) are set in the collective agreement for each year that agreement covers – so, if the term of the collective agreement is two years there will be two sets of steps and two sets of wage ranges per grade with the second year being an increase. On each renewal of the collective agreement the parties bargain and agree increased steps and wage ranges. So, in practice REA members get a wage increase every year based on collective bargaining and a ratified collective agreement.

[17] There is also the possibility of a wage increase by movement for a member within a grade. Employees in grades 1 or 2 progress from the step 1 wage rate to the step 2 wage rate after a specified period of time and subject to satisfactory performance.

[18] The placement of employees on a wage rate within the wage range for grades 3, 4 and 5 occurs on the start of the members employment or when they join REA. Subsequent movement within a grade's wage range or movement up a grade occurs pursuant to clauses 15.2 – 15.7 of CEA1, CEA2 or CEA3.

[19] Clause 15.2 provides:

Grades 3, 4 and 5. Progression to a higher wage rate within a grade or movement between grades shall be by annual review by the company and subject to satisfactory performance relevant to the job function being carried out. Employees are also encouraged to talk to their manager at any time should they feel that a higher wage rate within a grade or movement between grades is merited. Note – this process also applies to experienced and high performing cleaners who may be eligible to be moved into Grade 3.

[20] Clause 15.3 provides:

Grade progression and satisfactory performance shall be determined by the employer in consultation with the employee and where the employee believes they have been disadvantaged by the employers determination they may dispute the decision through the dispute resolution provisions detailed in this agreement.

[21] The effect of these two clauses is that Nelmac is obliged to review all REA members' wage rates annually to consider any possible increase within the wage range for the grade, based on satisfactory performance. That review is to be by consultation with the member.

[22] So, there are two ways in which a REA member may get a wage increase: an increase in the wage range or step pursuant to the relevant collective agreement and any increase due to an annual review.

[23] REA says Nelmac has failed to carry out the annual reviews for its members. That allegation is supported by the oral evidence of five members of REA who all said they did not have annual reviews of their wages in the period 2017 to 2022. Some had one review, mainly in response to requests by them.

[24] Nelmac says its practice is for all employees to have an annual performance review or appraisal. Annual reviews of wages or salary should also occur at the same time with the performance review feeding a business wide wage/salary review.

[25] However, Nelmac says annual reviews and possible wage increases were problematic for REA members because of the delays in settling CEA2 and CEA3. This meant that wage step and range increases for 2017 and 2018 were not known until July 2019 when CEA2 was ratified. Also wage step and range increases for 2020 and 2021 were not known until the end of 2021 when CEA3 was fixed.

[26] Nelmac says this delay made it difficult for it to finalise wage increases on review as it did not know what the wage increase due to bargaining as set in the relevant collective agreement was (or would be). The point being that Nelmac did not know if wages could be adjusted in addition to any increase in the collective agreement such that overall increases in wages remained within budgets.

[27] It appears that this difficulty meant there was a reluctance for some managers to conduct reviews, some are said to have told members they would not do reviews pending any bargained wage increase as it would be a form of “double dipping”. Nelmac says it did not see the situation as one of “double dipping” but concedes there were difficulties and it appears that it was Nelmac’s position not to conduct reviews of wages whilst collective bargaining remained ongoing and the outcome (as that impacted wages) was unknown.

[28] Nelmac says, notwithstanding this REA members were not disadvantaged as the majority received wage increases, albeit retrospectively for some years, when CEA2 and

CEA3 were ratified. Nelmac has reviewed the wage rises for all REA members from 2017 until 2022 and this shows:

- (a) Nearly all members have received wage increases every year, however the majority of the increases were due to increases in wage steps or range in the relevant collective agreement.
- (b) There are three exceptions where employees did not receive a wage increase in 2022 after a wage review because of performance issues.
- (c) Two employees were offered wage increases in 2022 after reviews that were said to be inclusive of any increase arising out of subsequent collective bargaining but these were refused.

[29] Whilst I understand the issues Nelmac faced with protracted bargaining as that related to wage reviews and potential annual increases my conclusion is that it failed to conduct wage reviews on an annual basis with REA members and this was a breach of CEA1 in 2017 and CEA2 in 2019 and 2020.

Drug and alcohol testing

[30] REA says Nelmac has breached clause 42 of CEA1, CEA2 and CEA3 because it has conducted random drug and alcohol testing on its members and clause 42 only allows for drug and alcohol testing to be done on a “for cause” basis i.e., when Nelmac suspects a member is under the influence of drugs or alcohol at work.

[31] Clause 42 provides:

For reasons relating to Health and Safety, such as, an employees behaviour justifies a suspicion that they are under the influence of drugs or alcohol, the employer may require that employee to undergo a medical examination by the New Zealand Drug Detection Agency (NZDDA) or an equivalent provider nominated by the employer at the employer’s expense.

[32] Nelmac accepts it has conducted random drug and alcohol testing on REA members. It says it is entitled to do this under its drug and alcohol policy which applies to REA members because of the references to policies in CEA1, CEA2 and CEA3. In summary clause 41 deals with policies and provides that members must adhere to all policies. Alternatively, it says if the drug and alcohol policy does not apply to REA members under CEA1, CEA2 and CEA3 then random drug testing (in compliance with the policy) is a health and safety reason and therefore justified under clause 42.

[33] I find that clause 42 of CEA1, CEA2 and CEA3 does not prevent Nelmac from conducting random drug and alcohol testing on REA members pursuant to its drug and alcohol policy for two reasons:

- (a) REA members are bound by and must adhere to all Nelmac policies pursuant to CEA1, CEA2 and CEA3.
- (b) Clause 42 of CEA1, CEA2 and CEA3 allows for random drug and alcohol testing on REA members as this testing is done for health and safety reasons (which clause 42 permits).

[34] Nelmac has not breached CEA1, CEA2 or CEA3 by conducting random drug and alcohol testing on REA members.

Annual holidays

[35] Clause 34.2 of CEA1, CEA2 and CEA3 provides:

With effect from 1 December 2008, upon completion of six years' current continuous service with the employer, each employee shall for the sixth and subsequent years be entitled to an Annual Holiday of five weeks. The fifth week's holiday may be taken in conjunction with or separately from the first four weeks as may be mutually agreed.

[36] Nelmac has applied clause 34.2 in the following way. When an employee completes six years of work they can accrue a fifth week of holiday in their seventh year and essentially

get this extra week after completion of seven years of service. By way of example one REA member, who gave evidence in my investigation meeting, commenced employment in November 2004 and completed six years of service in November 2010. She then accrued her extra weeks leave during her seventh year and this was added to her leave balance in November 2011.

[37] REA says this is wrong and there is no requirement to accrue the fifth weeks leave during the seventh year of employment. REA says the accrual applies on the completion of the sixth year of employment.

[38] I find that clause 34.2 means a member is entitled to receive a fifth week of holidays on the sixth year anniversary without it having to be accrued during the seventh year of employment. The clause refers to two things that reinforce my interpretation:

(a) The entitlement is upon completion of six years of service.

(b) The entitlement is for the sixth and subsequent years of service.

[39] That is the clause provides that upon completion of six years of service the employee is entitled to an extra week of holiday for completing the sixth year. And then the employee is entitled to an additional week for every subsequent year of service.

[40] So in the case of the employee example, she should have had an additional week of holiday added to her leave balance in November 2010 in recognition of six years of service and for completing that sixth year.

[41] If Nelmac required an employee to accrue the fifth week of holiday in the seventh year of service rather than adding the extra week to leave balances on completion of six years of service, then Nelmac has breached clause 34.2 of CEA1, CEA2 and CEA3.

Hours of work

[42] REA says that for many years there has been dissatisfaction and disagreement over additional hours of work both relating to how that is required of members and how they are paid for it.

[43] Having heard the evidence from Mr and Mrs Drummond and the some of the REA members I am not satisfied that there is an evidential basis to establish that there have been any practices by Nelmac relating to additional hours that would amount to a breach of CEA1, CEA2 or CEA3.

Good faith in bargaining

[44] REA claims that Nelmac has failed to provide information to it that it requested and that this is a breach of the duty of good faith as it relates to bargaining.

[45] Nelmac says the specific request for information was responded to appropriately but in any event the information sought was not done so during bargaining nor did it relate to bargaining.

[46] Having heard the evidence from Mr and Mrs Drummond I am not satisfied that there is an evidential basis to establish that there have been any failings by Nelmac to provide information requested by REA in circumstances that would amount to a breach of the duty of good faith in bargaining pursuant to s32 of the Act.

Undue influence

[47] REA says Nelmac approached two of its members and offered them pay rises if they left the union. REA says this is a breach of s 11 of the Act.

[48] There is no evidence that establishes that this occurred and I find that Nelmac did not breach s 11 of the Act.

Agreement relating to meetings

[49] In the course of my investigation meeting when evidence was being given by Mr and Mrs Drummond on this claim, Nelmac agrees it would meet with REA on a quarterly basis. REA accepted this and it resolved its claim. I do not need to consider this claim any further.

Agreement relating to “Green Spaces Operator”

[50] REA says there was an agreement in facilitation that Nelmac would stop using the title “Green Spaces Operators” for certain jobs or positions.

[51] Nelmac denies there was any such agreement but conceded in the course of my investigation meeting that it was prepared to change job or position titles to references that it and REA could agree to that better reflected to tasks and skills.

[52] The parties agreed to consult over this and make the necessary changes. On this basis I do not need to consider this claim any further.

Remedies

[53] REA has been successful in establishing breaches by Nelmac of CEA1 and CEA2 in relation to annual wage reviews. REA has also established that Nelmac’s stated way of applying clause 34.2 of CEA1, CEA2 and CEA3 would be a breach of CEA1, CEA2 and CEA3 in respect of the additional holiday entitlements for six years of service. I will now consider the remedies sought for these breaches.

Penalty for breach in relation to wage and grading criteria

[54] REA seeks penalties against Nelmac for its breaches in relation to annual wage reviews.

[55] Section 134 of the Act states that every party who breaches an employment agreement is liable to a penalty under the Act. Employment agreement is defined in s 5 of the Act as including an employee's terms and conditions of employment in a collective agreement.

[56] So by breaching CEA1 and CEA2 Nelmac has breached relevant members of REA's employment agreements and is liable to a penalty.

[57] However, an action for a recovery of a penalty for a breach of an employment agreement must be brought by a party to the employment agreement who is affected by the breach pursuant to s 135(1) of the Act. And any action for the recovery of penalties must be commenced within 12 months of the date when the cause of action (the breach) became known to the person bringing the action pursuant to s 135(5) of the Act.

[58] I am not satisfied that REA meets these requirements in terms of the application it has made to recover penalties so I am not able to award penalties in this instance for the breaches by Nelmac.

[59] However, if I am wrong on that point, I would not award penalties in this instance in any event.

[60] In considering whether a penalty should be imposed for the breaches of an employment agreement I must consider all relevant matters including those listed in s 133A of the Act. Applying those matters:

- (a) The object of the Act is to build productive employment relationships by promoting, amongst other things, collective bargaining. In the circumstances Nelmac did not want individual wage negotiations to undermine collective bargaining; it wanted collectively bargained wage rates to be agreed so it needed to ensure budgets were not exceeded by individual wage increases leaving no room to negotiate collective increases.

- (b) The extent of the breaches were reasonably significant in terms of the number of employees and the time span but the nature of the breaches was limited by the fact that all members received wage increases through collective bargaining.
- (c) The breaches were intentional but given the circumstances justifiable.
- (d) It is hard to assess if there was any loss that flowed to members by not having annual wage reviews as members received the benefit of annual wage increases due to collective bargaining.
- (e) Nelmac has not paid any compensation but all REA members have received pay rises and it appears that it is now conducting annual wage reviews.
- (f) The employees were not vulnerable and represented by their union.
- (g) Nelmac has not been found to have breached clause 15 of the collective agreements before.
- (h) I consider that the nature of the relationship between REA and Nelmac and the difficulties both sides experienced with collective bargaining, which resulted in delays in agreements being ratified and put in place is highly relevant to my assessment. It puts Nelmac's actions into context.
- (i) Bargaining is not being promoted if I penalise Nelmac for not negotiating with REA members individually – I am essentially telling Nelmac they should have prioritised individuals over the ongoing collective bargaining.
- (j) I also have in mind that imposing penalties where it is difficult to establish if there was any loss for employees arising from the breaches and where employees received wage increases in any event, albeit retrospectively, is somewhat contradictory.

[61] Overall, I am not satisfied that penalties can or should be imposed against Nelmac for its breaches of clause 15 of CEA1 and CEA2.

Compliance in respect of Annual holidays

[62] In respect of the potential breaches of clause 34.2 of the CEA1, CEA2 and CEA3 REA seeks a compliance order.

[63] I am satisfied that a compliance order is appropriate and make one pursuant to s 137 of the Act in the following terms - Nelmac must comply with clause 34.2 of REA members' employment agreements in so far as any members who have been employees for six or more years should be granted an additional fifth week of holiday at the completion of their sixth year of employment and at the completion of every subsequent year.

Orders

[64] Nelmac has breached clauses 15 of CEA1, CEA2 and CEA3 but I will not impose a penalty for these breaches.

[65] Nelmac's stated way of applying clause 34.2 of CEA1, CEA2 and CEA3 would be a breach of CEA1, CEA2 and CEA3. To the extent this has occurred or may occur in the future with further iterations of clause 34.2, I order Nelmac to comply with their obligation to REA members who have been employed for six or more years by granting those members an additional fifth week of holiday at the completion of their sixth year of employment and at the completion of every subsequent year.

Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, REA may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Nelmac 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.

[67] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.²

Peter van Keulen
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.