IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 371
3177409

	BETWEEN	GREGG SMITH Applicant
	AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Victor Corbett, counsel for the Applicant Channy Mao, counsel for the Respondent
Investigation Meeting:	9 March 2023
Submissions received:	23 March, 11 and 14 April 2023
Determination:	13 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Gregg Smith was employed as a civilian member of the New Zealand Defence Force (NZDF) in the position of Research and Development Lead.

[2] An individual employment agreement (IEA) entered into by the parties, identified the respondent Chief of Defence Force (CDF) as Mr Smith's employer.

[3] From 2015, Mr Smith served for a fixed term of employment until 2017 when he became a permanent employee. He continued to serve until he resigned and finished early in 2023.

[4] In July 2022 while still with NZDF, he applied to the Authority for an investigation and resolution of two problems arising from the employment; 1) a failure of CDF to give him an annual performance review in each year of service, and 2) a failure of CDF to allow him a Loyalty Payment of $1,000 upon completing four years' service, while remaining a contributing member of the New Zealand Defence Force KiwiSaver scheme (NZDFKS).

[5] Mr Smith lodged an amended statement of problem in which the resolution sought for the problems is expressed to be; 1) an order that CDF pay a penalty of $10,000 for the breach of good faith through failing to deliver annual performance reviews, and 2) an order for CDF to make a $1,000 Loyalty Payment to him.

[6] At an investigation meeting, Mr Smith and NZDF personnel gave evidence or provided information and were questioned by counsel Victor Corbett and Channy Mao, and the Authority. Comprehensive written submissions were provided by counsel, for the assistance of the Authority in resolving the employment problems.

[7] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore record all the evidence or information received, or submissions made.

Annual performance reviews

[8] Adrienne Poulter, Human Resources Manager – Northern Region of NZDF, gave evidence about the remuneration review (ARR) conducted by CDF as of 1 July each year.

[9] She said its purpose was to ensure that civilian staff members such as Mr Smith were paid at the appropriate level. An ARR did not necessarily lead to a pay rise and might simply confirm that pay had been commensurate with performance for the assessment period. A Salary Review Panel moderated the outcome of reviews across all the staff assessed, and the Panel made the decision whether to change the level of remuneration of anyone assessed. Staff can request a review of the outcome of their ARR.

[10] As well as potentially affecting pay, an ARR is an important form of communication and an occasion to give and receive feedback between employer and employee about things such as performance, conduct, aspiration, and opportunity.

[11] Mr Smith had difficulty with getting an ARR in several years and in the 2016/17 and 2018/19 years did not receive one at all.

[12] He could see where the problem lay. His reviewer was simply overwhelmed with other work. There was nothing personal about the omission, but understandably he felt he may have missed out on a pay rise in those two years through breach of a condition of his employment.

[13] The Authority accepts from the evidence of Ms Poulter that this is unlikely in the circumstances. He did receive increases in most years and in other years there may have been little movement across the board for employees.

[14] In the first year, 2016/17, Mr Smith was transitioning from fixed term to permanent employment and it seems likely that in offering permanent employment consideration would have been given to his performance and grading before the offer was made.

[15] In the second year, 2018/19, independently of an ARR he was graded at a 100% performance level, the highest grade, and his remuneration would have been linked to that.

[16] Although there was a breach of the employment agreement in each of the two years through the failure of CDF to provide an ARR, from the evidence it seems unlikely the breaches resulted in financial disadvantage to Mr Smith. Whatever the outcome of those ARR's may have been if performed, with justification Mr Smith was dissatisfied that a condition of his employment had not been observed, particularly in 2018/19.

[17] The breach was not a continuing one beyond the assessment year in question, after which a new ARR period began. There was then an opportunity for a catch-up or correction if Mr Smith had missed out in the year before.

[18] The claim for a penalty was not brought within the required 12 months following the end of either ARR period, in 2016/17 or 2018/19. No statement of problem was not lodged until July 2022 and no penalty was claimed until October 2022, well out of time.

[19] The penalty claim cannot succeed. No order is made against CDF in relation to the failure to provide an ARR.

KiwiSaver Loyalty Payment

[20] NZDF provides its own KiwiSaver scheme and promotes it by offering $1,000 Loyalty Payments. They are made after one, four and seven years of contributing membership.

[21] Early in employment by CDF, after Mr Smith had transferred his existing Kiwisaver account to NZDFKS, he began making contributions to that scheme through NZDF payroll. Later he decided he would pay directly from his bank account and was doing that as the fourth anniversary of his joining the scheme approached. In February 2020, upon raising with payroll his pending entitlement to the Loyalty Payment, he was told he was ineligible to receive it because he had not been paying contributions through payroll by deduction from his fortnightly pay.

[22] In 2017 after his first year of service, Mr Smith had received the Loyalty Payment of $1,000, although CDF later disputed his entitlement to it in 2020 when the issue of the four year payment arose. Mr Smith considered he may have been eligible in 2017 to receive the payment because of the contributions he had been making through payroll at the time. Because of the lapse of time, CDF did not try to recover the $1,000 payment.

[23] The issue in 2020 over the four year payment was not the level or frequency of the contributions Mr Smith had made to NZDFKS or his membership of that scheme. That information could readily be established from his personal banking records, the IRD or the scheme administrator Mercer. The issue was the path by which his contributions had reached the KiwiSaver scheme.

[24] Mr Smith was advised that the requirement for contributions to be made through payroll, was to be found in an instruction which had been issued by CDF in a Defence Force Order (DFO).

[25] As to Mr Smith's 'loyalty', it can be said that he was no less loyal in what he had done than anyone else who had contributed to NZDFKS and received a Loyalty Payment. He had duly and faithfully established and advanced his holding in his employer's KiwiSaver scheme. In doing so he had supported the wider interests of the State and taxpayers in having people join such a savings scheme. Also, for the Loyalty Payment qualifying period of four years, Mr Smith had faithfully served NZDF. Reports show he performed very well.

[26] The social and statutory objectives of KiwiSaver as a nationwide savings incentive had been achieved and Mr Smith's method of contributing did not derogate from the scheme or reduce the efficacy of it.

[27] Mr Smith considers that the DFO instruction his attention was drawn to by CDF in 2020, was information 'hidden' from his knowledge and consideration. He had not been aware of the DFO when he made his decision to change by making his contributions direct to NZDFKS, instead of through payroll. The information he obtained from NZDF had not identified the existence of the DFO.

Defence Force Order 3

[28] DFO 3 was an order of the CDF promulgated under the Defence Act 1990, with effect from 1 October 2015.

[29] Such orders may be made for the purpose of performing the functions and duties and exercising the powers of the CDF. They must not be inconsistent with the Defence Act or any other enactment, such as the ER Act for example. There is no suggestion that DFO 3 was *ultra vires* the Defence Act or inconsistent with any legislation.

[30] DFO 3 required that to be eligible for Loyalty Payments, referred to in the Order as 'incentive payments', NZDFKS contributions had to be made via payroll deductions.

[31] DFO 3 refers consistently to 'incentive payments' rather than 'Loyalty Payments', the name used in NZDF's written Guide to the NZDFKS scheme that Mr

Smith saw. It can be assumed they are the same thing, but it would have been easy and helpful to make that clear by standardising the description of the payment. To add variety although not necessarily clarity, on the NZDF website what appears to be the same payment is called an 'employment retention payment' The existence of these different terms suggests that a consolidation of the relevant rules and publications they appeared in, might have gone some way towards avoiding the problem Mr Smith encountered.

[32] The intent of DFO 3 is expressed at 7.6A.10. to be;

> The intent of the NZDFKS incentive payments is to encourage members of the NZDF to join NZDFKS and continue contributing through NZDF payroll to their KiwiSaver account.
>
> (underlining added)

[33] The purpose of the DFO 3 is to prescribe the 'conditions of service' for incentive payments. 'Contributory service' is defined at 7.6A.13. as;

> Each day that a member of the NZDF:
>
> 1. Contributes to NZDFKS through a deduction from their NZDF remuneration, …
>
> (underlining added)

[34] The Authority finds that the intent is clear in DFO 3 that contributory service, to establish eligibility for an incentive payment, is to be measured by the number of years over which an employee contributes by having a deduction made from their remuneration, through the NZDF payroll. Using that measurement, Mr Smith was not eligible to receive the four year Loyalty Payment in 2020.

[35] Administratively there are good reasons for making deductions through payroll. Mark Williamson, NZDF Benefits Manager, said in evidence that this method of contributing is very important, as it is used to determine if an employee has met the criteria of contributing for the qualifying period of any Loyalty Payment. Payroll can also see who the members of the NZDFKS are and who they are not.

[36] There would seem to be other ways payroll could get this information, although they may be less convenient. If for privacy reasons Mercer cannot identify scheme members to CDF, employees themselves can confirm membership and provide details of their contributions by disclosing banking records or IRD information. Mr Smith had records of all that information.

[37] The Authority finds he was a member of NZDFKS and a contributor to the scheme for the four year qualifying period. Although there are statements in the IEA and the NZDFKS Product Disclosure Statement that contributions 'will be' deducted by the employer through payroll, contributions made in that way are not stated in those publications to be mandatory. The Product Disclosure Statement makes no reference to DFO 3, and neither does the IEA.

[38] Mr Smith told the Authority he does not dispute the meaning of DFO 3. His problem is that he was simply unaware of its existence, despite making reasonable efforts to find out the rules or requirements. He read the NZDFKS Guide published by NZDF and Mercer jointly, visited the NZDF 'force4families' website, and he asked NZDF payroll and Mercer if he could make his own contributions directly. He was told he could.

[39] The website 'force4families' describes the incentive payment as one of the 'Key features' of NZDFKS, yet it makes no mention of the DSO 3 condition or limitation on eligibility.

[40] DFO 3 is not referred to in the published written Guide, a place where an employee could expect to see details of important terms and conditions of membership of NZDFKS.

[41] DFO 3 was however accessible to employees, including Mr Smith, on the NZDF intranet.

[42] The Authority finds in the circumstances that the separate documentation or publication of this rule in a Defence Force Order, DFO 3, to some extent hindered Mr Smith from obtaining relevant information about an important aspect of his employment. The NZDF was not as open and communicative as it could have been with Mr Smith about the full extent of the scheme and its conditions. By omitting

reference to that rule in the other literature Mr Smith had access to, CDF partially obscured an important benefit of the employment relationship. Although the literature he did see suggested that additional terms and conditions might apply, it failed to state whether in fact there were any, and if so, what they were or where they could be found.

[43] A page of the 'hr-toolkit', under 'NZDF KiwiSaver Incentive Payment', purports to list eligibility criteria. The page describes the purpose of the payment. Mr Smith had met that stated purpose, choosing the scheme and remaining a contributing member of it and a member of NZDF.

[44] The eligibility criteria are listed against three bullet points as if the list is a complete one. The listed criteria do not include the requirement found in DSO 3 that contributions are to be made through NZDF payroll.

[45] DFO 3 is referred to in the 'hr-toolkit' page but in a different connection, the requisite qualifying time as a contributing member. There was no issue about that in Mr Smith's case, that might have alerted him to a need for him to look at DSO 3.

[46] The Authority considers the 'hr-toolkit' entry is misleading or deceptive, or likely to mislead or deceive, because in representing the list of criteria to be a complete or exhaustive list, it fails to include the DSO 3 criterion that contributions are to be made through NZDF payroll.

[47] That failure was a breach of the good faith duty imposed on parties to an employment relationship by s 4 of the ER Act, not to mislead or deceive each other, or do anything likely to mislead or deceive each other.

[48] The Authority considers it is likely that if the DSO 3 criterion requiring contributions to be made through NZDF payroll had been referred to outside of the intranet, in places such as the NZDFKS Guide, Mr Smith probably would have seen it and become better informed of the Loyalty Payment eligibility requirements.

[49] Mr Williamson considered that it may have been overlooked by NZDF that a member of NZDFKS might choose to make contributions directly, as Mr Smith had done. He thought Mr Smith may have been the only contributor who had done this, and he was unaware of any other employee who had elected to cease contributing to NZDFKS via payroll and later sought a Loyalty Payment.

Available remedies

[50] Although the particular remedy sought by Mr Smith in his amended statement of problem was the recovery of the four year $1,000 Loyalty Payment as wage arrears, the Authority has kept in mind its power, under s 160(3) of the ER Act, to concentrate on resolving the employment relationship problem, however that problem had been described in the amended statement. With that broad objective in mind, the Authority has considered five potential avenues of remedy available under the ER Act, four of which were discussed in submissions; 1) dispute, 2) penalty, 3) personal grievance, 4) wage arrears, and 5) compliance.

A dispute?

[51] While Mr Smith's problem is one arising out of or related to an employment relationship and employment agreement, there is no real 'dispute' of the kind intended to be resolved by this remedy under s 129 of the ER Act. The problem is more one of having reasonable access to important information about the employment, or the reasonable dissemination and publication to employees of knowledge about their employment and employment relationship. The problem is also one of supplying information that did not mislead or deceive. In the absence of a 'dispute', the Authority gives no declaration as to the interpretation, application or operation of the employment agreement.

A penalty claim?

[52] Although a penalty can be recovered under s 4A of the ER Act for certain breaches of good faith where a higher level of liability has been established, in this case that remedy was not claimed until final submissions were made two weeks after the investigation meeting had finished. CDF was not fairly put on notice of the penalty claim, which in any event was probably made outside the statutory time limit of 12 months.

[53] In February 2020, Mr Smith learned from NZDF payroll that his claim for the payment had not been accepted, but it was not until July 2022 he lodged the first statement of problem. Even then no penalty for a breach of any kind was claimed. Subsequently, in an amended statement of problem lodged in October 2022, a penalty

was claimed for breach of good faith, but it was directed at annual performance reviews not the Loyalty Payment.

[54] Any breach of good faith was not a continuing breach. It occurred at the latest when Mr Smith was advised he would not receive the $1,000 payment for his 4 year membership of NZDFKS. He had 12 months from February 2020, until February 2021, to claim a penalty.

[55] There was a breach of good faith when NZDF published misleading or deceptive information about the criteria for eligibility to receive the Loyalty Payments. This was deliberate. CDF knew or ought to have known that DFO 3 contained a further criterion which the publication did not disclose. It was a serious breach in the context of the social and economic purposes of Kiwisaver, and the importance of encouraging participation in Kiwisaver, and the breach was sustained. The publication has apparently not so far been reviewed and changed.

[56] Although Mr Smith's employment relationship with NZDF did not end until early 2023, operatively the misleading or deceptive behaviour is confined to the time in about 2016 or 2017, when Mr Smith had been able to decide whether to contribute directly to NZDFKS or continue making contributions through payroll. A claim for penalty needed to be made by 2018.

Personal grievance?

[57] Conceptually, the remedy of personal grievance for unjustified action causing disadvantage to an employee could fit Mr Smith's problem, but a grievance must be raised within 90 days. Mr Smith did not apply for leave to have time extended on the grounds of exceptional circumstances, and the delay in this case is substantial. The 90 day period expired in about May 2020.

Wage arrears claim?

[58] In the view of the Authority, the $1,000 Loyalty Payment is within the definition of wages and a claim under s 131 of the ER Act, as made, could in theory provide a remedy. The definition of wages at s 5 of the ER Act includes amounts payable in respect of services provided for time. Serving time with NZDF, for four years, was a component of the loyalty the payment was intended to reward. It also has some

similarities to a payment of bonus, which is defined as wages under the definition in the Wages Protection Act 1983.

Compliance order?

[59] Although compliance may compel performance where an employer has not complied with any provision of an employment agreement, DFO 3 was not an express or implied term of Mr Smith's IEA.

DFO 3 was in force

[60] The fundamental problem remains that whether classed as wages or anything else, the money was not payable because the DFO 3 condition of payment was not met. The real problem in this case is that Mr Smith was not made aware, and did not become aware early on, of DFO 3. Having suggested in its Guide that there might be other conditions of eligibility for the Loyalty Payment, NZDF had some onus to draw attention to those. By omitting to refer to them in what was held out to be a comprehensive guide to NZDFKS, the employer misrepresented the position to be that there were none.

[61] Had the Guide consolidated and explained fully all the rules and conditions of eligibility for the Loyalty Payment, it is likely this problem brought by Mr Smith would not have arisen. He could have seen clearly what choices he had available and decided whether he wanted to put himself in line for the payment, provided he remained in the scheme for the four year qualifying period.

[62] Just above the carefully worded disclaimer of liability on the cover of the Guide, it is described as 'A GUIDE TO HELP YOU MAKE THE MOST OF YOUR MEMBERSHIP'. Unfortunately, the Guide does not extend to simple cautionary words advising that 'the most' will only be achieved if contributions are made through payroll.

[63] Mr Williamson confirmed the date of DFO 3 as 1 October 2015. As that is the same date as the Guide, it seems that before the printing and publication of this literature a chance was missed to reproduce in the Guide the important limitation words of the DFO, 'contributing through NZDF payroll'.

[64] For the reasons given, the Authority finds that none of the five remedies considered is available to Mr Smith on the facts of this case.

Equity and fairness ought to prevail

[65] Bearing in mind the status of a DFO, the CDF is urged by the Authority to now stand by the representation made in DFO 3, that;

> NZDFKS incentive payments will be applied equitably for <u>all</u> members of the NZDF who belong to the NZDFKS.
>
> ……
>
> NZDFKS incentive payments will be applied fairly …
>
> (underlining added)

[66] Mr Smith was a member of NZDFKS but was discriminated against because his contributions were not deducted through payroll. Unfairly, the rules were obscured from his knowledge and attention, and they were misrepresented.

[67] In an email of 20 February 2020 to Michele Bateman, Team Leader Payroll, Mr Smith argued he had not been treated equitably or fairly. The Authority agrees.

[68] Mr Smith suggested that the DFO 3 rules around contributing through payroll be made more accessible through publication in places such as the Guide, which do not mention this requirement. Ms Bateman in her reply to Mr Smith agreed he had raised a valid point about the lack of clarity in the eligibility rules found in the Toolkit page. The Authority agrees. Not only were they unclear, the rules were presented misleadingly.

[69] The Authority is unable to make any order compelling CDF to make payment, but it does recommend that CDF now act equitably and fairly towards Mr Smith and pay him the amount of Loyalty Payment claimed.

[70] Mr Williamson said that Mr Smith's situation appeared to be unique. Mr Smith expressed the same view, that his situation was common to 0.001% of NZDFKS

members. It seems unlikely that payment now to Mr Smith will have a ‘floodgates’ effect.

[71] CDF submits that before Mr Smith receives a four-year Loyalty Payment, he should account for the payment made to him in 2017 of the one year Loyalty Payment. NZDF payroll considered this was paid by mistake, although Mr Smith thought that may not be so because he may have been contributing to NZDFKS at the time the one year payment was made.

[72] If there was a payment made by mistake, it was entirely CDF’s decision not to try and recover that money due to lapse of time. That decision should not be viewed as an indulgence granted to Mr Smith or an act of generosity shown to him. The Authority does not understand Mr Smith had any responsibility for the payment made by mistake or that he caused that mistake. If he was not consulted about it, NZDF can hardly claim Mr Smith ought to be indebted or grateful to CDF for not trying to recover the money from him.

[73] CDF had the opportunity to try and recover the payment CDF claims was made by mistake but elected not to. Because of the poor dissemination of important information, Mr Smith was not given an opportunity to put himself back in a position where he could make NZDFKS contributions through payroll. An election was not made available by CDF to him.

Conclusion

[74] In summary, no orders are made against CDF, but a recommendation is given for a Loyalty Payment to be made by CDF to Mr Smith.

Costs

[75] In the unusual circumstances of this employment relationship problem, it may seem fair and just that the parties should bear their own costs. Matters of principle have been aired and the accountability of each party has been investigated. There were merits on both sides.

[76] Should either party decide to apply for legal costs, this must be done within 14 days of the date of this determination, and any reply within a further 7 days of the application made.

Alastair Dumbleton
Member of the Employment Relations Authority