

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 325
3242719

BETWEEN

PETER FERNANDES
Applicant

AND

COCA-COLA EUROPACIFIC
PARTNERS NEW ZEALAND
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Emily Griffin, counsel for the Applicant
Anne Wilson and Nina Jirkowsky, counsel for the
Respondent

Investigation Meeting: 28 March 2024

Determination: 4 June 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter Fernandes, with the support of his union E tū, sought determination of a dispute about the interpretation and application of a term in a collective agreement (CA) made by the union and Coca Cola Europacific Partners New Zealand Limited (CCEP). The CA covered equipment service technicians working for CCEP.

[2] Mr Fernandes said CCEP had not correctly applied a term in the CA signed by the company and the union on 29 July 2022 that provided for a pay rise of “3.5% effective 1 November 2021”.

[3] Mr Fernandes had worked for CCEP since 2005. He first joined the union in 2016 but left in 2020, working from then under an individual agreement with annual pay reviews. On 24 February 2022 he rejoined the union. Company representatives

understood he did so after learning that he would not get a pay rise on 1 March through his individual annual review.

[4] Mr Fernandes' renewal of his union membership occurred some five months before the parties' representatives signed the CA on 29 July 2022. After the CA was signed other union members got the 3.5 per cent pay rise applied to their earnings from 1 November 2021, resulting in some back pay for a period of around seven months and a 3.5 percent higher salary on an ongoing basis. Mr Fernandes, however, did not get any back pay or the 3.5 per cent rise applied to his ongoing wages. The company said this was because he was on an individual employment agreement, and was not a union member, on the 1 November 2021 date from which the pay rise was said to be "effective". It said he would not be eligible for a pay rise during the term of the 2021-22 CA.

[5] Union representatives, pursuing the matter on Mr Fernandes' behalf, had told CCEP that he was entitled to the pay rise from the date that he joined the union.

[6] Part of the difference of opinion arose from disagreement over whether CCEP's capability and engagement manager Christine Sandilands and E tū organiser Alvy Tata had discussed and agreed, before they had signed the CA on behalf of the company and the union, that the pay rise provided in the agreement would not apply to Mr Fernandes. In CCEP's view he was not eligible because both the effective date of the pay rise and the date he joined the union fell within the company's annual pay review period for workers on individual agreements, that ran from 1 March 2021 to 28 February 2022. CCEP said the union and the company had "historically agreed" that workers could not move between the individual and collective agreement "remuneration rounds" as that could risk 'double dipping' in whatever pay rises might be provided through the two processes.

[7] The matter came to the Authority for determination after the parties had not resolved this dispute in mediation.

The Authority's investigation

[8] Mr Fernandes, Ms Tata and Ms Sandilands each provided a written witness statement and attended an investigation meeting to answer questions from me and the

parties' representatives. The representatives made oral closing submissions at the end of the meeting.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issue

[10] The question for resolution was whether Mr Fernandes was entitled to a 3.5 per cent increase on his paid rate from 1 November 2021 under the provisions of clause 45.2 of the CA. If he was entitled to that payment, Mr Fernandes sought an order requiring CCEP to comply with the clause.

Principles for interpretation of collective agreements

[11] Legal principles applied to the interpretation of contracts guide the interpretation of collective agreements.¹

[12] As explained by the Supreme Court:²

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.” This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as “background”, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provides by the contract as a whole and any relevant background informs meaning. ...

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty. ...

[13] Aspects of the context and background accepted as relevant to the interpretation and application of collective agreements include recognition that they do not simply

¹ *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [74]–[78].

² *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60] and [63] (footnotes omitted).

provide for an economic exchange of the type found in arms-length business agreements; they involve people and human interactions in ongoing employment relationships; and they occur within a framework of statutory obligations (such as the mutual duty of good faith) and common law obligations (such as the duties of fidelity and fair dealing).³

[14] In evaluating evidence about the negotiations of a collective agreement, the Supreme Court has also noted the “need to maintain the key distinction between the objectively apparent consensus and subjective individual intentions”.⁴

[15] Those principles are applied to considering Mr Fernandes’ application by answering three questions :

- (i) what is the ordinary and natural meaning of the actual term providing the pay rise?
- (ii) does the context of the CA as a whole, looking at other terms in it, suggest the same or some different meaning was intended?
- (iii) does any other relevant part of the background to negotiation and agreement of the term indicate the parties mutually intended some other specialised meaning to apply to the term providing a pay rise?

The ordinary and natural meaning

[16] When this CA was signed by the parties’ representatives on 29 July 2022, its agreed term was already eight months underway. Clause 45, with the heading “Term of Agreement” comprised the following two provisions:

- 45.1 This agreement shall come into force on 1st November 2021 and shall continue in force under 1 February 2023.
- 45.2 All paid and printed wages rates for permanent employees will be increased by 3.5% effective 1 November 2021.

[17] A schedule headed Salary and Allowances included the following table setting out five classifications of equipment service technicians, labelled from Tech 1A to Tech 4, and identifying qualifications required for each level. The table lists the “minimum base rate” for the salary at each level and is stated to be “effective from 1 November 2021”.

³ *Le Gros v Fonterra Co-Operative Group Ltd* [2023] NZEmpC 193 at [25].

⁴ *New Zealand Air Line Pilots’ Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [86].

Classification	Qualification	Minimum Base Rate (effective from 1 November 2021)
Tech 1A	Advance Trade Certificate	\$76,065
Tech 1	Full Registration	\$74,066
Tech 2	Electrical Service Technician (EST)	\$70,623
Tech 3	Electrical Applicant Serviceperson (EAS)	\$67,176
Tech 4	Entry Level	\$63,732

[18] The CA terms and salary schedule set no other criteria or timeframes for payment at those levels.

[19] On its plain reading the agreement intended all permanent employees would have the 3.5 per cent pay increase applied to their pay from 1 November 2021. There was no category of worker, or any individual worker, excluded from the rise.

[20] The increase also applied to both the paid rate and the printed rate. This meant all employees in each service classification would receive at least the printed rate provided for someone with their qualifications. Those paid more than that printed rate would have their higher rate increased by 3.5 percent.

[21] There was no provision in the term that indicated the increase applied only to permanent employees who were union members at the date at which the pay increase was said to be “effective”. Rather, on its ordinary and natural meaning, the increase was to apply back to the date of 1 November 2021 whenever the parties eventually finalised the whole agreement. The term did not stipulate that any worker benefiting from that increase had to be a union member on 1 November 2021. The ordinary meaning allowed for a worker who joined the union, for example, on 2 November 2021 or 28 July 2022 to get the benefit of the back pay stretching back to the 1 November date from whenever the agreement was finalised.

[22] During the investigation meeting it emerged that Mr Fernandes understood he was employed on the Tech 2 classification but CCEP’s pay roll system recorded his classification as Tech 3. The investigation, and this determination, proceeded on the basis that he was employed at the Tech 3 level.

[23] At that level Mr Fernandes had to be paid no less than \$67,176 as his minimum base rate. He was, however, at that time paid an annual base salary of \$68,700.

[24] On the ordinary and natural meaning of clause 45.2 this “paid” rate had to be increased by 3.5 per cent, taking it to \$71,104.50. This was the effect of the clause as written, regardless of whether that took his actual rate to a level higher than the minimum base rate of \$70,623.23 for a Tech 2 classified worker.

[25] CCEP submitted that the word “paid” in this clause was intended to apply only to base rates that were paid to a person under the CA, not those paid under terms of an individual employment agreement. There was nothing in a natural and ordinary reading of the clause that supported that distinction.

Context of the whole agreement

[26] Those conclusions about the natural meaning of clause 45 have to be checked in the context of other terms in the CA.

Coverage

[27] At 1.3.1 the CA’s coverage clause states “this agreement shall cover employees employed by the company as ... Equipment Service Technicians ...”. At 1.3.2 the clause states that “the agreement shall not apply to employees in management positions, or administrative positions or to independent contractors ...”.

[28] This establishes the terms of the CA were intended to apply to all technicians. No category of employees or individual worker who fitted the occupational group as described were excluded. Sub clause 1.3.2 spelt out some categories of people who worked for the company who were excluded. It did not exclude Mr Fernandes by name or by any description that applied to him.

Application

[29] Clause 5, headed Application, states:

- 5.1 The terms and conditions contained in this agreement shall supersede all terms and conditions of employment that may have applied prior to the date of coming into force of this Agreement.
- 5.2 The employees acknowledge the employer’s right to conduct their business in an orderly and business-like manner and accept the rules established by their employer.

5.3 This agreement may be varied by agreement between the employer, the employees concerned and the Union.

[30] Three points arose from considering how those provisions applied to the circumstances or might change the meaning of how clause 45.2 was to be applied.

[31] Firstly, clause 5.1's reference to the "date of coming into force of this [CA]" relates to clause 45.1's statement of that date as being 1 November 2021. This means the CA had effect from that date to supersede whatever terms and conditions had previously applied to Mr Fernandes, and other union members. Applying that collective provision to him as a union member covered by the CA replaced whatever individual terms otherwise and earlier may have governed his employment.

[32] Secondly, clause 5.2's reference to the employees accepting rules established by the employer cannot reasonably be read as permitting CCEP to say it has a policy (discussed further below) that prevented employees opting out of an individual annual review process during a year or that overrules the terms of a CA reached through a process supervised by statute.

[33] Thirdly, clause 5.3's reference to varying the CA does allow for the prospect that some agreement could have been reached that the pay rise provided in clause 45.2 was not to apply to Mr Fernandes. However, the clause identifies three parties to such an agreement – CCEP, E tū and "the employees concerned". While Ms Sandilands (as discussed further below) said she understood Ms Tata had agreed the pay rise would not apply to Mr Fernandes, there was no suggestion Mr Fernandes had been consulted with or agreed to such an exclusion.

Policies

[34] Clause 22.1, under the heading "Policies and Rules" confirmed CCEP's broad power to institute various policies:

Employees agree to abide by all company policies. The company shall be entitled to institute, amend and vary policies and rules in consultation with staff in relation to its activities and the conduct expected of its employees from time to time [sic] such policies and rules shall be observed in good faith by employees.

[35] Arguably, the reference to policies "in relation to its activities" allowed for CCEP to institute a policy regarding operation of its annual review process for workers

on individual employment agreements, including dates restricting when employees could 'opt out' of that individual process. To do so required, however, consultation with staff about such a policy. There was no evidence that whatever annual review process CCEP operated included a policy with such restrictions, implemented after consultation with staff.

[36] Rather, the evidence on this point was limited to a suggestion in Ms Sandiland's witness statement that CCEP and the union had "historically agreed" that workers were:

not able to participate in two remunerations rounds within a 12-month period or move between agreements to taken advantage of multiple remuneration increases as it was not the intention to allow employees to switch between agreements and essentially 'game' a duplicate advantage.

[37] Ms Sandilands, who had joined CCEP in mid-2021, had no direct knowledge of what was said to have been "agreed". She said a former human resources advisor had told her such an understanding had been reached with the union. Ms Tata, whose contact as a union organiser with the worksite stretched back only around a year at the time, said she had checked union bargaining records and found no information about any such agreement.

[38] Mr Fernandes claim would also not have resulted in him getting "a duplicate advantage" or 'double-dipping' because, according to Ms Sandilands' evidence, Mr Fernandes had already been told that he would not get a pay rise through the individual annual review process.

[39] If CCEP had wanted such a policy, it could have written one and consulted workers about it. There was no evidence it had.

Written variation

[40] If the parties had agreed that clause 45.2 was not to apply to Mr Fernandes, clause 38 suggests that should have been recorded in a written variation:

38.1 This agreement may be varied or amended at any time by written agreement between the parties.

[41] Section 51 of the Act prohibits a union from signing a collective agreement or a variation of it without having notified the employer of its procedure for ratification by the employees to be bound by that agreement.

[42] If there was a variation to the CA that Mr Fernandes and the other union members were to be bound by that excluded him from being paid the pay rise in the agreement, the provisions of s 51 of the Act and clause 38.1 of the CA suggest that such a difference would be in writing and explicit to the members before they voted on it. There was no such written variation.

Conclusion on context

[43] For the reasons discussed, the context of other terms in the agreement did not indicate the interpretation and application of clause 45.2 to the circumstances of Mr Fernandes should differ from the ordinary and natural meaning of the clause that the pay rise was to apply to his paid wage rate from 1 November 2021.

Relevant background knowledge or special meaning

[44] The last aspect of the evidence that required consideration was the nature and effect of the conversation Ms Sandilands said she had with Ms Tata before they both signed the Terms of Settlement (summarising key changes agreed in bargaining) on 27 July 2022 and the CA itself on 29 July 2022.

[45] Ms Sandilands said the meaning and interpretation of clauses 45.1, 45.2 and the Schedule 1 were not specifically discussed during bargaining. However, sometime between 7 July and 22 July, she telephoned Ms Tata to specifically ensure the situation with Mr Fernandes was clear before the formal terms of settlement were agreed, signed and ratified. Ms Sandilands said she referred to Mr Fernandes not being “a member of the collective” on 1 November 2021, having taken part in the individual review process as late as February 2022 and employees not being allowed to “double dip across both individual and collective agreements”. She said Ms Tata has agreed Mr Fernandes would not be eligible for the 3.5 per cent increase. Ms Sandilands said she then went ahead with signing the CA on the understanding that she and Ms Tata “were effectively in agreement as to the interpretation of the clauses of the new collective”.

[46] Ms Sandilands accepted nothing was exchanged in writing to confirm any such agreement between her and Ms Tata on this point. She had not, for example, sent an “as discussed” email soon after that call to record any agreement with Ms Tata about the meaning or application of the term about the pay rise.

[47] Ms Tata, in her evidence, did not accept Ms Sandilands' recall of such a firm and clear verbal agreement that Mr Fernandes would not get a pay rise at all. Ms Tata accepted Ms Sandilands had called her and talked specifically about Mr Fernandes. In her written evidence Ms Tata said she had agreed Mr Fernandes would not be eligible for back pay to 1 November 2021. However, she said they had agreed Mr Fernandes would be eligible to a pay rise from the date he joined the union in February 2022.

[48] Ms Tata and Mr Fernandes confirmed in their oral evidence that Ms Tata had not told Mr Fernandes about that conversation at the time. Mr Fernandes contacted Ms Tata soon after the other union members got their back pay and pay rise in early August 2022 to ask why he had received no increase. Ms Tata then contacted Ms Sandilands by email on 16 August with this query:

Peter Fernandes did not receive any negotiated increase from the recent bargaining. Peter was also informed he would not be receiving any wage adjustment for another two years. I don't believe there was any agreement in the terms of settlement that excluded Peter from receiving outcomes from bargaining. Appreciate clarification from the employer as to why.

[49] Ms Sandilands replied:

We discussed this over the phone and thought we were aligned. Peter was on an IEA for the March 2022 IEA rem review process which was aligned to his performance. As his rem was reviewed in March, he is not eligible for the November CEA increase as employees can't participate in both rem review cycles.

[50] Ms Tata responded:

Agreed we did talk of Pete not being eligible from the period March 2021 to Feb 2022 (this being a 12 month period), however Peter joined the union Feb 24th 2022, there is no provision in the terms of settlement or the CA where an employee cannot participate in a rem cycle review process or receive the union negotiated outcomes, moving forward Peter would be entitled to the union increase from 1 March 2022 onwards.

[51] The written and oral evidence of the witnesses, and what could be gleaned from these emails of the circumstances at the time of concluding the CA, was not sufficiently certain or clear to confirm a mutual intention by the company and the union, or some other specialised meaning to be read into the words of the CA, to exclude Mr Fernandes from the benefit promised in clause 45 to all union members who were "permanent employees".

[52] There was no evidence that the union members who had to ratify the agreement before it was signed by the union's representative were provided with any information suggesting that the pay rise promised in it would apply only to those who were union members on 1 November 2021 and that Mr Fernandes would be excluded.⁵ The terms of settlement document, signed by Ms Tata and Ms Sandilands on 27 July 2022, set out what the parties agreed E tū and the union delegates would recommend for acceptance at the ratification meetings. It included the wording that became clause 45, with no reference to any limitation on its application to Mr Fernandes.

[53] Mr Fernandes had also not individually been consulted about or agreed to any such prospect. Rather, it was his evidence that he had asked in a union meeting, before the CA was signed, whether any pay increase would apply to him, and Ms Tata had confirmed that he was part of the collective and increases would apply to him.

[54] Neither was the evidence sufficient to support the union's submission that the term should be read as having a specialised meaning requiring payment of the increase to Mr Fernandes only from the date he became a union member. This later date was really a compromise proposed by the union after the dispute about the interpretation arose rather than reflecting the unqualified words of the CA's written term about all rates increasing for permanent employees from 1 November 2021.

[55] The parties' representatives both knew Mr Fernandes was a union member on the dates that the terms of settlement and the collective agreement were signed in July 2022. If one or both parties considered he should be excluded from the provision for back pay to 1 November 2021, they would have needed to do so by express, written terms rather than rely on the uncertain oral terms of a telephone conversation.⁶

[56] Adopting a different interpretative approach in order to assist CCEP's logistical difficulties managing the individual pay review processes it has chosen to implement was not appropriate.⁷

⁵ Employment Relations Act 2000, s 51.

⁶ Section 54.

⁷ *Le Gros v Fonterra Co-Operative Group Ltd* [2023] NZEmpC 193 at [43]-[45].

Outcome

[57] For the reasons given, clause 45.2 of the CA applied to the pay rate due to be paid to Mr Fernandes from 1 November 2021. Accordingly, CCEP is ordered to pay Mr Fernandes the amounts due to him under the clause by no later than 28 days from the date of this determination.⁸

Costs

[58] In matters concerning a dispute over the application, interpretation or operation of terms of a collective agreement, the Authority generally applies a presumption that parties will bear their own costs.⁹ As confirmed with counsel at the investigation meeting, the presumption applies in this matter.

Robin Arthur
Member of the Employment Relations Authority

⁸ Employment Relations Act 2000, s 137.

⁹ See “Costs in the Authority”, Practice Direction of the Employment Relations Authority, p 5.