**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2025] NZERA 640
3320240

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| | BETWEEN | NEW ZEALAND FIRE AND EMERGENCY COMMANDERS' ASSOCIATION<br>Applicant |
| | AND | FIRE AND EMERGENCY NEW ZEALAND<br>Respondent |

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| Member of Authority: | David G Beck |
| Representatives: | Tim Cleary, counsel for the Applicant<br>Chris Baldock and Anmol Shankar counsel for the Respondents |
| Investigation Meeting: | On the papers |
| Submissions Received: | 2 July 2025, 21 July 2025 and further information on 7 August 2025 from the Applicant<br>18 July 2025, 18 August 2025 and 11 September 2025 from the Respondent |
| Date of Determination: | 13 October 2025 |

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**DETERMINATION OF THE AUTHORITY**

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## Dispute

[1] The New Zealand Fire and Emergency Commanders Association (FECA) has raised a dispute pursuant to section 129(1) of the Employment Relations Act 2000 (the

Act), concerning the interpretation of a provision in a collective agreement (CA) with their members' employers Fire and Emergency New Zealand (FENZ), pertaining to how employer superannuation contributions are dealt with for their members who pay into both the New Zealand Fire Service Superannuation Scheme (Firesuper) and a KiwiSaver scheme.

[2] FECA is claiming arrears of KiwiSaver employer contributions and general damages for FENZ's alleged failure to comply with the KiwiSaver Act 2006 (KS Act).

[3] In contrast, FENZ says they have already taken sufficient steps to rectify the situation after discovering in January 2024, that it had failed to pay compulsory employer contributions (CECs) to individuals KiwiSaver accounts where those individuals were also participating in a FENZ "FireSuper" non-complying fund.

[4] FENZ assert remedial steps taken and options provided was an approach consistent with the applicable collective employment agreement and that adopting an effectively literal interpretation that FECA favours, would provide an inequitable windfall to selected employees.

[5] FECA also place at issue the Authority's jurisdiction to award general damages for past non-compliance with the KS Act. FECA in adopting their stance, asks the Authority to determine if it is permissible pursuant to s 101B of the KS Act, to apply a 'total remuneration' approach to CECs salary deductions.

**What caused the dispute?**

[6] FENZ is a Crown entity established by the Fire and Emergency Act 2017 (FENZ Act). The FENZ-FECA collective agreement (FENZ-FECA CA) covers District/ Group managers and senior specialist positions that lead the operational firefighting workforce throughout New Zealand.

[7] Clause 8 of the FENZ-FECA CA under a heading "SUPERANNUATION" relevantly provides:

> (a) The employee is entitled to participate in the New Zealand Fire Superannuation Fund, subject to meeting the eligibility criteria for the Fund or being otherwise approved for participation by

the Trustees of the scheme in accordance with the scheme rules. Where the employee is not approved to participate in that scheme, they will be encouraged to participate in KiwiSaver.

(b) Where the employee is participating in either the New Zealand Fire Superannuation Fund or KiwiSaver, the employer's annual contribution to the employee's superannuation up to six percent (as calculated on the employee's base salary and set out in the Fire and Emergency New Zealand Remuneration Package Calculator) will be a benefit in addition to base salary paid. It will not be tradeable for base salary and as such will not form part of the calculation for position in range. Employer contributions for those participating in KiwiSaver are based on matching employee contributions up to six percent of base salary.

[8] The Firesuper scheme is governed by a trust deed the parties to which are FENZ and Firesuper Trustee Limited. The scheme has two separate funds, one that is a complying fund under the KS Act and one non-compliant (the regular fund or default scheme).

[9] This dispute is confined to FECA members who contribute to both the 'non-complying' Firesuper scheme and a KiwiSaver fund. Essentially, FECA is contending in the absence of a provision in the Firesuper trust deed governing employer contributions to the non-complying scheme, FENZ should pay employer contributions on both schemes. FECA asserts benefits gained under the Firesuper trust deed are independent of the statutory benefits members should be able to access if they also enrol in a KiwiSaver scheme.

[10] FENZ for this identified group of employees has historically paid employer contributions to those opting for the Firesuper non-complying scheme but no additional employer contribution to this group who also have enrolled in a KiwiSaver Scheme.

*FENZ's position on employer superannuation contributions*

[11] In an internal FENZ email provided to the Authority of 26 June 2024, FENZ's Regional People Business Partner (RPBP) apprised senior management of an issue pertaining to those who had chosen to be both KiwiSaver contributors and party to Firesuper's non-complying fund, as "we have 735 people where we need to address where their employer contributions go for their superannuation". A 27 June staff letter

was attached setting out various remedial options and the RPBP opined if members did not respond by a given date "FENZ is required to implement a salary sacrifice clause in our collective employment agreement." It is noted that prior to this communication FENZ had made a voluntary disclosure to the Inland Revenue Department regarding their discovered default and started engaging with them on appropriate remedial measures.

[12] The aforementioned 27 June letter over the signature of the National Manager Workplace Relations to impacted FENZ employees, entitled "KiwiSaver Compulsory Employer Contributions", opened by stating FENZ had identified several people who were members of more than one superannuation scheme where "the requirement to pay compulsory employer contributions had not been met". The letter in objectively confusing terms, first sought to explain the distinction between the complying fund and non-complying fund by describing how employer contributions were treated for the complying fund. It then points out the FENZ actual employer overall contribution as 6% and that "anything over this requires a reduction in base salary".

[13] The letter then provides options for those who are currently members of a KiwiSaver scheme and the Firesuper non-complying scheme (confusingly using the term "standard scheme"). These options briefly summarised were:

1. Electing to place 3% of employee contributions into the complying fund - allowing FENZ to then make a split 3% KiwiSaver scheme employer contribution and 3% to the complying fund.
2. A temporary suspension of KiwiSaver contributions for a maximum permissible, period of 12 months on application to Inland Revenue.
3. Remaining in both the Firesuper non-complying fund and a KiwiSaver scheme with their base salary being reduced to account for FENZ making an additional employer contribution to the KiwiSaver scheme.

[14] The above letter provided some more useful explanatory example scenarios of how the above options would play out and noted if no response was provided by 22 July 2024, FENZ would reduce base salary to reflect the employer KiwiSaver contribution they were required to make (essentially an imposition of option 3).

*FECA's response raising a dispute.*

[15] FECA's secretary in a response email of 1 July 2024, raised a dispute pursuant to s129 of the Act. FECA first made a series of observations that relevantly and in summary, included their view that:

- The FENZ-FECA CA (cl 8) had no provision covering members in both Firesuper and KiwiSaver schemes and the employer contribution provision for KiwiSaver is stated as to match employee contributions up to 6%.
- The KS Act prevailed over any inconsistent provision of the FENZ-FECA CA and the Firesuper trust deed expressly prevailed over FENZ remuneration policy.
- A member was entitled to the FENZ Firesuper employer contribution of 1.52 ratio for every dollar regardless of involvement in any other scheme.
- There is no clause in the FENZ-FECA CA permitting "salary sacrifice" and any deduction would appear inconsistent with s 4 of the Wages Protection Act 1983 (WP Act).
- FENZ had an obligation under the KS Act to contribute 3% of base salary under a qualifying KiwiSaver scheme and it can not apportion the 3% or lesser amount to another fund without the member's agreement and in any case the other fund must be a complying superannuation fund.

[16] FECA concluded FENZ must pay FECA members in both non-complying and KiwiSaver schemes a 3% employer contribution to KiwiSaver without reducing their Firesuper employer contributions and that a total remuneration approach was impermissible.

[17] FENZ replied to the dispute by an email of 17 July 2024 comprehensively rejecting FECA's analysis and suggested what flowed from their mutual CA and

remuneration policy negotiations was a situation where statutory minimum provisions had been exceeded but "it was always intended that a total remuneration approach would apply to any employer superannuation contributions above 6%".

[18] Thereafter on 19 July 2024, FENZ issued a statement to affected employees comprehensively setting out FENZ's view of the dispute and noted an intention to commence compulsory employer contributions of 3% to those in KiwiSaver schemes and the corresponding reduction in base salary by 21 August 2024. At the same time FENZ noted the options contained in the 27 June letter to avoid base salary reductions remained open beyond the earlier imposed 22 July deadline.

[19] Further correspondence and discussion were engaged in up to 15 August, when FECA then curtailed potential resolution by indicating they were filing proceedings with the Authority.

[20] FENZ then proceeded from 20 August 2024 to action superannuation deductions in reliance on their expressed stance and belief that a total remuneration approach was permissible.

**The Authority investigation**

[21] FECA made an application to the Authority dated 29 August 2024. The parties were referred to mediation that occurred in November 2024, but the dispute remained unresolved. A case management conference proceeded on 14 April 2025 at which the parties agreed the matter would be dealt with by submissions that were then timetabled for mid July 2025.

[22] In an email of 7 August, FECA's counsel acknowledged that FENZ had remediated past employer contribution defaults for impacted members in the period spanning 1 April 2021 – 31 March 2025 but the remaining claimed breaches of statutory obligations remained at issue.

**Issues to be determined**

[23] The issues the Authority must broadly determine are:

(a) Is the Authority able to determine FECA's claim for general damages if it is determined that FENZ's omission to pay affected employees their due employer superannuation contributions amounted to a breach of contract under s 162 of the Act?

(b) Whether FENZ has by making unauthorised wage deductions to pursue a total remuneration approach, breached any provision of the FENZ-FECA CA or breached the WP Act and if so, is it appropriate to order reimbursement of the amounts deducted?

(c) Whether in the alternative, FECA's members agreement to the FENZ-FECA CA was a consent to a total remuneration approach and no identified breaches occurred?

(d) Whether no orders should be made until the Inland Revenue Department (IRD) has determined FENZ's liability to pay CECs prior to 27 June 2024?

(e) How costs are to be dealt with.

**Scope of Authority jurisdiction**

[24] The first issue is the jurisdiction of the Authority in this matter. The respondent submits the IRD should be allowed to determine liability issues as the administrator of the KS Act and cites two Authority decisions dealing with withheld deductions that held no jurisdiction existed or were directed to the IRD for resolution. [1] Further FENZ submission suggests an order that undercuts an IRD process would be inappropriate.

[25] In contrast, FECA's submission highlighted the Authority's discretion to award arrears of wages or other money payable under s 131(1)(a) of the Act where a default has arisen pursuant to an employment agreement. [2] The default cited being FENZ's

[1] *Christiansen v Rasing t/a Chickens 4U* [2011] NZERA 13 and *Da Silva v Amazing Cleaning limited* [2024] NZERA 628.
[2] Employment Relations Act 2000, s 131 Arrears.

obligation under clause 8 (b)of the FENZ-FECA CA to provide the contractual benefit of employer superannuation contributions in addition to base salary. Further FECA submit the Authority under s 162 of the Act, has the same power the High Court has to make an order for breach of contract.

[26] The jurisdiction of the Authority is well settled with the majority of the Supreme Court in *FMV v TZB*, generally holding if a claim "reflects a problem that relates to or arises from an employment relationship" it falls within the exclusive jurisdiction of the Authority, even if it could be framed another way. The court specifically noted if a claim could be framed in terms of one or more of the examples of jurisdiction set out in s 161(1)(a)-(qd) of the Act it must be brought before the Authority.[3]

[27] Given this matter has been framed as a dispute about the "interpretation, application or operation of an employment agreement" [4] and a potential breach of an employment agreement, it falls within s 161(1)(a), (b) and (g) of the Act, notwithstanding IRD's interest in providing a view on the matter.

[28] For completeness, I observe that the Authority in numerous decisions has determined jurisdiction in disputes relating to employer KiwiSaver obligations not being met and the two Authority outlier determinations cited are outlier exceptions rather than the norm. [5]

**Finding**

[29] I find on issue (a) and (d) that the Authority has jurisdiction to determine matters in this dispute and there is no requirement to stay this matter to await an IRD ruling.

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[3] *FMV v TZB* [2021] NZSC 102 at [94].
[4] Employment Relations Act 2000, s 161(1)(a).
[5] See for example: *Wilson v Modular Conveyers Ltd* [2015] NZERA Auckland 349, *Larissa Stevenson v Everlast Design Limited* [2017] Christchurch 94, *Roy v Carrington Resort Jade LP* [2023] NZERA 4 and *Caswell v Kamo Landscape & Quarry Supplies Ltd.*

**Was the FENZ-FECA CA breached?**

[30] The next general issue is whether the FENZ-FECA CA was breached, and this entails the Authority providing an interpretation of the relevant CA provisions.

**The relevant law: interpretation principles**

[31] The law on principles applying in interpreting employment agreements is well settled, with objectivity prevailing and an emphasis on the centrality of the text of the agreement. The Supreme Court among three leading authorities has indicated that:

> … 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 provided by the contract as a whole and any relevant background informs meaning. …
>
> 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.

[32] If a plain or unambiguous meaning is not derived from an initial object analysis as may be apparent here, I am further guided by observations the Employment Court made in *Godfrey Hirst New Zealand Ltd v National Distribution Union*:

> If, however, there is a true ambiguity, then broader extrinsic assistance for interpretation can be relied on. In addition to having recourse to other relevant provisions in the agreement, such extrinsic aids to interpretation may include evidence of the context in which the agreement was settled, the relevant legislation, and sometimes of the negotiations that led to the settlement. What the Court cannot consider are the accounts of the parties

> or their negotiators as to what they now say they intended to mean by the clause.

[33] Put another way, as expounded by the Employment Court in Le *Gros v Fonterra Co-Operative Group Ltd* the Authority should seek to ascertain the meaning the parties would have reasonably intended at the time the agreement was negotiated.[6]

[34] The court in *Le Gros* also cautioned that the interpretation of a collective employment agreement is a "unique" exercise, and the Chief Judge endorsed observations made by her predecessor Chief Judge Colgan, in *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd* [7] and engaged in an analysis of the distinctness of such agreements by concluding:

> The short, but pivotal, point is that employment agreements are not akin to arms-length business agreements; they involve people and human interactions (not the economic exchange of money for goods); they occur within the framework of multifaceted obligations, both statutory (such as mutual obligations of good faith) and common law (such as the obligation of fidelity and fair dealing). These features provide relevant context when the Court is asked to determine a dispute as to the correct interpretation, application and/or operation of a collective agreement (in this case) or an individual employment agreement. [8]

[35] In assessing a plain language meaning of the FENZ-FECA CA clause in dispute (cl 8) it is apparent unhelpfully, that no distinction is drawn between the Firesuper scheme's complying and non-complying funds. The Firesuper scheme is first, imprecisely referred to as the "New Zealand Fire Service Superannuation Fund" to which an employee is entitled to "participate in". There is then reference in cl 8(b) to a distinction between participation in "either the New Zealand Fire Superannuation Fund or KiwiSaver" to attract the:

> ….. employer's annual contribution to the employee's superannuation up to six percent (as calculated on the employee's base salary and set out in the Fire and Emergency New Zealand Remuneration Package Calculator) will be a benefit in addition to salary paid.

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[6] *Le Gros v Fonterra Co-Operative Group ltd* [2023] NZEmpC 193 at [16}.
[7] *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd* [2014] NZEmpC 168 at [14] – [18].
[8] Above n 6 at [25].

[36] The clause then to reinforce, in my plain and unambiguous reading of such, introduces a distinction by use of the word "either" in cl 8(b), detailing that those employees in KiwiSaver will get employer contributions up to six percent of salary.

[37] What FECA is, in submissions, inviting the Authority to focus upon, is that cl 8 does not specifically deal with employees who have dual membership of KiwiSaver and either Firesuper scheme. As support for this omission being significant, FECA cited a corresponding provision of the New Zealand Professional Firefighters Union/FENZ CA that details membership of two schemes requiring employer contributions is dealt with by the additional cost of the employer contribution being deducted from base salary or weekly wage or any other superable payments made under the CA.

[38] While I accept that is the case, I find it is a stretch too far to imply that by omission, those holding dual membership of superannuation schemes should attract a six percent contribution on each scheme. Such an interpretation would ignore the distinction drawn by use of the term "either" or, would objectively, to a reasonable person be an absurd reading that would allow 'double dipping' of the employer contribution.

[39] Further, I was provided with no convincing contextual background to suggest it was the intent of the parties in negotiations and formation of the CA to confer a double benefit using cl 8 as a vehicle for this.

[40] I prefer FENZ's submission that:

> Ultimately, from the way that the clause is drafted , it is clear than neither party contemplated the scenario that has arisen for employees participating in both the Firesuper Non-Complying Fund and KiwiSaver.

**Finding**

[41] There is nothing in cl 8 of the FENZ-FECA CA that would suggest employees have dual, unencumbered entitlement to an employer contribution in situations where they hold membership of two superannuation schemes.

**The legality of FECA's approach to resolve matters**

[42] The remaining issue is assessing the legality of how FENZ has sought to unilaterally rectify the situation by the taking of a 'total remuneration' approach once they determined that employer KiwiSaver contributions had to be paid to employees participating in both a KiwiSaver scheme and the Firesuper non-complying scheme irrespective of the subsidy being paid on the latter scheme.

[43] FENZ's general submission is:

> Interpreting clause 8 in the context of the Remuneration Policy is the only way to avoid conferring an unintended windfall on a section of the Applicant's members, while disadvantaging those who by chance, did not leverage their superannuation participation in the same manner. This cannot have been what the parties reasonably intended at the time that they entered the agreement.

[44] FENZ contend that cl 7 of the FENZ-FECA CA – a clause headed "REMUNERATION AND PERFORMANCE REVIEW", enabled their total remuneration solution, contending it expressly incorporates FENZ's Remuneration Policy as applicable to terms and conditions of employment impliedly including superannuation issues. Clauses 7 (a) and (b) specifically relied upon, states:

> (a) The establishment and review of remuneration ranges for positions covered by this agreement will be determined by application of the Fire and Emergency New Zealand Remuneration Policy. FECA will be consulted on any proposed changes to this policy, and any proposed changes that materially affect the remuneration of the Associations [sic] members must be agreed between the parties.
>
> (b) Fire and Emergency New Zealand and the Association will meet annually in June to review the total remuneration ranges set out in this agreement (Schedule 2). The most contemporary data will be made available. Fire and Emergency New Zealand will consult the Association over proposed changes to these remuneration ranges and take into consideration savings achieved through implementing structural changes.

[45] FECA submit that a mere reference to "total remuneration ranges" in the context of a clause designed to describe how remuneration ranges for specific positions are reviewed, is insufficient to establish a broader construct, that this clause demonstrates agreement on applying a total remuneration approach when assessing what part

employer superannuation contributions should form an analysis of total remuneration packages.

[46] Further FENZ contend that the contractual arrangement between the parties if accepted by the Authority that a total remuneration approach had been agreed pursuant to the CA, meant that the provisions of s 101B(1) KS Act that require compulsory contributions to be paid in addition to an employee's gross salary could be circumvented and the exception provision of s 101B(4) KS Act prevailed that allows a total remuneration approach to be agreed between the parties. If this was so, FENZ says it follows that the salary deductions made to rectify the situation would not transgress s 5(1)(a) of the WP Act as they would have been agreed in writing between the parties by dint of the FENZ-FECA CA, i.e. clause 7 of the CA was seen by FENZ as an operative and agreed, "general deductions clause" obviating the need to seek an individual worker's written consent. Further FENZ suggested that they also complied in the cited correspondence with impacted FECA members in the consultation requirements set out in s 5(1A) of the WP Act before making deductions in reliance on a general deductions clause.

[47] FECA disagreed in submissions with the latter reading of S 102B (1) KS Act in an alternative submission that I need not traverse given my finding below.

**Finding**

[48] I find from a plain reading and unambiguous of clause 7 of the FENZ-FECA CA, that this provision has a specific and sole purpose to signal existing remuneration ranges set out in Schedule 2 of the CA can be reviewed by "application of the Fire and Emergency New Zealand Remuneration Policy". To extend this to suggest this provision expressly incorporates a discretionary FENZ remuneration policy in all aspects of remuneration settings is conceptually unsustainable as the parties have clearly agreed in the above clause that remuneration is an issue to be bargained between them as part of the CA terms as exemplified by the provision above, that cl 7(a) states any changes impacting "the remuneration of the Associations [sic] members must be agreed between the parties".

[49] Further, FECA submit that it follows from the above finding that any deductions from base pay in pursuit of a total remuneration approach to rectify the situation, would fall foul of s 5(1) WP Act as unlawful deductions without written consent or written request of the worker. [9] FECA's contention in summary is:

> …. a FECA member who is a member of the non-complying fund in FireSuper is entitled to the benefits contained in the Trust Deed. Independent of that, if the member also joins KiwiSaver the member is entitled to the statutory benefits of that scheme including the mandatory employer contribution without deduction from salary.

**Was there a breach of Wages Protection Act?**

[50] Having found that FENZ could not rely upon an assumption that a total remuneration approach had been contractually recognised it follows that the deductions made in individual salaries to rectify the identified superannuation issues were not made in accord with s 5(1) WP Act. The next question is what if any remedies are appropriate to rectify the identified breach.

[51] In considering remedies there is an obvious practical balance to be struck between my two findings – I have found cl 8 of the FECA-FENZ CA does not envisage dual, unencumbered entitlement to an employer contribution in situations where FECA members hold membership of both the Firesuper non-complying scheme and an approved KiwiSaver scheme and on the other hand I have found FENZ's rectification approach contravenes the WP Act by their failure to obtain written consent for individual salary reductions.

**Outcome**

[52] Taking all contextual matters into account (not all of which I have traversed for the sake of brevity and as permitted by s174E of the Act), I am not convinced any remedial measures are appropriate. In this respect I have considered that FENZ although engaging in sometimes confusing communication has not acted with ill intent in their approach to complying with statutory obligations under the KS Act and I am attracted to the compelling submission that it would offend principles of equity to view the approach taken by FENZ as punitive or transgressing any legitimate expectations

[9] Wages Protection Act 1983, s 5 (1)(a) and (b) or (1A).

of their employees. I concur with the following portion of FENZ's submission as succinctly capturing the essence of the issues:

> … neither the Applicants not the Respondent ever expected that employees would receive an additional benefit over and above what is contemplated in the CA simply by participating in the FireSuper Non-Complying Fund and KiwiSaver. Allowing the employees to retroactively withdraw their consent to adopting a total remuneration approach and benefit from unintended double contributions would be unequitable and would result in an unjustified windfall for the Applicant's members.

**Orders**

[53] For the reasons traversed above, no orders are made.

**Costs**

[54] The Authority adopts an approach for disputes under s 129 of the Act regarding the application interpretation or operation of collective employment agreement, that parties will normally bear their own costs. [10] I consider it appropriate to be a matter in all the circumstances, to find that costs lie where they fall.

David G Beck
Member of the Employment Relations Authority

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[10] Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6, bullet ii, available at: https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.