

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 251
EMPC 381/2023**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN THE CHIEF OF NEW ZEALAND
DEFENCE FORCE
Plaintiff

AND NEW ZEALAND PUBLIC SERVICE
ASSOCIATION TE PŪKENGA HERE
TIKANGA MAHI INCORPORATED
Defendant

Court: Judge KG Smith
Judge JC Holden
Judge Kathryn Beck

Hearing: 13–16 August 2024
(Heard at Wellington)

Appearances: JPA Boyle and N Lucie-Smith, counsel for plaintiff
P Cranney and D Allan, counsel for defendant

Judgment: 16 December 2024

JUDGMENT OF THE FULL COURT

[1] This judgment concerns whether the Chief of New Zealand Defence Force (CDF) breached s 9 of the Employment Relations Act 2000 (the Act) by giving a preference to certain non-union members:

- (a) between 1 July and 15 December 2020; and
- (b) between 1 July and 11 November 2021.

[2] It also resolves whether:

- (a) CDF passed on mid-point pay rates he had agreed in the collective agreement with the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Inc (NZPSA) to non-union members with undermining intention but not undermining effect, as referred to in s 59B(2) and (6) of the Act; and
- (b) as claimed by NZPSA, the effect of the preferences was also unlawful discrimination on the ground of union membership to the extent that they excluded union members.

[3] NZPSA succeeded in the Employment Relations Authority, with the Authority finding:¹

- (a) CDF breached the prohibition on preferences in s 9 of the Act in relation to bargaining for a collective agreement for 2020 and 2021, through his actions in backdating pay increases for non-union employees and increasing pay rates for non-union employees to match NZPSA negotiated rates;
- (b) To remedy this, NZPSA was entitled to:
 - (i) a declaration of breach; and
 - (ii) compliance orders requiring CDF to pay equivalent sums to all union employees under s 137 of the Act, and interest on those amounts.
- (c) CDF's actions in relation to NZPSA's claim of a breach of the duty of good faith need to be considered in light of the more specific provisions

¹ *New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Inc v Chief of Defence Force* [2023] NZERA 558 (Member Kinley) at [82].

in s 59B, rather than as a standalone claim of a breach of the duty of good faith in s 4;

- (d) CDF's actions constituted passing on of a term of employment, being mid-point pay rates that were the same or substantially the same as a term or condition in the collective agreement between NZPSA and CDF;
- (e) With reference to the factors in s 59B(6), while CDF's actions support a finding that CDF intended to undermine the collective agreement, they do not support a finding that CDF's actions had the effect of undermining the collective agreement; and
- (f) As CDF's actions do not meet both limbs of the test under s59B(2) to be a breach of the duty of good faith under s 4, a penalty under s 4A is not available.

[4] The Authority ordered that CDF:²

- (a) in consultation with NZPSA, identify which NZPSA members are eligible for payments for each of the periods between 1 July 2020 and 15 December 2020, and between 1 July 2021 and 11 November 2021;
- (b) pay, within 28 days of the date of the determination, to each eligible NZPSA member employed between:
 - (i) 1 July 2020 and 15 December 2020 the sum equivalent to the pay increase that non-union employees received for that time period; and
 - (ii) 1 July 2021 and 11 November 2021 the sum equivalent to the pay increase non-union employees received for that time period; and

² At [83].

- (c) pay, within 28 days of the date of the determination, to each eligible NZPSA member interest on the amounts calculated in accordance with the Interest on Money Claims Act 2016, using the civil debt calculator on the Ministry of Justice website.

[5] CDF has challenged that determination and seeks:

- (a) a finding that CDF did not breach the prohibition on preference contained in s 9 of the Act in relation to increases paid to employees on individual employment agreements in 2020 and 2021;
- (b) a finding that CDF did not breach his duty of good faith owed to the defendant under s 4 of the Act;
- (c) a finding that CDF did not breach his duty of good faith owed to the NZPSA under s 59B of the Act; and
- (d) costs.

[6] NZPSA raised whether the proceeding should be heard by a full Court, given there is a conflict in case law regarding remedies available for breaches of s 9. On 22 March 2024, Chief Judge Inglis constituted a full Court pursuant to s 209 of the Act.

[7] The parties agreed that the Authority's orders should be stayed pending the challenge. The Court accordingly made an order by consent staying the Authority proceedings, effectively staying execution of the determination.³

³ *Chief of New Zealand Defence Force v New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Inc* [2023] NZEmpC 197.

Facts

Civil staff remuneration

[8] CDF employs approximately 3,000 civilian employees. As at June 2019, approximately 577 of those employees were members of NZPSA.

[9] The salary review for the New Zealand Defence Force takes place annually, with an effective date of 1 July. The usual annual review process has two components. First, the remuneration table for civil staff is reviewed to see if it should be amended and, second, there is an annual remuneration review for each employee on the civil staff who potentially receives step increases based on performance.

[10] Historically, the review of the remuneration table for all civil staff was set outside the collective agreement. However, a determination of the Authority in 2017 found that, once CDF was faced with a proposed salary scale that NZPSA sought to have included in the collective agreement, he was required by s 32(1)(c) of the Act to consider and respond to that claim; he could not simply say that he will not agree to the inclusion of a scale in the collective agreement.⁴ CDF was ordered to negotiate meaningfully on NZPSA's proposal that a wage scale be included in the collective agreement.⁵

[11] The 2017 collective agreement took effect on 1 December 2017 and was for a term of 19 months, expiring on 30 June 2019. By agreement between CDF and NZPSA, the 2017 collective agreement incorporated the remuneration table issued by CDF on 1 July 2017 and required CDF to consult with NZPSA on the total remuneration bands that would apply from 1 July 2018, with a minimum 1.5 per cent adjustment to those bands. The NZPSA members continued to have individual Annual Remuneration Reviews that assessed whether they would receive step increases based on performance.

⁴ *New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated v Chief of Defence Force* [2017] NZERA Wellington 95 at [29].

⁵ At [35].

The bargaining for a new collective agreement

[12] Bargaining for a collective agreement to replace the 2017 collective agreement commenced on 1 May 2019. On 31 July 2019, the State Services Commission (SSC) endorsed an offer that included a two per cent across-the-board increase for NZPSA members covered by Part C of the collective agreement.⁶ The parties, however, remained some way apart and the bargaining proceeded slowly.

[13] In April 2020, and reflecting the circumstances faced by New Zealand as a result of the COVID-19 pandemic, SSC issued guidance on bargaining in the state sector. That guidance was publicly available on the SSC website.⁷ Essentially, while people in low-paid roles could expect their remuneration to increase, as a general principle there should be only limited increases for other employees.⁸ The advice from SSC to NZDF at this time included that Ministers did not expect to see backdating, that nil increases were expected for people earning over \$100,000 per annum, but that targeting increases for lower-paid employees, in particular those earning below the “living wage”, was within the constraint guidelines.⁹

[14] In late May 2020, NZDF asked SSC whether it would approve a three-month backdated payment for the NZPSA collective agreement if draft terms of reference were signed in principle by 3 June 2020. SSC advised that a three-month backdated payment was not tenable in the then current economic climate, but that formal advice would follow.

[15] On 2 July 2020, CDF forwarded a proposed salary scale to NZPSA, which he suggested would take effect from 1 July 2020. The proposed salary scale saw people at the bottom of the scale (grades 00 and 09 and step 1 of grade 10) receiving salary increases but otherwise the salaries remaining as they were. CDF asked NZPSA to

⁶ Part A of the collective agreement includes terms that apply to all members covered by the collective agreement. Part C has terms that apply to a closed group of members employed by CDF as at 2010 who have chosen not to go onto Part B terms and conditions. It preserves pre-2010 entitlements, including a 9.2 per cent employer superannuation contribution. It covers 100 mainly long-serving employees. Part B applies to everyone else.

⁷ <https://www.publicservice.govt.nz/assets/SSC-Site-Assets/Workforce-and-Talent-Management/Letter-to-Public-Service-CEs-Archived.pdf>.

⁸ Low-paid roles being those where the average pay is less than \$60,000 per annum.

⁹ The living wage is an hourly rate that is seen as the minimum needed to pay for basic necessities. In 2020, the living wage was \$22.10 per hour.

advise whether the proposed scale was accepted by its members by the end of July 2020.

[16] NZPSA did not accept the proposed scale because it did not meet the mandate of its members; NZPSA wanted something different from what was offered. We heard evidence from Mark James, NZPSA's national organiser with responsibility for members of NZPSA employed by CDF, who was involved in the 2020 collective bargaining. His evidence was that CDF was focussed on pay but that NZPSA had other issues it wanted to bargain over and seek resolution to. CDF left the proposed scale on the table for acceptance in the first part of August 2020 but then advised NZPSA that backdating of pay rates was no longer available.

[17] Mr James says NZPSA understood CDF to be saying that backdating was "forbidden" by the Public Service Commission (PSC), and that there was no scope for backpay.¹⁰ The word "forbidden" does not appear in the documentary evidence, but certainly, by the end of August 2020, the offers from CDF were on the basis there would be no backdating; the effective date of the uplifts was to be upon ratification of the terms of settlement.

[18] On 22 September 2020, CDF advised NZPSA that the remuneration table sent to it in June 2020 would be promulgated for civilian employees on individual employment agreements. CDF advised civilian employees of the new remuneration table on 23 September 2020 and also confirmed that the increases would take effect from 1 July 2020. Those increases to the remuneration bands only affected civil staff who were paid less than the living wage. Also, there were no increases for staff (except those earning below the living wage) as part of the annual remuneration review.

[19] Bargaining with NZPSA continued. PSC advised that, if a settlement was not achieved soon, it would need to review its endorsement of the previous offer as that endorsement had been given before the pay guidance was issued in April 2020. The parties attended mediation in October 2020. As a way of progressing resolution, CDF then provided proposed terms of settlement that included a redistribution of funding

¹⁰ The State Services Commission was renamed the Public Service Commission (PSC) from 7 August 2020.

but within the same fiscal envelope. This approach in part reflected that NZPSA's focus was on obtaining improvements in remuneration for its members who tended not to be low-paid employees. The overall value of the offer was at the limit of the funding allocated as being available.

[20] The offer made on remuneration was:

- (a) a living wage increase to \$47,808 base salary plus an additional \$1,200 to Part B members and a living wage increase to \$45,968 base salary plus \$1,200 to Part C members paid below these amounts;
- (b) NZPSA members paid more than the salaries in (a), and below \$68,000 would receive \$1,000 gross or 1 per cent, whichever is the greater; and
- (c) NZPSA members paid between \$68,000 and \$100,000 base salary would receive \$750 gross or 1 per cent, whichever is the greater.

[21] After some further discussions, terms of settlement were agreed on 26 November 2020 and ratified in mid-December 2020. The new collective agreement had enhanced long service leave provisions and a salary scale that saw increases for employees employed in the higher grades as well as a modest increase for employees employed in the lower grades, lower than the increase for employees on those grades employed on individual employment agreements. The salary increases in the collective agreement were effected on 3 March 2021, backdated to 18 December 2020.

The 2021 increases

[22] As part of the bargaining in 2020, NZPSA sought a two-year term and agreement to a further increase in remuneration from 11 November 2021. It did so primarily to ensure that there would be increases from that date in circumstances where NZPSA had a concern that, given the unknown impact of the COVID-19 pandemic, the economic situation could tell against increases generally in 2021. CDF agreed to the two-year term and to the increase in remuneration from 11 November 2021.

[23] NZPSA asked CDF to confirm that the negotiated rates would not be passed on to non-PSA members. CDF agreed to that with respect to the 2020 rates but said that the 2021 annual review would proceed in July 2021 in the usual way. NZPSA also sought to have the benefit of any increase to the remuneration tables for those employees on individual employment agreements passed on to NZPSA members. CDF declined that request and NZPSA accepted CDF's position.

[24] In 2021, when CDF came to consider the remuneration table for civil staff on individual employment agreements, Dean Pascoe, Director of HR Policy, Remuneration and Benefits, expressed the view in an internal NZDF paper to the NZDF advisory board that it would be sensible for the rates in the remuneration table to keep up with the NZPSA members' rates to avoid employees joining NZPSA for the purposes of obtaining the increase in the collective agreement. In evidence, Mr Pascoe said that his concern was actually broader than what was set out in his written paper, in that he did not wish salary rates to be the determining factor either way when an employee was considering whether to join or remain in NZPSA. His evidence was that NZDF had the budget to increase salaries for employees on individual employment agreements beyond what was proposed for July 2021, but his concern was that doing so would take those employees to higher rates than those on the collective agreement.

[25] Mr Pascoe noted in evidence, however, that:

- (a) any increases to pay for employees on individual employment agreements were performance based, and therefore conditional on a positive performance assessment, whereas the increases for NZPSA members under the collective agreement were contractual and an entitlement; and
- (b) the increases to the remuneration table for employees on individual employment agreements were percentage based, reflecting changes in market rates over two years from 2019, with the percentage increase applying at the respective midpoint of each grade and radiating in 2.5 per cent increments up or down to the steps either side of the midpoint;

whereas, the increases for NZPSA members under the collective agreement were for dollar sums which applied equally to each step in the pay grade, that is all persons in grade 10 would have received the same \$1,000 (gross) increase in pay.

[26] The remuneration table for employees employed on individual employment agreements arising from the review was advised to employees on 8 September 2021. It was effective from 1 July 2021. That review essentially aligned the remuneration table with the rates agreed with NZPSA, which were to take effect in November 2021.

The law

[27] Central to the case is s 9 of the Act. Section 9 is in pt 3 of the Act, which deals with freedom of association, and reflects the object in s 3(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.¹¹ Section 9 provides:

9 Prohibition on preference

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

[28] Pursuant to s 10 of the Act, a contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with s 9.

¹¹ Neither party engaged with the Conventions in their submissions.

[29] The other section of direct importance in this case is s 59B. That section is in pt 5 of the Act, which deals with collective bargaining:

59B Breach of duty of good faith to pass on, in certain circumstances, in individual employment agreement terms and conditions agreed in collective bargaining or in collective agreement

- (1) It is not a breach of the duty of good faith in section 4 for an employer to agree that a term or condition of employment of an employee who is not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer.
- (2) However, it is a breach of the duty of good faith in section 4 for an employer to do so if—
 - (a) the employer does so with the intention of undermining the collective agreement; and
 - (b) the effect of the employer doing so is to undermine the collective agreement.
- ...
- (5) It is not a breach of the duty of good faith in section 4 if anything referred to in subsection (2) or subsection (4) is done with the agreement of the union concerned.
- (6) In determining whether subsection (2)(a) and (b) or subsection (4)(a) or (b) applies, the following matters must be taken into account:
 - (a) whether the employer bargained with the employee before they agreed on the term or condition of employment:
 - (b) whether the employer consulted the union in good faith before agreeing to the term or condition of employment:
 - (c) the number of the employer's employees bound by the collective agreement or covered by the collective bargaining compared to the number of the employer's employees not bound by the collective agreement or not covered by the collective bargaining:
 - (d) how long the collective agreement has been in force.
- ...
- (7) Subsection (6) does not limit the matters that may be taken into account for the purposes of subsection (2)(a) and (b) or subsection (4)(a) or (b).
- (8) Every employer who commits a breach of the duty of good faith under this section is liable to a penalty under this Act.

The arguments

[30] NZPSA supports the determination of the Authority. It says that, through backdating pay increases for non-union members, there was a preference for non-union members on the bottom grades for the period 1 July 2020 to 15 December 2020.

[31] NZPSA also says there was a preference for non-union members who received salary increases between 1 July 2021 and 11 November 2021.

[32] Further, it says that CDF passed on salaries included in the collective agreement to non-union members with the intention of undermining the collective agreement. It accepts, however, that this did not have the effect of undermining the collective agreement.

[33] It seeks to have the Court uphold the orders of the Authority.¹² It also seeks a finding that the backdated increases at issue were unlawful discrimination on the grounds of union membership to the extent that they excluded union members.

[34] CDF says that the way in which the negotiations unfolded in 2020, and the way in which he and NZPSA agreed to enter into the collective agreement, meant there was no preference in 2020. He also says, in context, there was no preference in 2021; NZPSA was aware of and understood what might happen in that year. CDF also says he acted in good faith and was open and transparent in his communications to NZPSA.

Analysis

What does s 9 require?

[35] The meaning of s 9 of the Act is to be ascertained from its text and in the light of its purpose and its context.¹³ The placement of s 9, in pt 3 of the Act, underscores that it is part of a framework to enable employees to have the freedom to choose whether or not to form or be a member of a union for the purpose of advancing their collective employment interests and, in that regard, to prevent any person from conferring any preference or applying any undue influence, directly or indirectly, on employees because they are, or are not, a member of a union.¹⁴

[36] Section 9 is not one way; while the issue in this case is whether non-union members were given a preference over members of NZPSA, the section also prohibits

¹² See above at [4], and n 2.

¹³ Legislation Act 2019, s 10.

¹⁴ Employment Relations Act 2000, s 7.

a preference being conferred on a union member over a non-union member or over members of a different union.

[37] The Court has previously considered the meaning of a “preference”.¹⁵ A preference in the context of s 9 includes an advantage to some person or persons by reason of non-membership of a union over another person or persons because of the absence of union membership status.¹⁶ It is the giving of a priority or a material advantage for one person over another person.

[38] The courts have also previously considered whether motive is relevant and have concluded that it is not. The issue is what caused the preference to be conferred. If it was union membership (or non-membership), it is prohibited. The motive for the preference is not relevant.¹⁷

[39] Read in isolation, s 9(1)(b) would suggest employees had to be on terms of equal value. A term-by-term analysis would be consistent with s 9(3), as that involves looking at a particular term or condition, with a preferential term or condition being allowable if it meets the requirements in s9(3).

[40] Section 9(2), however, expressly provides that s 9(1) is not breached simply because an employee’s terms and conditions are different from those of another employee employed by the same employer. That subsection suggests a global approach, considering the employee’s terms and conditions as a whole. Such an approach is also consistent with commonsense when it comes to bargaining. Different employees, or groups of employees, may see benefits in a different package and s 9(2) confirms that a different overall package will not, in itself, be a breach of s 9(1). If that were not the case, then the effect of s 9 would be to require employees to be employed on the same terms and conditions.¹⁸

¹⁵ *New Zealand Meat Workers Union v Taylor Preston Ltd* [2009] ERNZ 54 (EmpC) at [49].

¹⁶ *National Union of Public Employees v Asure New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC) at [46]; *Association of Professional & Executive Employees Inc v Te Whatu Ora – Health New Zealand* [2022] NZEmpC 226, [2022] ERNZ 1127 at [35]; and *New Zealand Air Line Pilots’ Assoc IUOW Inc v Tasman Cargo Airlines Pty Ltd* [2023] NZEmpC 234, [2023] ERNZ 1063 at [62]–[63].

¹⁷ *Taylor Preston Ltd v New Zealand Meat Workers Union and Related Trades Union* [2009] NZCA 372, (2009) 6 NZELR 828 at [26].

¹⁸ Apart from terms and conditions covered by s 9(3).

Section 59B

[41] Another issue arises when considering s 9 alongside s 59B. Section 59B provides that it is a breach of the duty of good faith if an employer passes on terms or conditions of employment agreed to in collective bargaining if this is done with the intention of undermining the collective agreement and has the effect of doing so. In light of those two provisions, there is an issue as to what an employer can do when determining terms and conditions for non-union employees.

[42] Mr James gave evidence that his view was that the combined effect of s 9 and s 59B was CDF could not have offered non-union employees remuneration at a higher rate than that payable to NZPSA members, and nor could he pay them at the same rates, as that would be passing on. That cannot be right. As noted, s 9 cuts both ways; if it is a prohibition on the employer paying more to non-union employees, it is also a prohibition on paying more to union employees (unless s 9(3) applies).

Pay review for 2020

[43] On the particular facts of this case, we consider it significant that the pay scale ultimately set for non-union employees, effective from 1 July 2020, had previously been offered to NZPSA on behalf of its members, and had not been accepted by it because it did not meet the mandate that it had from its members. As noted, NZPSA then went on to agree different terms and conditions. They included higher rates for more senior employees, lower rates for the employees who were at the same level as the non-union employees who gained pay rises in 2020, and a different commencement date.

[44] NZPSA says that it agreed to the later commencement date on the understanding that backdating had been forbidden by PSC. CDF was clearly operating on the basis that PSC had expressed a strong view that backdating was inappropriate and affected CDF's bargaining position in the collective bargaining. We see no barrier to CDF taking what was a hard line on backdating as part of the bargaining, given the guidance it had been given by PSC and the reasons for that guidance. Parties are entitled to take hard lines on bargaining positions. We do not agree that CDF misled

NZPSA; he had expressed a firm view that increases would not be backdated, which he is entitled to do.

[45] In summary, in respect of the 2020 bargaining, we find it was not a breach of s 9 for CDF to agree to the settlement of the collective bargaining in circumstances where the offer had already been made and not accepted by PSA. While the terms agreed with NZPSA primarily were to do with remuneration, there also was an additional term in respect of long-service leave after 10 years of service. Mr Cranney, counsel for NZPSA, minimised that term, but it is not for the Court to assess the value of the bargain struck between NZPSA and CDF. Essentially, NZPSA agreed to a bargain that it felt was more advantageous to its members, who tended not to be in the lower grades. That position was open to NZPSA, and it was open to CDF to accept it.

Pay review for 2021

[46] As part of the settlement in 2020, the parties agreed to remuneration increases, to take effect in November 2021, for the reasons already noted. NZPSA was advised and fully aware that there would be a review conducted effective 1 July 2021 for non-union civilian employees. It is axiomatic that such a review may have led to lower increases, or higher increases, than those obtained by NZPSA. In the event, the increases in July 2021 for non-union employees mirrored the increases that NZPSA had negotiated for its members, but with an earlier effective date, consistent with CDF's obligations to its non-union employees to conduct salary reviews effective from July of each year.

[47] The different timing for the 2021 pay increase for NZPSA members was part of the deal reached in the 2020 bargaining between CDF and NZPSA. In that bargaining, NZPSA achieved the certainty it sought. When it agreed to the November 2021 timing, it did so in the full knowledge that there would be a review in July 2021 for non-union employees. In those circumstances, we consider that, while the NZPSA members received their pay rises after the non-union employees, that was part of the different deal negotiated between NZPSA and CDF in 2020, and was permitted by s 9(2). We find there was no breach of s 9.

Was there a breach of good faith under s59B?

[48] We now turn to whether, in fixing the 2021 increases for non-union staff, CDF passed on a term or conditions that had been agreed in bargaining for a collective agreement and, if he did so, whether that was with the intention of undermining the collective agreement and had the effect of doing so.

[49] The first issue is whether there has been passing on. The contemporaneous material indicates that the salary scale offered to non-union employees in July 2021 was developed by reference to the rates that had been agreed with NZPSA. The rates offered to non-union employees were substantially the same as those in the collective agreement that bound CDF. We find there was passing on.

[50] The second issue is whether that was done with the intention of undermining the collective agreement.

[51] Although Mr Pascoe may have had a broader concern not to allow remuneration rates to be the determining factor for employees considering whether to join or remain in NZPSA, the contemporaneous written paper only expressed the concern of employees joining NZPSA in order to gain the rate negotiated with it. It is clear that the matching of remuneration was done to deter employees from joining NZPSA to access the collective agreement. We find the passing on had the intention of undermining the collective agreement.

[52] For there to be a breach of good faith under s 59B(2), however, there must be both intention (pursuant to s59B(2)(a)) and effect (pursuant to s 59B(2)(b)). As it transpired, and as accepted by NZPSA, the passing on did not have the effect of undermining the collective agreement. This means that, regardless of intention, CDF was not in breach of s 59B of the Act.

[53] The parties did not address s 59B(3) and (4). These subsections make clear that a breach of good faith can occur where there is either an intention to undermine collective bargaining *or* the effect is to undermine collective bargaining. However, this only applies to passing on of terms agreed to in collective bargaining before they are incorporated into a collective agreement. It does not apply in the present

circumstances, as the NZPSA pay increases had been incorporated into a collective agreement.

Conclusion

[54] CDF did not breach s 9 of the Act in relation to remuneration paid to non-union employees between 1 July and 15 December 2020; and between 1 July and 11 November 2021. The terms and conditions of employment of members of NZPSA covered by the collective agreement, and non-union members on individual employment agreements, were simply different. The terms of the collective agreement were a product of the bargain negotiated in 2020 by NZPSA and CDF, and it is not for the Court to assess the value of that bargain.

[55] CDF passed on rates that were substantively the same as those in the collective agreement between CDF and NZPSA. Such passing on was done with the intention of undermining the collective agreement. However, it did not have the effect of undermining the collective agreement. Accordingly, there was no breach of s 59B of the Act.

Discrimination

[56] As noted, NZPSA also claims that the effect of the preferences was unlawful discrimination on the ground of union membership to the extent that they excluded union members.

[57] Discrimination because of an employee's union membership status is a ground for a personal grievance. No personal grievance was before the Court. Otherwise, in the present context, the claim of discrimination adds nothing to the claim of a breach of s 9.

[58] Given our finding, there is no need to deal with the application made by CDF for an order that this claim be struck out.

Remedies

[59] Given our findings, it is not strictly necessary to deal with potential remedies.

[60] We make the following comments, however. The courts have previously recognised the difficulty with remedies for breaches of s 9.¹⁹ Section 10 provides for the effect of a finding of a breach of s 9, being that the prohibited preference has no force or effect. That leads to the potentially unsatisfactory result of reducing terms for employees who benefit from the preference and not materially helping the employees who have potentially been adversely affected.

[61] In *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc*, Chief Judge Colgan concluded that a compliance order under s 137 of the Act requiring the company to give the same benefit to the adversely affected employees was an available remedy. His reasoning was that s 137 is worded broadly, allowing the Authority or the Court to craft an appropriate and just solution for an established wrong that s 10 does not justly rectify. We are not convinced that is the case.

[62] Certainly, pursuant to s 137, the Authority (and, derivatively, the Court)²⁰ may, in addition to any other power it may exercise, order a party or witness to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with s 9. The difficulty is that the non-compliance would have been the provision of the preference, so any order would need to be directed at that non-compliance. We agree with the full Court in *Asure* that there is no statutory basis for the remedy sought by NZPSA, and granted by the Authority.²¹ As submitted by Mr Boyle, counsel for CDF, NZPSA effectively is asking for an order that its collective agreement be varied to increase certain rates and/or change the effective date of the increases in rates to match those in the individual employment agreements. That is contrary to the Act, which prohibits the Authority or Court from

¹⁹ *Taylor Preston Ltd*, above n 15 ; *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZEmpC 119, [2014] ERNZ 247; *Association of Professional and Executive Employees Inc*, above n 16.

²⁰ *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC) at [37].

²¹ *Asure New Zealand Ltd*, above n 16, at [59].

making an order varying a collective agreement or any term of a collective agreement.²² Again, we agree with the full Court in *Asure* that, in the context of pt 3 of the Act, the avenue for addressing a breach of s 9 is provided in s 10, being that the preference has no force or effect.²³ That does not mean that the employees who had inferior terms and conditions were left without a remedy; as identified, they could raise a personal grievance for discrimination.²⁴

Outcome

[63] CDF has been successful in his challenge. The Authority's determination is set aside and this judgment stands in its place.

[64] The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.²⁵ Those costs ought to be able to be agreed. If that does not prove possible, CDF may apply for costs by filing and serving a memorandum within 20 working days of the date of this judgment. NZPSA is to respond by memorandum filed and served within 15 working days thereafter, with any reply from CDF filed and served within a further five working days. Costs will then be determined on the papers.

Kathryn Beck
Judge
for the full Court

Judgment signed at 5 pm on 16 December 2024

²² Employment Relations Act, ss 162, 163 and 192.

²³ *Asure New Zealand Ltd*, above n 16, at [60].

²⁴ Employment Relations Act, ss 103(1)(c) and 104.

²⁵ See "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.