

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN FINSEC Incorporated and James Richard Cortright (Applicants)

AND ANZ National Bank Limited (Respondent)

REPRESENTATIVES Keith Jefferies for the Applicants
Hamish Kynaston for the Respondent

MEMBER OF AUTHORITY P R Stapp

AFFIDAVIT AND SUBMISSIONS 1 July 2005 and 1 (and bundle of documents) and 8 August 2005 and 13, 16 September 2005 and 7 October 2005 and 8 and 14 November 2005

DATE OF DETERMINATION 10 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. This is an employment relationship problem about Mr Cortright's coverage under a collective agreement. Mr Cortright and Finsec Incorporated (FINSEC or the Union) are seeking to enforce the coverage provisions of the collective employment agreement as it applies to Mr Cortright.

Background

2. Mr Cortright commenced his employment with the National Bank of New Zealand as a senior analyst programmer on 18 August 1999. He still holds that position. He reports to a project manager. He says that when he was employed by the bank he was not informed as to the existence of a collective agreement.
3. On 27 April 2004, Mr Cortright joined FINSEC. In April and May 2005, Mr Cortright contacted his union to inquire how he could join the collective. Subsequently he was told that the bank would not let him join. Mr Cortright lodged his claim for coverage while the 2004/2005 collective agreement was in force (SIR 1).

4. A new collective agreement has been subsequently agreed and come into force. The agreement was effective from 1 April 2005 (SIR 2). The coverage clause and pay framework relevant to Mr Cortright's claims have not changed from the previous collective agreement.
5. Upon Mr Cortright's appointment confirming his position of senior analyst programmer, core systems development with the National Bank on 20 July 1999, his terms were covered by an individual employment agreement (letter 20 July 1999). Employment terms and conditions for managers and executives dated April 1999 applied to his position (SIR 2 and 3). The 1999 managers' booklet was replaced in 2003 with a managers' booklet dated October 2003 (SIR 4).
6. On 1 December 2003, the respondent took over the National Bank's business, including the applicant's employment.
7. The relevant coverage clause (from the collective agreement) provides that:

“Coverage

1. *This agreement covers the following roles:*
 - (a) *Generalist banking roles, which include:*
 - (i) *Customer service officer, banking consultant, sales consultant, direct service and sales representative, direct service and sales specialists 1 and 2, lending services officer, account services officer, rural banking consultant, corporate and business banking consultant, trade finance officer, transactional banking consultant, foreign currency accounts officer, and their team leaders; and*
 - (ii) *Any new generalist banking roles which are formulated; and*
 - (b) *S1-S4 specialist roles as described in clause 30 of this agreement.*
2. *This agreement does not cover staff members in management roles.”*

8. Mr Cortright's role did not fall within the “*generalist banking roles*” referred to in clause 1(a) of the collective agreement but his role is a “*specialist role*” and whether or not his role is a management role in terms of sub clause 2 above. Mr Cortright has a role and responsibility statement for his position. It reflects a specialist role.
9. The parties are in dispute about the interpretation of Mr Cortright's role in regard to “*S1-S4 specialist role*” described in clause 30 of the collective agreement.
10. The April 2004 collective agreement, clause 30, Salary System and Job Roles, sub clauses (b) to (d) are relevant.

These make provision for:

“(b) *Specialist roles.*

Roles may be defined as specialist roles.

Specialist job roles are also described in accordance with the core competencies required to perform them. Salary progression in these roles occurs in two phases:

- *development, and*
- *Consolidation.*

The CASs [competency assessment schedule] agreed between the parties on a collective or individual basis to find the competencies required for each salary increase. They should be read in conjunction with this Agreement and may be varied from time to time by agreement. Insertion added.

(c) *Salary scales*

Salary scales for the core generalist banking roles are attached and form part of this Agreement.

(d) *Specialist roles covered by this Agreement have a salary scale determined with regard to the consideration of four descriptors relating to four standard salary bands. Jobs may directly align with these bands based on those criteria, or they may fall between the bands where the assessment indicates this is appropriate.*

These descriptors are based upon:

- *Complexity of the role*
- *Degree of decision-making in the job*
- *Whether or not the role involves management of staff.*

S4. Accountable for a diverse range of highly complex tasks which require considerable judgement and ‘in depth’ analysis. Has discretion to make significant decisions affecting the operation of their business unit. Would normally have the assistance of support staff. Typically senior positions and senior supervisors.

S3. Supervisors and other experienced specialists undertaking duties where there is a requirement for ‘in depth’ analysis. Duties are of a complex nature. Able to make decisions within defined parameters. Typically senior project officers, business analysts, legal.

S2. Staff in positions who provide a specialist service requiring analysis and operational judgement. May be a member of a team. May be a skilled administrative staff member where initiative and judgement are required.

S1. Staff who provide a specialist service either requiring operational judgement or undertaking administrative support activities.”

11. The parties have not been able to resolve this matter through communications with each other and attendance at mediation services provided by the Department of Labour. Therefore, the Authority has been requested to determine the matter. It was agreed that the Authority deal with the matter on the papers.

The issues

12. The primary issue is a matter of interpretation. Is Mr Cortright's position covered by the provisions of the collective agreement? What determines coverage?
13. Mr Cortright's employment relationship problem filed in the Authority on 21 April 2005 includes a claim for exemplary or other damages for distress, humiliation and loss of dignity and the compensation for the loss of any benefit, whether or not of a monetary kind, that he might have been entitled to expect.
14. By agreement of the representatives, a decision was made to proceed on the coverage issue first. These other matters have been put to one side.
15. FINSEC's application dated 21 April 2005 is seeking to enforce Mr Cortright's rights under the collective agreement. The interpretation dispute will cover the problem as it has been raised by FINSEC. Any further issues arising on enforcement are reserved.

The applicants' submissions

16. The applicants say that Mr Cortright's role is a *specialist role*. It is submitted that his role fits within the specialist role *descriptives*. The applicants' argument is that Mr Cortright should have been employed and remunerated under the CAS [competency assessment schedule]. It is submitted that the bank's practice of using salary as the determinant of coverage stands in contrast to the applicants' argument that the coverage clause should be used to determine coverage.
17. In his position, Mr Cortright has no management role or function whatsoever. He has no staff under his control. He has no power to discipline employees and he has no command or regulatory duties. It is submitted he is a senior specialist computer programmer with union membership who works under direction and accordingly has coverage.

The respondent's submissions

18. The respondent says that S1-S4 specialist roles are defined among other things by the salary attached to the role. This is disputed by the applicants. The bank says that to be covered the salary for the role must fall within the salary scale specified in the agreement. Mr Cortright's salary exceeds the maximum specialist salary payable under the 2004 collective agreement by nearly \$30,000.

19. The bank also considers that Mr Cortright holds a “*management role*” and therefore cover is excluded. It is accepted that the issue is a matter of interpretation.

Mr Cortright’s role

20. Mr Cortright’s appointment confirmed his role in the position of senior analyst programmer, core systems development. It is common ground that Mr Cortright’s role did not fall within the “*generalist banking roles*” referred to in clause 1(a) of the collective agreement. It is agreed that his role is a “*specialist role*”. However, being a specialist role the issue is whether or not it is covered in the collective agreement under clause 30 of the collective agreement: “*S1-S4 specialist role*” as described. The respondent has used the salary for the role and categorised his role as a management role because of its scope rather than any numbers of staff to supervise. His role has no CAS [competency assessment level] and has not been employed or remunerated under CAS.

The determinants for Coverage

21. There is no salary cap under the terms of the collective agreement. The only exclusion provision is where an employee is in a management role.
22. There is nothing that prevents coverage under the collective agreement where an employee is paid more by arrangement under individual terms.
23. Therefore, Mr Cortright holding a specialist role, provided it is described in clause 30 of the collective agreement, would entitle him to coverage. He must be covered since the ANZ National Bank’s position of determining coverage by salary and not under the coverage clause is an incorrect approach to the matter. The salaries are determined and a band applies but does not mean the salaries are prevented from being higher than the top rate in the scale on an individual basis. Also the bank cannot rely upon Mr Cortright’s role being a management role when it clearly is not.

Summary of reasoning

24. My reasons for deciding in favour of the applicants are:
- There is no salary bar.
 - Coverage is not determined by salary but by the coverage clause.
 - Aligning jobs with the salary bar or falling between the bands is discretionary.

- The Act permits overlapping coverage by collective agreements and individual employment agreements (see s 61 of the Act).
- Management roles should be able to be distinguished and there does not appear to have been any agreement on this in regard to Mr Cortright and his role in the bank.

25. As a member of FINSEC Mr Cortright is entitled to coverage under the collective agreement.

26. Costs are reserved.

P R Stapp
Member of Employment Relations Authority