

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Bryan Gilmour, Phil White, Wayne Nicholas
(Applicants)

AND ANZ National Bank Limited (Respondent)

REPRESENTATIVES Peter Cranney for Applicant
Andre Lubbe for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION Wellington
MEETING 31 October 2006

FINAL SUBMISSIONS 8 February 2007

DATE OF 13 March 2007
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Each of the applicants, Messrs Wayne Nicholas, Brian Gilmour and Phil White, have had a long and successful career with the ANZ National Bank Limited (“the Bank”) and its predecessor banks. All were employed as personal managers, although only Mr White remains employed by the Bank.
2. In essence, each of the applicants claim that the Bank breached its duties to them by refusing to increase their salaries until the Bank determined that they were paid the appropriate salary for their position. The Bank considers that it is not in breach of any of its duties to the applicants, who it believes are paid in excess of the amount the Bank is required by contract and in fairness to other personal bankers to pay them.

The Facts

3. While called personal managers, a number of the applicants and their colleagues also had responsibility for business clients, especially in the regions. In 2004, the ANZ Bank merged with the National Bank of New Zealand to form the respondent, the ANZ National Bank. Following that merger, new employment agreements, which were complete agreements, were entered into between the Bank and the applicants, prior to the concerns over their remuneration that later arose. These were individual employment agreements of a standard nature.
4. The applicants' terms and conditions of employment were contained in letters of appointment and the individual employment terms and conditions of managerial staff booklet. Each applicant's position and their duties and responsibilities were as previously advised and remained unchanged. Their pay was set in a statement of total target remuneration and all the applicants' remuneration clauses appear to be the same, as follows:

Remuneration

The remuneration for your position is based on a Total Employment Cost (TEC) structure.

Your TEC level is: \$xx,xxx per annum

TEC is based on full time employment and will be proportional if you work part time.

Your TEC is made up of your cash salary and any benefits such as employer superannuation contributions, private use of a Bank provided motor vehicle and/or private use of a carpark. Employer and employee superannuation contributions and benefits are based on a notional salary determined by the Bank. In most cases this will be 70% of your TEC.

...

Please note that any other Bank provided benefits not currently included in your TEC, such as Banking Products, may be added or addressed at a later date.

The Bank conducts an annual market review of remuneration. The date this review is based upon is 1 October, although we reserve the right to change this if business needs require. This review includes all components of your TEC such as salary and the cost of any benefits provided by the Bank. The Bank may, following consultation with affected staff, amend your TEC to include any increase in the cost of benefits provided, however, if this occurs it will not result in any decrease in the cash salary component of your TEC. The value ascribed by the Bank to a TEC benefit (as amended from time to time) is conclusive for all aspects of the employment relationship.

Attached is a Total Target Remuneration (TTR) statement that includes your reviewed TER or TEC and sets out the components that will now be included in your TEC.

Your TTR statement also has provision for a Target Incentive (TI) amount. Your TI is the amount that you may be entitled to receive should you meet the requirements of the incentive scheme developed by your business unit. Your business unit will advise you of your personal TI when the incentive scheme is communicated.

...

Incentive schemes do not form part of your terms and conditions of employment. The schemes and potential payments are offered at the discretion of the Bank and may be varied or cancelled by the Bank at any time.”

5. Although their positions' grading was said to be important to the applicants there is no reference to any particular grading in the employment agreement.
6. Apparently as a result of the amalgamation of the two banks, the Bank was concerned about the pay of personal managers whose positions were not covered by the collective employment agreement, even although the work they did was basically the same as the applicants' group of personal managers. Of particular interest to the Bank were that 32 of the 45 staff on individual agreements were paid more than the level of personal managers under the collective employment agreement.
7. The Bank attempts to implement a fair pay fixing system through the use of Hay methodology to establish relativity between roles. It was concerned that personal bankers on individual agreements had their positions evaluated under the Hay system as if they had credit discretion even though they did not. Also of note to the Bank was that fewer and fewer business clients were being dealt with by personal bankers such as the applicants.
8. These issues were seen by the Bank to be inconsistent with its equitable, transparent and fair approach to remuneration. The Bank therefore decided to review the role of personal manager through the use of data provided by a remuneration consultancy, Higbee Schaffer. Its survey looked across the major banks and what they pay for different positions based on a total remuneration approach, which includes bonuses, superannuation, etc. That survey showed that for personal managers across the industry the average total remuneration was \$62,735, while the 75th percentile (i.e. the personal manager earning more than 75% of her/his equivalents) was \$69,830. The top grade under the collective employment agreement was \$62,160. The

applicants were paid around or above the 75th percentile, despite not having any credit discretion and being able to earn up to \$6,000 in bonuses.

9. While the Bank consulted with FINSEC about the review generally, it did not do so in any detail. The Bank wrote to all personal managers on 15 November 2005 advising them of the review and telling them that they would be advised of the implications of any changes. It did not, however, consult at all with any of the applicants until after it had determined what it wanted to do about the results it had discovered.
10. The Bank's decision on this matter was first communicated to the applicants by way of a letter dated 9 December 2005 as set out below:

“Personal Manager Review October 2005

You have already been advised that ANZ Retail has recently undertaken a review of the Personal Manager position's grading. This letter explains in more detail the outcome of this review, what this means for you and the options you have open to you.

The review confirmed that the appropriate grading for the Personal Manager role is L3, a non-TEC position. The Review highlighted that a number of historical remuneration and contractual issues exist that we now need to address. The objective of the review is to ensure that all our Personal Managers are appropriately remunerated on the correct contractual arrangement for the role. The Personal Manager role falls under the CEA coverage and we have a legal obligation to ensure that employees are covered under the appropriate agreement.

Fundamental to the Review is that no staff member should be financially disadvantaged and therefore you will be presented with 2 Options to choose from depending on your needs. As you were employed with the Bank prior to 2 October 2001, this includes the option of reinstating your lending benefits, if you so choose. The attached Remuneration Comparison Worksheet details the components that make up your existing TEC package and provides you with 2 CEA/mirror IEA Options to choose from.

You will be given a fourteen day period to consider the option best suited for you and to take independent advice prior to confirming your acceptance of the offer or otherwise. If you choose not to accept the offer presented to you, you will remain on your current TEC package. As you are currently being over remunerated for the role you are carrying out, your current salary will be “red-circled” until such time that the CEA/mirror IEA salary scale meets or exceeds your current TEC. You will also no longer participate in the Personal Manager incentive scheme as you are on a managerial package.

You should be aware that this review process does not entitle you to redundancy compensation as your Personal Manager role still exists and remains exactly the same, and you are being offered a package with an equal value to your current TEC package.

If you have any questions about any aspects of this review, please feel free to contact me.”

11. The only difference between the two options presented was that one had a separate lending benefit as opposed to other allowances, but in both cases the amount of the total allowances was the same.
12. Because the Bank was aware that the applicants might react strongly to its decision, personal meetings were arranged to deliver the letters and discuss them, with the applicants’ managers being provided with information on how to address any issues raised.
13. As anticipated, the applicants objected to, as they saw it, having their positions downgraded. Mr Nicholas thought the Bank was acting totally unfairly and this was a major reason for his later resignation in April 2006. Mr Gilmour believed that as a result of this change he lost status, was excluded from the management team. He has resigned from the Bank subsequent to the investigation meeting. While Mr White remains in the employment of the Bank, he remains very upset about what he sees as a loss of status.
14. Despite correspondence, mediation and discussions between the parties, they have not been able to reach any agreement and hence it falls to the Authority to make a determination.

Determination

15. I do not accept that the applicants have had their positions regraded downwards. They still retain their grading. Their remuneration, however, is to be set in accordance the arrangements in their employment agreements. The employment agreements make no provision for cost of living adjustments, rather, by specific written agreement, the Bank has undertaken to do an annual market review of remuneration. While the word market is not defined, I accept that the market referred to is the market for the employment of bank officers in New Zealand in similar positions to the applicants. The review includes not only salary but all benefits provided by the Bank.

16. I accept that the Bank has met its requirements in this regard, albeit that the applicants are most disappointed that, in the Bank's view, the market review of remuneration shows them to be over-remunerated. As there is no obligation, as noted above, on the Bank to pay cost of living or other increases, the Bank is entitled to decline to improve workers' remuneration, albeit that in doing so it runs the risk of alienating and eventually losing valued staff, as has happened with the applicants here.
17. There is no evidence that in conducting the review the Bank acted as it did for any reasons inimical to the duty of good faith. It was entitled as a matter of existing policy to take internal relativities into account and determine the outcome of the remuneration reviews it undertakes. Furthermore, the applicants had no legitimate expectation of regular pay increases, as the Bank's policies in this regard were made clear to the applicants.
18. On behalf of the Bank, Mr Lubbe, perhaps generously, conceded that the Bank's actions in putting a cap on the applicants' remuneration constituted an action of the Bank to the disadvantage of the applicants' employment, or one or more conditions thereof. I accept, however, that any such disadvantage was substantively justifiable. Internal relativities are an important issue for employers when setting remuneration and inconsistencies need to be addressed at some point. There was no evidence that the applicants were not paid in accordance with market rates for individuals in similar jobs. Furthermore, the Bank was not attempting to reduce the applicants' remuneration and they had no legitimate expectation of future increases.
19. I do not accept that the applicants have suffered any particular loss of status either. I note here that the applicants remained on the same grade and effectively therefore had the same status. In any event it was clear to me on the evidence that the matter of the most significant concern to the applicants was the loss of potential future remuneration increases.
20. I therefore determine that if the applicants were affected by the Bank's actions to their disadvantage, the Bank's actions were justified, except in relation to the issue of consultation.

21. Consultation is mandatory where positions may be made redundant or the continuation of employees' employment will, or is likely to, be adversely affected by a proposed decision by an employer. In this case, the positions the applicants held have not been disestablished by the Bank. Furthermore, there has been no substantial change to the positions they have held. It therefore follows that there can be no claim for redundancy. It also follows that as the continuation of the applicants' employment was not likely to be adversely affected by the Bank's decisions on remuneration, consultation was not necessary under this head.
22. Pursuant to their duty of good faith to their workers, employers are also required to be active and constructive in establishing and maintaining productive employment relationships in which the parties are, among other things, responsive and communicative (s.4(1A)).
23. For reasons given above, I find that there was no obligation on the Bank to negotiate or reach agreement with the applicants over the way the Bank intended to remunerate them in the future. In this case the issue is therefore whether the duty of good faith, and in particular as set out in s.4(4)(d) applies, and whether consultation was required. As the Bank has accepted that its actions were actions to the employees' disadvantage, it seems apparent that its actions at the time, and the proposal that preceded them, might and did impact on the applicants. I therefore determine that s.4(4)(d) does apply.
24. In *Auckland City Council v. New Zealand Public Service Association Inc* [2003] 2 ERNZ 386, the Court of Appeal addressed the issue of consultation in circumstances set out in that subsection, albeit before the 2004 amendments to the Act. The Court of Appeal rejected what it described as an almost unlimited approach to consultation in the Employment Court's judgment on the case. It noted that if the Employment Court was correct then the initial Council resolution determining to review expenditure would have amounted to a proposal potentially impacting on employees and therefore requiring consultation. It went on to hold that it would therefore be hard to think of any decision in the conduct of a business that would be outside the obligation for consultation. The Court of Appeal did, however, agree with the

Employment Court that the content of any obligation of good faith will depend on the circumstances. The Court of Appeal held, at para.[24]:

“To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.

We need say no more about the general approach dictated by the Act. It is not possible to lay down rules or protocols defining what may or may not constitute dealing in good faith. The statute is seeking to establish good employment relationships. It seeks that the parties embrace that objective and to deal openly and fairly to that end. ... Any general requirement of ‘energetic and positive displaying of good faith behaviour’ goes too far.”

25. The Bank has accepted that its actions amount to a disadvantage. The Bank also was aware that the employees would feel its decision very keenly. For instance, it arranged for a special meeting with the applicants and had prepared its managers for a strong reaction by the applicants to its decision to arrest any future remuneration progression, at least for the time being. While important to the Bank the issues could not be described as urgent.
26. In these circumstances, I find that a fair and reasonable employer would have consulted the applicants before deciding that it would implement its new approach to their remuneration. Simply informing FINSEC that it intended to conduct such a review is insufficient. Thus while a fair and reasonable employer would not have needed to consult at the proposal stage, it should have done so at the point that it had a firm proposal to make, rather than simply making a decision and requiring the applicants to accept one of two equally unpalatable options.
27. It is safe to assume that the broad outcome, however, in terms of the applicants’ remuneration, would most likely not have been any different, had there been consultation. That has certainly remained the position, despite the applicants pursuing this claim to the Authority. It is clear that the Bank was determined to right what it saw as a significant issue in terms of internal relativities. After all, for the reasons given above, it was entitled to implement such a decision, subject of course to proper consultation. There may have been changes, however, as a result of

consultation, to how its decision was implemented, such as the ability of the applicants to attend management meetings, for instance.

28. It therefore follows that the applicants must succeed in their claim for compensation, either as a breach of good faith or as an unjustifiable action to their disadvantage. The way the Bank's decision was delivered to them was unfair and insensitive. It had the effect on them that the Bank foresaw, yet chose not to minimise by consultation and personal support. Compensation in these circumstances must, however, be limited to the breach by the Bank. I accept that consultation would not have had a significant effect (certainly on the main issue of concern to the applicants). On the other hand the sense of shock felt by the applicants could have been considerably assuaged by prior consultation. I therefore conclude that compensation of around \$3,000 would be appropriate.
29. I therefore order the respondent, the ANZ National Bank Limited, to pay to the applicants, Wayne Nicholas, Bryan Gilmour and Phil White, the sum of \$3,000 each in compensation under s.123(1)(c)(i).

Costs

30. Costs are reserved.

G J Wood
Member of the Employment Relations Authority