

**THIS DETERMINATION
CONTAINS AN ORDER
PROHIBITING PUBLICATION OF
CERTAIN INFORMATION
REFERRED TO IN THIS
DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 98
5577448

BETWEEN NEW PLYMOUTH DISTRICT
COUNCIL STAFF
ASSOCIATION INC.
Applicant

AND CHIEF EXECUTIVE NEW
PLYMOUTH DISTRICT
COUNCIL
Respondent

Member of Authority: Vicki Campbell

Representatives: Megan Gundersen for Applicant
Caroline McLorinan for Respondent

Investigation Meeting: 9 October 2015

Determination: 12 October 2015

DETERMINATION OF THE AUTHORITY

- A. Non publication orders apply to specific documents as set out in paragraph [1] of this determination.**

- B. The New Plymouth District Council did not breach the collective agreement when it excluded from coverage of the collective agreement those employees appointed to the newly established Professional Lead positions.**

- C. The New Plymouth District Council has breached the collective agreement when it excluded from coverage of the collective**

agreement employees appointed to the newly established Team Coordinator positions.

D. New Plymouth District Council is ordered to comply with clauses 2.2 to 2.4 of the 2013 – 2015 collective agreement.

Non publication orders

[1] The Council sought non-publication orders which were consented to by the Association. I now confirm the orders I made orally at the investigation meeting that except to the extent necessary to explain my reasoning in this determination the document attached to Ms Andrea Smith's brief of evidence and the following documents (referred to by their reference in the agreed bundle of documents) are prohibited from publication:

A, B, G, H, J, U, V, AA, BB, MM, NN, OO, PP, QQ

Employment relationship problem

[2] This matter is a dispute about the interpretation, application or operation of the collective agreement dated 1 July 2013 to 30 June 2015 between the New Plymouth District Council Staff Association Inc. (the Association) and the Chief Executive of New Plymouth District Council (the Council).

[3] The Association claims the Council has breached the collective agreement by not offering the collective agreement to appropriate positions and will breach the collective agreement when the Council fills 14 Lead and Coordinator positions.

[4] The Council denies the claims.

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

Background

The collective agreement

[6] The parties to this dispute are parties to a collective agreement which expired on 30 June 2015. Pursuant to the Employment Relations Act 2000 (the Act) the collective agreement continues in force.¹

[7] The clauses subject to this dispute had their genesis in the collective contract dated 2000 - 2002. That contract provided for the exclusion from coverage of the contract of all Second Tier (Departmental) Managers and Third Tier (Divisional) Managers in addition to a number of specified positions. Eleven of the 19 specified positions had the word “Manager” in their title and eight positions did not.

[8] In 2002 the coverage and exclusion clauses were renegotiated. At the time of those negotiations the structure of the Council also changed. Gone from the exclusions clause is any reference to Third or Second tier managers and rather than named positions the clause identifies generic categories of positions which are to be excluded. This change remained in future collective agreements and is mirrored in clause 2.4 in the current collective agreement. In addition to these changes the parties also included as exclusions to coverage “...*any other staff whose salary exceeds that of those designated*”.

[9] Since 2002 clause 2.4 has been varied in the following ways:

- (a) In 2005 the reference to other staff whose salary exceeds those designated was replaced with “...*any other staff whose remuneration is above \$59,500*”.
- (b) In 2007 the remuneration level was increased to \$65,500.
- (c) In 2013 the clause was varied to remove the reference to a specific salary to “...*and any other staff whose remuneration is above Grade 16 of the StrategicPay job evaluation*”.

[10] The disputed clauses in the 2013-2015 collective agreement deal with issues of coverage in the following way (verbatim):

2.2 Coverage of CA

¹ The Employment Relations Act 2000 section 53.

This CA shall apply to all employees of NPDC engaged in any of the job roles below who work for more than an average of 15 hours per week for a period of greater than three months who have, at the date of coming into force of this CA, authorised the PSA to represent them:

- Inspectorate/Regulatory.
- Engineers.
- Customer Services.
- Clerical/Administration.
- Policy/Planning.
- Accounting/Payroll.
- Community Development.
- Technical/Curatorial.
- Information and Communications Technology.
- Library.
- Parks.
- Recreation and Events.

2.3 *New Employees*

The parties agree that all new employees of the Council who are employed to perform work falling within the “Coverage” clause 2.2 shall be offered the opportunity to become covered by this CA by joining the PSA.

2.4 *Exclusions*

This CA shall not apply to the following positions:

- Chief Executive/Assistant Chief Executive.
- General Managers.
- Managers.
- Human Resource staff.
- PA to Chief Executive.
- PA to Mayor,

and any other staff whose grading is above Grade 16 of the StrategicPay job evaluation system.

[11] The agreed method of determining when a role was to be covered by or excluded from the collective agreement was to first ascertain whether a position was one of the categories of positions set out. If it did not fall into one of the categories of position the next step was to consider whether the pay grade for the position was above grade 16.

2015 Restructuring

[12] In 2014 the Council embarked on a restructuring program which it termed a “realignment” process. The process resulted in the development of a new integrated leadership framework (ILF). Expectations for each position in the realigned management structure of the Council were defined in the documents used during the consultation process.

[13] As often happens in restructuring exercises new terminology was introduced which the Council hoped would reinforce the change process. One of those changes in terminology was the desire of the Council to move away from describing positions as management positions. Two positions are at the heart of this dispute. They are the positions titled “Professional Lead” (Lead) and “Team Co-ordinator” (Coordinator).

[14] It was common ground that the Council began its consultation process about its realignment strategy and proposed outcomes on or about 21 April 2015. At this meeting Ms Karly Johnson, the then Chairperson of the Association raised a concern with those making the presentation regarding the coverage of the collective agreement to those appointed to the new Lead and Coordinator positions.

[15] On 4 May 2014 Ms Andrea Smith, Manager of Organisational Development, emailed Ms Johnson and other Union organisers advising that the roles proposed under the ILF would not fall under the coverage of the collective agreement due to the leadership responsibilities for all of those positions.

[16] This was followed by a letter dated 5 June 2015 in which Ms Smith advises that the title of “Coordinator” had been redefined as part of the ILF and as a result of the leadership responsibilities the Coordinator roles would not fall under the coverage of the collective agreement.

[17] All employees offered positions within the ILF were only offered individual employment agreements. It is the offer of individual agreements to employees appointed to the Lead and Coordinator positions which has led to the dispute about the application of clause 2.4 of the collective agreement.

Issue

[18] The key issue for resolution in this dispute is whether the new Lead and Coordinator positions fall under the coverage clause of the collective agreement or are excluded by the application of clause 2.4.

Determination

[19] It is well established that *Vector Gas Limited v Bay of Plenty Energy Limited*² is the leading authority on contract interpretation, and that the principles referred to in that case apply to the interpretation of employment agreements.³

[20] The Authority is required to adopt a principled approach to the interpretation of employment agreements and the meaning of a disputed clause is to be determined objectively. This requires the Authority to inquire into what a reasonable and properly informed third party would consider the parties intended the words of the contract to mean.

[21] The Supreme Court in *Vector* held that extrinsic material could be used to clarify the meaning of a disputed clause whether or not it was ambiguous in case the plain and unambiguous meaning did not properly reflect what a reasonable person with awareness of the circumstances surrounding the contractual arrangements would consider the parties intended their words to mean.

[22] A useful summary of the principles relating to contractual interpretation is provided by the Employment Court in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*⁴:

In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, never the less, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[23] This dispute centres on the interpretation of the word “Managers” which is one of the categories of position excluded from coverage of the collective agreement and,

² [2010] 2 NZLR 444.

³ *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317; [2010] ERNZ 317.

⁴ [2011] NZEmpC 149 at [17].

whether the newly established positions of Lead and Coordinator are “Managers” positions and therefore excluded from coverage of the collective agreement.

[24] The Association says the word “Managers” should be interpreted in accordance with its original purpose for inclusion in 2002 and in accordance with how it has been interpreted by the parties from 2002 until 2015. The Association submits that Manager should be given its “positional” or “title” meaning and not a “functional” meaning as asserted by the Council.

[25] The Council submits that positions are excluded from coverage of the collective by reference to whether the work they perform is managerial, rather than by reference to whether their job title includes the word manager.

[26] It was the Council’s evidence that generally if a person was appointed to a position considered a management position in the old structure it was unlikely their pay grade would not be below Grade 16. That approach is consistent with the wording in the original exclusion clause of the 2002 collective agreement which excluded employees who were appointed to a salary which exceeded that of the designated positions.

[27] The plain ordinary meaning of the word “Manager” is materially, as expressed in the New Zealand Oxford dictionary.⁵

A person responsible for controlling or administering an organisation or group of staff.

[28] Applying clause 2.4 only to positions which have “Managers” in the title is too restrictive. The plain and ordinary meaning of “Managers” is capable of including employees who do not have manager in their title. In 2000 when the exclusion clause was initially negotiated, there were at least eight of the 19 positions specified that did not have the word “Manager” in their title.

[29] Case law supports an interpretation of the coverage clauses in a way that focusses on the work that is performed.⁶ I find the exclusion of “Managers” is

⁵ New Zealand Oxford Dictionary First Edition at page 679.

⁶ *APN New Zealand Ltd v New Zealand Amalgamated Engineering Union* [2004] 2 ERNZ 281 at [34] where the Court of Appeal held that the definition of “coverage clause” in s 5 and the language of ss 56(1)(b)(ii) and 62(2)(a)(i) require a primary focus on the “work” which is covered.

similarly directed towards the work that is performed by managers and is not restricted by what is in the title.

[30] Also relevant to this determination are clauses 4.4.1 and 4.4.2 of the collective agreement, which states that in a restructuring where employees may face redundancy, the parties will minimise the loss of employment as far as it is practicable through alternative options including redeployment. Redeployment is defined as:

(meaning an agreed transfer to an alternative position within the Council notwithstanding that the alternative position may involve a significantly different position description and/or different terms and conditions of employment; redeployment may also include an agreed transfer to a new employment locality).

[31] The two contested positions which are the subject of this determination have different responsibilities and accountabilities. I have assessed each position separately to determine whether either or both of the positions fall under the definition of “Managers” and therefore excluded from coverage of the collective agreement.

Professional Lead Positions

[32] The job descriptions produced to the Authority from the old and new structures demonstrate that the new Lead positions are similar to positions previously held by “Managers” who were excluded from coverage of the collective agreement.

[33] The Job Levelling guide produced by Council to assist the Authority and which is to be used for job evaluation purposes defines the newly established Lead positions as being accountable for a number of employee management issues such as work and performance. The position is described as being the team manager and those appointed will be expected to resolve issues.

[34] The Job Levelling guide outlines information which will be used by the Council to obtain market data on salaries from Strategic Pay. The information shows that for all three levels of the Lead positions, salaries are equivalent to Grade 17 and higher of the Strategic Pay grades.

[35] I have concluded the Professional Lead positions have accountabilities and responsibilities of controlling or administering their teams within the Council and

those filling the roles are “Managers” as defined by the plan and ordinary meaning of the word.

[36] I find the Council has not breached the collective agreement when it excluded those employees appointed to the newly established Lead positions from the coverage of the collective agreement.

Team Coordinator Positions

[37] The collective agreement recognises that employees redeployed into alternative positions may require training. The Council says that the new Coordinator position holders will be required to take responsibility for recruitment and disciplinary processes for employees in their teams. One of the strategies behind the realignment has been to push the accountability for the management of staff down to the lowest possible level.

[38] The Council accepts that employees appointed into the newly established Coordinator roles may not be taking on those responsibilities at present but that is because some of those redeployed into the new positions require training in some aspects associated with staff management as it is recognised they have not had to undertake some of those responsibilities in their old roles.

[39] This evidence is at odds with the information contained within the Job Levelling guide produced by Council which outlines approximate profiles for job sizing purposes. The information will be used by the Council to obtain market data on salaries from Strategic Pay. The information shows that for all levels of the Coordinator positions (there are five levels in all), salaries will be equivalent to Grade 16 or below of the Strategic Pay grades.

[40] The evidence from the Council that it would not have positions with management functions on a grade lower than 16 is inconsistent with its approach of only offering individual agreements to employees who were redeployed into the newly established Coordinator positions given that each of the five levels of Coordinator have been assessed at a pay grade of 16 and lower.

[41] The Job Levelling guide describes the Coordinator positions as being accountable for the work and performance of others as a “supervisor”. Unlike the

Lead positions there is no statement in the definition of any management responsibilities.

[42] The plain ordinary meaning of the word “supervise” is materially, as expressed in the New Zealand Oxford dictionary:⁷

Oversees the actions or work of others.

[43] This definition is in line with the definition contained in the Job Levelling guide, which sets out the responsibilities of a Coordinator as being responsible for staff in process-focussed or technical officer roles with an emphasis on scheduling, work allocation and monitoring.

[44] Further, in answer to questions at the investigation meeting Ms Smith told me that the lowest salary in the Grade 16 band for an experienced employee is approximately \$80,000. Mr Karl Osten was in an acting position of Team Leader in the old structure and has been redeployed into the new position of Animal Control Coordinator. His evidence is that he is doing essentially the same job.

[45] Mr Osten told the Authority that he was not required to be responsible for the recruitment and discipline of staff and although he has had input into a recent recruitment he does not hold responsibility for the decision making aspects of the recruitment. Ms Smith says this is because he has not yet had the required training but that it is the Council’s objective that Mr Osten will hold those responsibilities.

[46] Mr Osten was unable to tell me what his current salary is but he did confirm that it is less than the \$80,000 Grade 16 figure Ms Smith gave the Authority as being the lower end of the scale for someone with experience being appointed to a role.

[47] I have concluded that the Coordinator roles do not meet the definition of controlling a group of staff but rather the roles will oversee the work of employees. Further, the coordinator roles have been identified as attracting a pay grade of 16 and lower, and are not, as set out by the collective agreement “... *above Grade 16...*”.

[48] I find that the Council has breached the collective agreement when it excluded employees appointed to the newly established Coordinator positions from coverage of the collective agreement.

⁷ Supra n 5 at page 1128.

Orders

[49] New Plymouth District Council is ordered to comply with clauses 2.2 to 2.4 of the 2013 – 2015 collective agreement.

[50] The parties, sensibly, negotiated an agreement as to how matters would progress in the event that the Authority found one or both of the positions could not be excluded from the coverage of the collective agreement. New Plymouth District Council should now comply with the agreements reached in the joint memorandum dated 15 September 2015 in respect of those appointed to Team Coordinator roles.

Costs

[51] Costs are reserved. Due to the nature of the employment relationship problem and given that both parties were partially successful I am of a mind to let costs lie where they fall.

[52] The parties are invited to resolve the matter of costs between them. If they are unable to do so the parties shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Each party shall have a further 14 days in which to file and serve memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority