IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 234
EMPC 427/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION IUOW INCORPORATED First Plaintiff
AND	NIGEL ANTHONY FARMER Second Plaintiff
AND	MURRAY JOHN APPLETON Third Plaintiff
AND	TASMAN CARGO AIRLINES PTY LIMITED Defendant

Hearing:	25 July 2023 (Heard at Auckland)
Appearances:	R McCabe and J Hall, counsel for plaintiffs K Dunn and K Creagh, counsel for defendant
Judgment:	20 December 2023

JUDGMENT OF JUDGE K G SMITH

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[1] On 16 June 2019 an email was sent by Michael Young, Tasman Cargo Airlines Pty Ltd's Chief Executive Officer (CEO) to all of the company's staff. Among the general business discussed in that email was a statement about a pay rise.

[2] The CEO introduced the statement under the heading "People" before reminding the staff that Tasman Cargo's Board reviewed remuneration once a year,

usually in May, with any salary changes backdated to 1 April that year. The CEO's email included this sentence:

> I am pleased to say the Board has awarded a 3 % increase in salaries backdated to April 1. (note CPI was 1.5%.).

[3] The CEO's email went on to comment that the increase covered all full-time and part-time employees but did not apply to contractors and certain other employees such as those who had recently received an increase through promotion.

[4] The administrative aspects of this pay rise were dealt with towards the end of the CEO's email. He advised its recipients that unfortunately it was too late to incorporate the pay rise into the latest pay run but that he would investigate having it dealt with in a separate pay run. Staff were advised that if this option was not possible, the pay increase would be dealt with in the next month's pay.

[5] The CEO's email ended by expressing the Board's thanks to the staff for their contribution throughout 2018.

[6] Nigel Farmer was a Tasman Cargo employee at the time when he received the CEO's email. Mr Farmer is now retired but was employed by Tasman Cargo as a pilot from 2014 until October 2022. In 2018, he resigned from his position as a captain and became a first officer.

[7] The dispute which has emerged between Mr Farmer and Tasman Cargo stems from what happened immediately after the CEO sent his email.

[8] On 17 June 2019, the New Zealand Air Line Pilots' Association IUOW Inc gave notice to Tasman Cargo initiating collective bargaining. By that stage, Mr Farmer had joined the union and expected to be covered by any collective agreement that was concluded.

[9] On 8 July 2019, Tasman Cargo's Head of Flight Operations, Andrew Sturrock, advised Mr Farmer by email that, along with other pilots who were union members, he would not receive the pay increase referred to in the CEO's email. The reason for this decision was because the company considered any future changes to remuneration

would become part of the bargaining process. Mr Sturrock's email was also sent to the union's bargaining representatives.

[10] Mr Farmer was not paid the three per cent increase in 2019 or at any time since then. However, the company's non-union employees were paid the increase with effect from 1 April that year.

[11] A collective agreement between the union and Tasman Cargo was signed about a year later on 22 April 2020, but it was backdated to come into effect from 1 April 2020.

[12] The collective agreement addressed remuneration. So far as first officers were concerned, it included a top pay rate that was less than the remuneration Mr Farmer had negotiated with the company as part of stepping down from his former rank of captain.

[13] Before the collective agreement was ratified, Mr Farmer wrote to Tasman Cargo about the pay rise he anticipated receiving because of the CEO's email. He asked the company to reconsider its position but got no response.

[14] Mr Farmer considers he is owed arrears of pay. He claimed that the absence of the pay rise flows into the value of bonuses he was entitled to receive for each of the years 2020, 2021 and 2022. In a schedule provided as part of his evidence he calculated the amount considered payable.

[15] There is no material dispute about these events. What is disputed, however, is the legal consequences arising from them.

The determination

[16] The plaintiffs were unsuccessful in the Employment Relations Authority.[1] The Authority did not accept there was any breach of good faith by Tasman Cargo or that Mr Farmer and Murray Appleton were owed money.

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1 *New Zealand Air Line Pilots Assoc IUOW Inc v Tasman Cargo Airlines Pty Ltd* [2022] NZERA 636 (Member Robinson).

The challenge

[17] The plaintiffs challenged the determination and sought as remedies:

(a) A declaration that Tasman Cargo owed wages to Mr Farmer and Mr Appleton of three per cent for the period from 1 April 2019 to 1 April 2020.

(b) An order that Tasman Cargo pay them "cumulative wage arrears" of three per cent from 1 April 2019 "plus interest at the prescribed rate".

(c) A declaration that in denying the three per cent wage increase to the union's members, following the initiation of collective bargaining, Tasman Cargo breached its good faith obligations under s 32 of the Employment Relations Act 2000 (the Act).

(d) A declaration that Tasman Cargo breached the prohibition on preferences under s 9 of the Act.

(e) Orders under s 10 of the Act that the three per cent wage increase given to non-union members has no force or effect or, in the alternative, that the Court exercise powers under s 137 of the Act to order the amount of the preference to be paid to Mr Farmer and Mr Appleton.

(f) Costs.

[18] Initially, the plaintiffs sought another declaration to the effect that the company breached the duty of good faith in s 4 of the Act by failing to provide reasons as to why pilots who were union members did not receive the increase. That application was not pursued.

[19] Tasman Cargo did not accept that its behaviour gave rise to any of the causes of action pleaded by the plaintiffs. As affirmative defences, it pleaded that at the time the collective agreement was ratified the employees covered by it knew that it did not include a pay rise from 1 April 2019. It did not raise any issues about whether the

declarations now sought and other remedies claimed by the plaintiffs all arose from matters that were before the Authority.

[20] The statement of defence did not plead that a complete agreement clause in the collective agreement precluded the application of earlier agreements or understandings and was therefore a bar to the wage arears claims, although that subject was addressed in submissions.

The issues

[21] The issues in this case are:

(a) Did the 16 June 2019 email result in an agreement to provide a pay increase?

(b) If the 16 June 2019 email resulted in an agreement to provide a pay increase, could Tasman Cargo rescind or withdraw it because bargaining was initiated by the union?

(c) Was any pay increase subsumed into or overtaken by the collective bargaining?

(d) Does the collective agreement preclude a claim for arrears of pay by the plaintiffs?

(e) Are arrears in pay due and if so, in what amount?

(f) Does the withdrawal or rescission of the 16 June 2019 email breach s 9 of the Act by being an unlawful preference?

(g) If there was an unlawful preference, what remedies, if any, are appropriate?

(h) Did Tasman Cargo breach its good faith obligations under s 32 of the Act?

[22] There is a preliminary matter that needs to be dealt with before considering each of those issues.

[23] Mr Appleton is cited as the third plaintiff, but he took no part in the proceeding at all. He did not give evidence during the Authority investigation either. None of the witnesses addressed his circumstances, except to the extent that there may have been an invitation to draw inferences that they were comparable with Mr Farmer's situation.

[24] In the absence of evidence from Mr Appleton the challenge as it relates to his wage arrears claim fails.

Was there an agreement for a pay rise?

[25] Mr McCabe's primary submission was that the CEO had authority to award a pay rise, which was not conditional on any other act or event, and that it was therefore binding. Tasman Cargo did not dispute that it had approved a pay rise or that the CEO had authority to send the email.

[26] Clause 12 in the individual employment agreement between Mr Farmer and Tasman Cargo provided that his remuneration could be reviewed annually at the company's sole discretion but that a review did not commit it to any pay rise. The balance of cl 12 spelt out what would happen if a pay rise was to be awarded:

> … it will be based on meeting the company's operational targets in the preceding calendar year and the change in the NZ CPI All Ordinaries index in the preceding calendar year.

[27] Clause 12 concluded by saying that any increase would be effective from 1 April of the relevant year and any backpay owing from that date would be paid.

[28] Tasman Cargo's counsel, Ms Dunn, preferred not to see the email as varying the employment agreement or as otherwise creating a binding commitment. She submitted its unilateral nature was relevant and sought to qualify the effect of the announcement of the pay rise because the increase was not actioned before it was overtaken by the union's bargaining notice.

[29] Essentially, the submissions were that the employment agreement was not varied either because no consideration was provided for the pay rise, or it was not complete and was therefore ineffective until actioned through payment.

[30] Wrapped up in the submission was an argument that there was no demonstrable acceptance of the email by Mr Farmer. That approach treats the email as if it was a proposal that required acceptance before becoming binding.

[31] I do not accept Ms Dunn's submissions questioning the effectiveness of the CEO's email to vary the employment agreement. As long ago as 1993 the Court of Appeal addressed a similar situation in *Talley v United Food and Chemical Workers Union of New Zealand*.[2] The Court said:[3]

> We are disposed to think that the continued performance of the contract following a variation such as a voluntary pay increase, or the practical benefit to the employer of the employee's willingness to continue to serve in the light of the incentive, should be seen as consideration sufficient for the change to become incorporated into the contractual terms.

[32] Although those observations were obiter they have been applied subsequently.[4]

[33] A pay rise was clearly intended. The CEO's email was unequivocal. Its terms were consistent with the essential elements of the employment agreement; the company made a decision which was within its sole discretion to make, it was an annual review as the agreement contemplated, and the email stated when it would apply from. The email referenced the previous financial year's achievements by congratulating staff for their performance.

[34] If the terms of the CEO's email were not plain enough, he sought assistance from a consultant in response to the union's bargaining notice. In his email to the consultant he stated that the Board had agreed to give everyone a backdated three per cent increase, adding that pay rises were usually announced in May and that the staff had been told that it had been approved and would be paid to them. The question the

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2 *Talley v United Food & Chemical Workers Union of NZ* [1993] 2 ERNZ 360 (CA).

3 At 376.

4 See *Owen v McAlpine Industries Ltd* [1999] 2 ERNZ 819 (EmpC) at 839; *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115, [2017] ERNZ 668 at [148] and [151]; and *Fernandez v Rappongi Excursions Ltd, (t/a Denny's Restaurants)* [2019] NZEmpC 99, [2019] ERNZ 278 at [53]–[55].

CEO asked of the consultant was whether the pay rise was still to be paid to the pilots "as planned"?

[35] Mr Farmer remained employed as a first officer after the chief executive's email was sent and his continued service meant there was a contractual requirement to pay.

Could the CEO's email be withdrawn?

[36] This issue has been addressed in the previous discussion.

[37] Once the pay rise was announced the email could not be withdrawn or the pay rise rescinded unless Mr Farmer agreed which he did not do.

Was the CEO's email overtaken by bargaining?

[38] Mr Sturrock was also part of Tasman Cargo's bargaining team. As already mentioned, the company took advice when the union's bargaining notice arrived. The advice the company received was that if a collective agreement came into force it would replace any "pay awards processes". That advice, however, fell short of justifying a refusal to pay an increase that was already announced.

[39] Mr Sturrock said that during the first bargaining meeting the company referred to the email he sent to pilots on 8 July 2019 informing them that the pay rise would need to be discussed during bargaining. By that stage the union had not disclosed any salary claims, which were deliberately deferred until near the end of bargaining.

[40] When the union tabled its salary claims, they were for what Mr Sturrock described as an enormous and unacceptable increase. In the end, agreement was reached for a small pay increase and other benefits. The union did not request backpay.

[41] Mr Farmer's position was discussed but, it seems, only after agreement in principle was reached. It was accepted that his salary before bargaining was higher than first officer salaries would be after the collective agreement was concluded. Mr Sturrock said the union's bargaining representatives volunteered that they would discuss the matter with Mr Farmer.

[42] Mr Farmer was not in a position to contradict Mr Sturrock's evidence. The union's bargaining team did not give evidence.

[43] I accept Mr Sturrock's evidence that Mr Farmer's position was discussed by the parties at some point, either during the later stages of bargaining where salaries were discussed or after it concluded. Of course, that does not affect the situation from 1 April 2019 and falls short of establishing that the union, as Mr Farmer's agent, agreed to a salary for him that removed the pay rise.

Does the collective agreement preclude the pay rise?

[44] That leaves whether the collective agreement precluded the pay rise that applied from April 2019. Ms Dunn relied on a complete agreement clause at paragraph 1.5.1 of the collective agreement to assist Tasman Cargo's position and to exclude Mr Farmer's claim. Complete agreement clauses are enforceable.[5] Mr McCabe did not object to this submission being made and, consequently, for completeness it is assessed. The clause reads:

> 1.5 SAVINGS/COMPLETE AGREEMENT
>
> 1.5.1 This Agreement, including the attached Appendices comprise the entire Agreement between the Parties and supersedes any previous representations, agreements or understanding (whether written or oral) relating to the pilot's employment with the Company.
>
> 1.5.3 Notwithstanding the foregoing, no pilot covered by this Agreement shall incur any reduction in his/her current equipment category, salary or rank by virtue of the making of this Agreement, except where provided for and in accordance with the terms of this Agreement.

[45] Tasman Cargo's position was that despite the union subsequently asking, in around January 2021, about payment between 1 April 2019 and 1 April 2020, its members were not entitled to the three per cent pay rise because they had negotiated their increase in bargaining and the complete agreement clause was a bar to any claim.

[46] Ms Dunn's submissions are unsuccessful for two reasons. The first has already been dealt with. The bargaining did not remove the pay increase awarded to Mr

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5 See *White v Reserve Bank of New Zealand* [2013] NZCA 663, [2013] ERNZ 367 at [33]; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [217]–[222] and [261].

Farmer from 1 April 2019. Further, the company did not point to any aspect of the union's notice initiating bargaining, a bargaining process agreement, or any of the proposed settlement terms that somehow showed agreement was reached that held in abeyance or rescinded any pay rise already in place from April 2019.

[47] The second reason is the difficulty confronting Tasman Cargo from cl 1.5 itself. While cl 1.5.1 provides that the collective agreement superseded previous agreements, there is a savings provision in cl 1.5.3. No pilot was to incur a reduction in salary or rank because of the agreement except where expressly provided.

[48] Mr Farmer's position was not specifically provided for in the collective agreement and it follows that he has the benefit of the savings provision.

[49] The provision means that the increase approved by the company in June 2019 was part of the salary Mr Farmer enjoyed when the collective agreement was signed. It could not be withdrawn or denied in reliance on the collective agreement.

Are arrears of pay due?

[50] Given the analysis earlier in this judgment, it follows that Mr Farmer is entitled to arrears from 1 April 2019. While his evidence contained a table calculating his claim, Mr McCabe requested an opportunity for the parties to liaise over the proper sum to pay, which I accept is appropriate.

Did Tasman Cargo confer an unlawful preference?

[51] Part 3 of the Act establishes employees' right to freedom to choose whether or not to form or be members of a union for the purposes of advancing their collective employment interests.[6] Section 7(b) provides that:

> …no person may, in relation to employment issues, confer any preference or apply any undue influence, directly or indirectly, on another person because the other person is or is not a member of a union.

[52] The union claimed that Tasman Cargo breached s 9 of the Act, which reads:

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6 Employment Relations Act 2000, s 7(a).

> **9 Prohibition on preference**
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> (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.

[53] Section 10 provides that a contract, agreement or other arrangement has no force or effect to the extent that it is inconsistent with s 9.

[54] The union's case is straightforward: a preference was conferred or created when the company paid non-union employees the three per cent pay rise while declining to pay it to the unionised pilots. It pointed to the only difference between those two groups of employees being union membership.

[55] Mr McCabe said the union's point was illustrated by *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*[7] and *Pact Group v Service and Food Workers Union Nga Ringa Tota Inc*.[8]

[56] In *Taylor Preston*, the Court found that a preference was conferred where an offer was made to employees on individual employment agreements of a wage

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7 *New Zealand Meat Workers and Related Union v Taylor Preston Ltd* [2009] ERNZ 54 (EmpC). The union did not refer to the decision on applications for leave to appeal: *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union* [2009] NZCA 372, (2009) 6 NZELR 828.

8 *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZEmpC 119, [2014] ERNZ 247.

increase over three years when those terms were rejected by the union members in collective bargaining.

[57] In *Pact Group*, the Court had to consider whether there was a breach of s 9 arising from how the employer treated pay rises. In that case, throughout negotiations for a collective agreement the impression conveyed by the employer to the unions with which it was bargaining was that it could not afford more than a low pay increase. However, after the collective agreement was concluded, the employer proposed to pay non-union employees in a way which delivered a higher effective pay increase than was offered to the unions. The non-union employees were all engaged on materially identical individual employment agreements that closely followed the relevant provisions of the applicable multi-union collective agreement that applied to the unionised workforce.[9] The only difference in terms and conditions of employment between those union and non-union groups was wages.

[58] The question for assessment in *Pact Group* was whether a benefit was conferred on non-union employees because they were not members of the union.[10] The Court held that, in the circumstances, where both groups of employees performed the same work and all other things were equal between them, the reason the non-union members were paid more was because of their status; they were not members of either of the two unions the employer was dealing with.[11] On that basis the preference claim was made out.[12]

[59] Ms Dunn's response was that the union's approach was too narrowly focussed and that there was no unlawful preference just because two groups of employees are treated differently.

[60] Ms Dunn referred to *Pact Group* but also relied on the more recent decision in *Association of Professionals and Executive Employees Inc v Te Whatu Ora – Health New Zealand* (*APEX*).[13] The unlawful preference that was the subject of the *APEX* decision were letters of understanding between certain (then) District Health Boards

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9 At [9].
10 At [51].
11 At [72].
12 At [65] and [73].
13 *Association of Professionals & Executive Employees Inc v Te Whatu Ora – Health New Zealand* [2022] NZEmpC 226.

and the New Zealand Public Service Association (PSA) that temporarily changed the way in which weekend penal rates were calculated for union members employed as medical laboratory workers.[14]

[61] The Court accepted that while there was a short-term increase in penal rates for a specific purpose (to ensure employees who were required to work additional weekends during the recent pandemic were incentivised to do so), there was nevertheless a material advantage conferred on PSA members as compared to APEX members.[15] Before the letters of understanding were signed the PSA members had lower penal rates balanced out by higher salary rates in a collective agreement. Increasing the penal rates therefore gave them better overall remuneration.[16] The Court concluded there was a preference to PSA members in the decision to offer them an increase in their penal rates without also offering one to APEX members.[17]

[62] From these cases Ms Dunn took the following propositions:

(a) In *APEX* the Court found that any preference meant a priority or advantage, by reason of membership or non-membership of a union, over others because of the absence of that status.

(b) There was no requirement to establish an employer's intention.

[63] I agree with both propositions. It is not necessary to establish an intention or motive; that was confirmed by the Court of Appeal in *Taylor Preston*.[18]

[64] Ms Dunn emphasised that in *Pact Group* and *APEX*, the employment agreements were compared before an analysis of potential differences was possible. She invited a comparison beyond just looking at the three per cent increase, observing that the two groups of employees were not comparable because the non-union employees were not pilots. Rather, they had managerial, administrative and support roles. The submission was that a comparison was required to be able to establish if

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14 At [1].
15 At [41].
16 At [41].
17 At [42].
18 *Taylor Preston Ltd v New Zealand Meat Workers and Related Trades Union*, above n 7, at [26].

the overall terms and conditions of each group meant that the pay rise awarded to one and the not the other ultimately conferred an improper benefit.

[65] Additionally, implicit in the submissions was an argument that the whole collective agreement that emerged from bargaining needed to be considered, because the absence of the three per cent pay rise may have been offset by the remuneration actually agreed on and by other benefits.

Analysis

[66] Section 9 does not confine itself to incentives or disincentives offered to comparable groups of employees with similar jobs. Section 9(1)(a) is about any preference in obtaining or retaining employment. Section 9(1)(b) talks about any preference in relation to terms or conditions of employment, fringe benefits or opportunities for training, promotion or transfer.

[67] I accept that the pay rise to the non-union employees is material but it cannot be looked at in isolation. The union has not established that paying the non-union employees was an unlawful preference, because s 9 contemplates some comparison from which membership or non-membership of a union can be discerned as the reason for the employer's actions. In this case that involves assessing the terms and conditions that were concluded in the collective agreement and comparing them to those of employees who benefitted from the pay rise announced by the CEO. That comparison was not possible because there was no evidence about the terms and conditions of the other employees who received the pay rise.

[68] I am not therefore prepared to determine without more that the pay rise to one group coupled with the withdrawal or refusal to honour the pay rise to another establishes an unlawful preference.

[69] That means it is not necessary to consider whether s 10 applies and, if it does, to assess a suitable remedy. However, in the interests of completeness, the following comments are made. The union sought a compliance order and tentatively suggested that s 10 could be interpreted to permit the Court to deprive the non-union members of their pay rise, although it was reluctant to be seen to force that outcome.

[70] I prefer the analysis in *APEX* about s 10: the section operates so that to the extent the preference remains it is ineffectual and to the extent employees have not received payment in accordance with the preference it is not enforceable.[19] Had matters advanced to this stage, the remedies claimed by the union would not have been granted.

Did Tasman Cargo breach its duty of good faith?

[71] The union sought to establish that a breach of s 32(1)(d)(iii) occurred when Tasman Cargo declined to pay the increase to its members following the CEO's email. The section provides that the union and employer "must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining". The only remedy sought was a declaration.

[72] Mr McCabe submitted that Tasman Cargo undermined the collective bargaining by denying the increase to union members. The point was that the union would have to bargain for a previously approved pay increase. He relied on *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* and the Authority's determination in *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Independent Newspapers Ltd* as supporting the union's position.[20]

[73] Insofar as the *University of Auckland* decision was concerned, the submission was that the Court in that case considered a claim that a pay offer to non-union members, made at the same time bargaining was initiated by a union, undermined bargaining. The analysis in submissions went no further.

[74] The determination in *Independent Newspapers* was relied on as being persuasive because it mentioned a Canadian judgment containing a comment that the duty to enter into bargaining in good faith must be measured on a subjective standard. That comment was considered to assist the union.

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19 *Association of Professionals & Executive Employees Inc v Te Whatu Ora – Health New Zealand*, above n 13, at [70].

20 *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland* [2005] ERNZ 224 (EmpC); and *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Independent Newspapers Ltd* ERA Wellington WA51/01, 3 August 2001.

[75] Ms Dunn's response was that s 32(1)(d)(iii) was not breached, because Tasman Cargo's position about the pay increase was clearly stated before bargaining. The company was said to have been transparent and the union knew it would negotiate over remuneration during bargaining.

Analysis

[76] Section 32 requires the parties to an employment relationship to deal with each other in good faith.[21] Without limiting the scope of the duty the parties to that relationship must not, whether directly or indirectly, do anything:

(a) to mislead or deceive each other; or

(b) that is likely to mislead or deceive each other.

[77] Section 4(1A)(a) provides that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence. Section 4(1A)(b) requires the parties to the relationship to be active and constructive in establishing and maintaining a productive employment relationship in which they are among other things responsive and communicative. The duty applies when bargaining for a collective agreement.[22]

[78] There was no pleading or evidence that anything said or done by either party during the bargaining was misleading, deceptive, or was likely to mislead and/or deceive. As Ms Dunn submitted, the company's position was clearly stated and known to everyone.

[79] I agree that Tasman Cargo was very candid in announcing its position about not paying the increase. However, the only reason offered to explain why the company acted as it did was because collective bargaining was initiated. That decision must have placed the union on the back foot in bargaining over pay. As Mr McCabe submitted, the bargaining position was potentially compromised because of the position from which the union started. In that sense, Tasman Cargo's action falls within s 32(1)(d)(iii) in that it was likely to undermine bargaining.

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21 Employment Relations Act, s 4(1)(a).
22 Section 4(4)(a).

[80] While the *University of Auckland* case illustrated one example of conduct undermining bargaining, the circumstances were sufficiently different to not be particularly helpful in this analysis. The determination in *Independent Newspapers* offers little assistance. In its assessment of s 32 the Authority did not rely on the Canadian case but applied a conventional analysis by considering the section's text in light of its purpose.

[81] While it can be said that Tasman Cargo was responsive and communicative in explaining its position, with perhaps commendable directness, that does not excuse its conduct.

Outcome

[82] For the foregoing reasons, Mr Farmer is entitled to arrears of pay from 1 April 2019, and as requested, the parties are provided with an opportunity to reach agreement about the value of them. If they cannot reach agreement, leave is reserved to apply to have them fixed.

[83] A declaration is made that in denying the pay increase to the union's members following the initiation of collective bargaining Tasman Cargo breached s 32(1)(d)(iii) of the Act.

[84] The remaining applications for declarations are declined.

[85] Costs are reserved. The parties are urged to agree on costs, but if they cannot do so, then memoranda may be filed.

K G Smith
Judge

Judgment signed at 11.40 am on 20 December 2023