IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 119
CRC 16/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PACT GROUP (A CHARITABLE TRUST) Plaintiff
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC First Defendant
AND	THE PUBLIC SERVICE ASSOCIATION TE PUKENGA HERE TIKANGA MAHI INCORPORATED Second Defendant

Hearing:	16 and 17 June 2014 (Heard at Dunedin) And by memoranda filed on 27 June and 1 July 2014
Appearances:	B Dorking, counsel for plaintiff T Oldfield, counsel for first defendant C McNamara, counsel for second defendant
Judgment:	8 July 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **The plaintiff did not breach cl 37 of the parties' collective agreement.**

B **The plaintiff breached s 9 of the Employment Relations Act 2000 by entering into contracts, agreements, or other arrangements which conferred on persons a preference in terms or conditions of employment because the persons were not members of the defendant unions.**

C **The plaintiff breached s 4(1) of the Employment Relations Act 2000 by misleading or deceiving the defendants in collective bargaining.**

D **Within 28 days of the date of this judgment the plaintiff is to comply with s 9 of the Employment Relations Act 2000 by paying to each of the members of the defendants, who were employed by it on 4 November 2011, a sum equivalent to two per cent of gross wages or salary (less PAYE tax) that those employees earned between 1 July and 4 November 2011, together with interest on that sum calculated at the relevant rate under the Judicature Act 1908 for the period from 4 November 2011 to the date of payment.**

E **The plaintiff is to pay a penalty pursuant to s 4A of the Employment Relations Act 2000 for its breaches of s 4(1) of the Employment Relations Act 2000 in the sum of $5,000 of which one-half is to be paid to the Registrar of the Employment Court at Wellington to the use of the Crown and the balance of which is to be paid in equal proportions to each of the defendants.**

F **The defendants are entitled to costs in the Employment Relations Authority and in this Court in a sum to be agreed between the parties within the next calendar month or, failing such agreement, after written application by the defendants to which the plaintiff may have the period of one month to respond in writing.**

REASONS

[1] This case consists of a challenge and a cross-challenge to a determination of the Employment Relations Authority.[1] It concerns the conduct of an employer in collective bargaining and the passing on to employees, who were not members of a union and were not covered by a collective agreement, of wage increases that were greater than those settled for union members under the collective agreement.

[2] The Authority, in a determination issued on 28 February 2013, concluded that Pact Group (Pact), a social services provider, breached a clause of its collective agreement with the two unions (to which I will refer as SFWU and PSA).[2] The

[1] *Service Food Workers' Union Nga Ringa Tota Inc v Pact Group* [2013] NZERA Christchurch 41, (2013) 10 NZELC 79-025.
[2] At [52].

Authority also determined that Pact had conferred an unlawful preference on its non-union staff members in breach of s 9 of the Employment Relations Act 2000 (the Act).[3] Further, the Authority concluded that Pact had breached its obligations of good faith under s 4(1)(b) of the Act by misleading the unions during collective bargaining,[4] but did not find a breach by Pact of its good faith obligations under s 4(6) of the Act which prohibits employers from doing anything to induce employees not to be covered by a collective agreement.[5]

[3] In respect of the breach of the collective agreement, Pact was directed to pay a penalty of $5,000, one-half of which was to be paid to the unions in equal proportions with the balance to the Crown.[6] In respect of the breach of s 4(1)(b) of the Act, the Authority directed Pact to pay a penalty of $5,000, one-half of which was payable to the unions in equal proportions and the balance of which was payable to the Crown.[7] In respect of the breach of s 9 of the Act, the Authority directed the parties to attempt to resolve the consequences of that breach in mediation.[8] That resolution has not eventuated.

[4] Pact challenges the Authority's findings against it. The unions cross-challenge the Authority's finding that although there was a breach by Pact of s 9, no compensatory remedies were to be awarded. The SFWU and PSA claim arrears of wages for their affected members. Pact submits that this is not a remedy available in law for a breach or breaches of s 9 of the Act.

[5] In the course of submissions I was referred to an earlier judgment of this Court, *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd*.[9] The opening words of that judgment bear repeating in this case because the same or similar difficult issues arise.

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[3] At [75].
[4] At [101].
[5] At [105], [113].
[6] At [60].
[7] At [122].
[8] At [78].
[9] *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ 537 (EmpC).

> [1] This case highlights … difficult tensions in collective bargaining and collective agreements … The first tension is between the wish of employers in such circumstances to have identical terms and conditions of employment for all employees performing the same work on the one hand and, on the other, the wish of … unions to distinguish and promote themselves by obtaining superior terms and conditions of employment for their members.

[6] There are, of course, differences between the cases. *ABB* was a case about preferment as between unions, whereas this is one about preferment between employees represented by two unions on the one hand and, on the other, non-unionised employees. But the underlying tension is a common theme of both cases, and others.

[7] During final submissions Mr Oldfield, counsel for the defendants, sought leave to add a further remedy for breach of s 9 of the Act. Very fairly, Mr Dorking did not oppose that application and I permitted the defendants to add a compliance order under s 137 of the Act, to their cross-challenge remedies. Mr Dorking was allowed a period to consider and make submissions on the question of this remedy, with Mr Oldfield having a subsequent period for reply. That accounts for the post-hearing submissions referred to in the entituling which would usually not be permitted.

The issues now for decision

[8] These have altered, at least to some extent, from those put before the Authority. They are:

- whether the employer passed on "automatically" the same terms and conditions of the collective agreement to other employees on individual employment agreements in breach of cl 37 of the collective agreement;

- whether the employer breached s 9(1) of the Act in its individual employment agreements with non-union employees by conferring on those employees a preference in relation to terms or conditions of employment;

- whether the employer breached s 4(1) of the Act by misleading or deceiving the unions in collective bargaining by falsely claiming that it did not have the financial resources to pay wage increases equivalent to more than one per cent per annum; and

- what are the remedies available in law for a breach of s 9 of the Act.

[9] The relevant facts are as follows. Pact is a registered charitable trust which employs support workers to care for people with intellectual disabilities who live in the community. The majority of those employees belonged to one or other of the two unions but there was a significant minority who were not members of either or any other union. Those non-union employees were all engaged on materially identical individual employment agreements that followed closely the relevant provisions of the applicable operative multi-union collective agreement covering unionised support workers.

[10] To perpetuate the longstanding practice of collective bargaining and collective agreements with Pact, the unions initiated collective bargaining for a new collective agreement in early 2011. This was intended to replace the then current collective agreement which was due to expire on 30 April 2011. Collective negotiations between the unions and Pact began on 11 April 2011. At the outset, the parties were significantly apart on what percentage wage increase might be paid to the support workers. Pact's stated position was that its general wage increase offer could not exceed, as a percentage, the increase in government funding which it had received in the last financial year. That was a one per cent increase over the previous financial year. In these circumstances, Pact's uncompromising offer in the bargaining was of a one per cent general wage increase.

[11] A number of collective bargaining meetings were held in April, May and August 2011. Pact repeated its stance on wage increases at those bargaining sessions. At the 31 August 2011 bargaining meeting, it presented a paper setting out again why it was unprepared to countenance any more than a one per cent wage increase. Very low level strike action was taken by employees in October 2011

which resulted in some of them being locked out by Pact, at least until that lockout was declared to have been unlawful.[10]

[12] The parties sought the assistance of a mediator in early November 2011, at which time the unions' percentage increase claims were reduced but Pact's one per cent offer was maintained by it. With the mediator's assistance, the parties settled on a two per cent wage increase but taking effect from 4 November 2011, that is almost six months after the expiry of the previous collective agreement. A new collective agreement otherwise operable for the period 1 May 2011 to 30 April 2012, was settled on 9 December 2011, subject to employee ratification. Pact said it was agreeable to this settlement because a two per cent wage increase for a six month term represented its stated wish and necessity of having a one per cent wage increase overall for the year. The agreement was subsequently ratified by the affected employees.

[13] On 6 January 2012, Pact wrote to all its non-union employees, offering them new employment agreements containing, among other things, a two per cent wage increase backdated to the first full pay week in July 2011. Pact offered to negotiate with non-union staff about the contents of these new proposed employment agreements, but none accepted that offer of negotiation. Some did not take up the new form of agreement proffered by Pact, but most non-union employees accepted these new individual employment agreements.

[14] There had been a long-established custom affecting collective bargaining and collective agreements between the unions and Pact, and between Pact and its non-union employees. This established custom or practice is an important contextual element in assessing the issues in this case. It was to backdate any wage increase, settled collectively, to 1 May each year. This involved the payment of back pay to that date, the amount of which depended on the date of execution of the relevant collective agreement. This meant that any percentage increase in remuneration was in practice a "per cent per annum" increase, albeit that a proportion of it was usually received in the form of back pay.

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[10] See *Service and Food Workers Union Nga Ringa Tota Inc v Pact Group Charitable Trust* [2011] NZEmpC 148, [2011] ERNZ 432.

[15] Pact's practice was to then review the remuneration of its non-union staff on individual employment agreements in light of what was settled in collective negotiations. Pact had, and purports to continue to have, a commitment to equal terms and conditions of employment for equivalent employees irrespective of whether they are union members or not. I use the word "purports" advisedly because the effect of the actions at issue in this case created an inequality in that relativity.

[16] Another element of the parties' custom and practice was that any relevant changes to collective terms and conditions of employment applicable to unionised employees would be passed on to those on individual employment agreements with backdated effect from 1 July each year. This longstanding practice contained a modest inbuilt advantage for union members in that remuneration increases were traditionally backdated a further two months for them than for employees on individual employment agreements. This practice appears to have had widespread and longstanding acceptance in the sense that it was not ever challenged by any party to it and was followed repeatedly. Although it did not create precise equality between unionised and non-unionised staff, it was the parties' collective modus operandi.

[17] Against this background, the unions and Pact entered into and conducted their collective bargaining in 2011 on the unspoken and unwritten assumption that what was always going to be a wage increase for unionised employees would be backdated to 1 May 2011. That mutual assumption continued until, on 4 November 2011, the mediator conveyed a formula for settling what had, by then, become their intractable dispute about a wage increase. This proposal involved a backdating, for payment purposes, only to the date of the mediation, 4 November 2011, some six months less than the previous backdating practice.

[18] Except that the proposal for settlement of the parties' wages claims did not emanate from Pact, the genesis of this settlement proposal is unclear. Persons who might have been able to clarify this issue were not called to give evidence. These included the mediator who conveyed the proposal to the Pact bargaining representatives, and the senior official from the National Office of the SFWU,

Alastair Duncan, who had been brought into the negotiations following industrial action and the prospect of further strikes or lockouts, litigation, and other protraction.

[19] The absence of the mediator's account is entirely understandable and appropriate in view of, and in compliance with, s 148(2) of the Act. It is unclear whether the proposal for a two per cent wage increase, but for only six months of the one year term of the collective agreement, emanated from Mr Duncan (or any other person or persons in the unions' bargaining team) or from the mediator as a proposal to break the deadlock and progress the negotiations. The origin of the proposal is, however, immaterial to the outcome of the case.

[20] It was, nevertheless, clear from that point that the unions were aware that any back pay to their members would be limited to the period after 4 November 2011. What the union negotiators still assumed, as a result of Pact's repeated assertions in collective bargaining that it could not afford wage increases of more than one per cent, was that non-union employees would not receive any more back pay than would union members. That assumption persisted until early January when it was first realised by the unions and their members that their non-union colleagues had been offered by Pact a wage increase equivalent to more than one per cent per annum.

[21] To resolve the differences in the parties' accounts of what was said in collective bargaining and, in particular, what Pact representatives told the union negotiators about Pact's response to the unions' wage increase proposals and about Pact's own proposals, I have put particular store by the contemporaneous written records relating to these events. These tend to confirm or contradict the parties' witnesses' accounts of what was said, heard, and intended.

[22] First, para 1(g) of the parties' collective bargaining process agreement or arrangement[11] provided that "Where a proposal is not accepted, the party not accepting the proposal will offer an explanation for that non-acceptance." Pact did so in respect of its repeated refusals of the unions' claims to wage increases. Its

[11] As required by s 32(1)(a) of the Act.

representatives responded that wage increases could not exceed the increase to its income that it had received.

[23] On 20 October 2011 Louise Carr, Chief Executive Officer of Pact, sent a memorandum to "Pact Staff", that is both unionised and non-unionised staff, on the subject of "Industrial action at Pact planned from October 20, 2011 and the effect on you and our services". This summarised the position in collective bargaining at that time including, in relation to proposed strike action, that:

> This action is taking place in support of a *4.5%* pay claim. Pact has offered 1%, which would see us passing on the average increase in our government funding from the past 12 months.

[24] In the same memorandum under the heading "Some background", Ms Carr continued:

> Our only income comes via fixed government contracts and increases to that income over the past year simply do not go anywhere near being able to cover a *4.5%* pay increase. At the same time we are also facing increasing costs due to inflation - so our real income has actually gone down in the past year. If we were to meet the union's claim, we would be overspending by **a massive** *$637,000*.

[25] Ms Carr's memorandum contained a graph illustrating, when compared to the previous year's increase of about one per cent in Pact income, the various costs that it would face as a result of the unions' then claims. This illustrated not only the cost to Pact of union members being paid what was then claimed by the unions, but taken into account in that graphic representation was the flow-on cost to Pact of paying non-union employees the same increase. Addressing Pact's intention to bank some of its increased revenue for unforeseen contingencies, Ms Carr's memorandum continued:

> As you can see even our offer means that we will have to find other savings to afford it never mind the additional union claim.
> …
> As an organisation we have [to] act responsibly to ensure we're around to support clients well into the future and safeguard the jobs for our staff. The Pact Board of Trustees and management would be highly irresponsible to take action now which will cause us sustainability problems in just [a] couple of years' time.
>
> Keeping such a surplus has enabled Pact to become the successful organisation that we have today and is an absolute bottom line. To

> compromise this is to potentially jeopardise the future for the sake of short-term gain.

[26] On 31 August 2011, Pact made a written statement in the course of bargaining which followed picketing of its Dunedin office, and television and newspaper coverage of the dispute. Pact considered that some things which had been said did not fully or fairly represent the position. Included in that written statement was the following:

> Ann [Ann Galloway, one of the SFWU officials involved in the bargaining] states in this interview [on local television channel 9] that we (Pact) have never said we cannot afford to meet the wage demand but that we are merely unwilling to accede what we perceive is the market movement in wages. This statement is totally incorrect, while some references in passing may have been made to market rates of pay our entire discussion has been based around the unaffordability of wage rises that exceed rises in our income.

[27] The document then set out Pact's explanation to the union parties about "Why can't we pay more". After stating that Pact's income was both fixed and from contracts with government for the performance of various services, it explained that it had no ability to pass on increased costs in the form of higher prices and was unable to sell more services. It said, therefore, that although its costs were variable, its income was fixed.

[28] Pact set out a simplified version of its income and expenditure, stating that the former was $22 million and the latter was $21 million consisting of wages of $14 million and other expenses of $7 million. It said that over the past 12 months its average increase in income from government had amounted to approximately one per cent of income, ie about $220,000. Its calculations included that its proposed one per cent wage increase would amount to $140,000. Pact witnesses agreed that these figures of one per cent and $140,000 referred to Pact's overall wages bill (ie for both unionised and non-unionised staff) of approximately $14 million.

[29] The terms of settlement signed by the parties' representatives on 9 December 2011, following the mediation held on 4 November 2011 at which agreements were reached in principle, contained the following:

> 2. Wages: Paid and printed rates shall be increased by two per cent. Such that:

> The rates in the collective agreement are increased two per cent and the per cent increase is passed on. Above agreement rates are therefore increased two per cent.
>
> Wage increases to apply from the 4th November. Such that:
>
> There is no increase in wages for the first half of the collective agreement.
>
> There is a two per cent wage increase for the second half of the agreement.
>
> Overall wages costs to be increased approximately one per cent over full term of the agreement, and maintained within the budgetary increase passed on by government.

[30] The offers of new individual employment agreements made to non-union employees were sent out in early January 2012. Attached to a covering letter addressed to each affected employee was a proposed new individual employment agreement. Advice of a wage increase in the covering letter was set out not in the form of a percentage but, rather, in dollar terms. One such typical letter contained the following paragraph: "As part of this review we are proposing to increase your hourly rate or fortnightly salary from $16.63 to $16.96." This was clearly a proposed increase in the hourly rate rather than a fortnightly salary and, as such, was an increase of two per cent. Other increases offered also amounted to two per cent. The letter continued:

> While we intend that the proposed new IEA would be current for the next year, the proposed wage increase would be back dated from the first full pay week in July 2011 which was the fortnight ended 17th July 2011.

[31] The proposed individual employment agreements distributed to non-union employees in early January 2012 included express and identical wording of other changes as had been agreed with the unions in the collective agreement settled in late 2011. These changes included payments for emergency callouts for on-call staff and a "Short Notice Allowance". Despite these provisions being inapplicable in the cases of some non-union employees, they were nevertheless included in the proposed individual employment agreements for all, illustrating the template or generic nature of those individual employment agreements.

[32] The foregoing documentary material confirms the evidence of the defendants' witnesses that all of the relevant communications from Pact to the unions about the reasons for its insistence on not exceeding a one per cent increased wage offer, related to its contended inability to afford any more than this increase across the whole of its workforce, both unionised and non-unionised. Although the majority of affected employees (213 in number) were members of the two unions, the minority who were not (approximately 150 employees) were nevertheless a significant proportion of the total workforce whose total wage bill was and would be not insignificant.

[33] I do not accept the evidence of Pact's witnesses that the foregoing relevant statements that they and Pact made, related to the long-term financial viability of Pact and not to the collective bargaining that was taking place in 2011. It is clear that Pact and its managerial representatives were concerned about the Trust's long-term viability. However, I have no doubt that the statements made repeatedly, both orally and in writing, to the union negotiators and to Pact's staff clearly conveyed the message from Pact that it could not afford to pay general remuneration increases, both under a collective agreement with the unions and as would be passed on to non-union staff, that exceeded one per cent.

[34] The unions say that this action breached cl 37 of the collective agreement by passing on automatically to non-union employees a pay increase that had been agreed in collective bargaining. The defendants also say that, because that increase took effect significantly earlier for non-union employees, this was the bestowal of a preference in favour of non-union employees in breach of s 9 of the Act.

[35] The unions also say that by offering non-union staff a wage increase which amounted to more than one per cent above previous rates (effectively a two per cent increase for about nine months of the year), Pact must be taken to have misled and/or deceived the unions in negotiations when it insisted that it was unable to afford to pay any more than a one per cent increase as indeed was the effective figure agreed with the unions in collective negotiations and settled in the collective agreement.

Unlawful passing on?

[36] Determination of this allegation of breach turns first on the interpretation to be given to cl 37 of the 2011-2012 collective agreement. Clause 37 provides:

> **37 NO FREELOADING CLAUSE**
>
> 37.1 The employer agrees that [it] will not automatically pass on the same terms and conditions of this Collective Employment Agreement to non union employees who were employed at the time of ratification.
>
> 37.2 The Parties accept that bargaining for individual employment agreements should be treated as a genuine process entirely separate from and independent of collective bargaining.
>
> 37.3 The complete form of this CEA shall not be used for any purpose other than a Collective Employment Agreement between the Service and Food Workers Union Nga Ringa Tota, the Public Service Association and the Pact.

[37] The first point to note is that the plaintiff, through counsel, disavowed any reliance on an argument that cl 37.1 did not apply to enhanced terms and conditions as compared to those in the collective agreement. Read literally, the phrase "the same terms and conditions" might arguably not encompass the enhancement provided by the backdating of new pay rates for non-union staff for a period of approximately four months. Mr Dorking focussed, rather, on the submission that the passing on was not "automatic".

[38] Counsel for the plaintiff accepted that interpretation of the word "automatically" in cl 37.1 is coloured by the words in cl 37.2 that Pact's bargaining with non-union employees for individual employment agreements was to be "a genuine process entirely separate from and independent of collective bargaining".

[39] The notion of passing on automatically, collectively agreed terms and conditions has been examined previously by this Court in broadly similar circumstances in *ABB* referred to earlier in this judgment.[12] In that case, the relevant clause prohibited the automatic passing on to employees who were not covered by a collective agreement without the payment of a bargaining fee by the employer to the

[12] *ABB*, above n 9.

union and, also automatically, the passing on to the members of any other union without the prior agreement of the first union. The Court noted that the provision was not a prohibition on passing on but, rather, a prohibition upon "automatic passing on" unless other specified conditions were fulfilled.[13]

[40] The Court concluded:

> [27] It is noteworthy that the parties addressed not simply passing on (a practice known in industrial relations and now recognised in the law) but, rather, what they termed "automatic" passing on. I conclude that "automatic" in this sense means as a matter of course, without conscious or deliberate consideration or, more particularly, absent a request to pass on. Automatic passing on does not necessarily mean doing so in the absence of union consent because clause 1.5 addresses expressly the giving of consent by the union to passing on.
>
> [28] The parties to clause 1.5 must have contemplated at least two scenarios. The first was the adoption of collectively negotiated and settled terms and conditions, for employees on individual agreements ("IEAs"). In this scenario I conclude that the parties meant "automatic" passing on to be the advice by the employer to those IEA employees that relevant collective terms and conditions would henceforth be those employees' individual terms and conditions. "Automatic" passing on in these circumstances may also have encompassed an invitation to those IEA employees to agree to these variations. However, such passing on would cease to be "automatic" where it was intended that those terms and conditions would be the subject of IEA variation bargaining.

[41] The second scenario outlined by the Court in *ABB*, and which was applicable on the facts of that case (but not in this), was that of passing on terms and conditions to another union.[14]

[42] Although the foregoing from *ABB* is of assistance in deciding the issue in this case, what is "automatic" passing on must nevertheless be interpreted in the context of cl 37, of the collective agreement as a whole, and in the light of background practices between these parties which I have outlined already.

[43] Interpreting and applying the test in cl 37.2, I have decided that the process of passing on by Pact to its non-union employees was a "genuine process". It reiterated a longstanding and previously uncontroversial process between the unions, Pact, and its non-union employees whereby terms and conditions settled in collective

[13] At [25].
[14] At [29].

bargaining and recorded in a collective agreement, would be passed on subsequently to non-union staff. Clause 37 had been in previous collective agreements between these parties. There had been no objection to such passings on in the past.

[44] In this case, the passing on was also "entirely separate from and independent of collective bargaining". Pact waited until its bargaining with the unions had been concluded and a collective agreement had been signed. Although it may no doubt have been frustrating for Pact (and the non-union employees) to have to wait longer than in the past for the conclusion of a sometimes acrimonious collective bargaining process, Pact did so. The fact that many, perhaps all, of the terms and conditions settled in collective bargaining were passed on does not mean that the process was not "entirely separate from and independent of" the collective bargaining. Content (the terms and conditions passed on) should not be confused with process. Clause 37 was more about process than content.

[45] Further, Pact invited its non-union employees to enter into new individual employment agreements with it including on the terms and conditions which it proposed to pass on. Pact expressed its readiness to negotiate further with individual employees whom it contacted individually by letter. Pact made it clear that if non-union staff did not wish to take up its new form of individual employment agreement, those employees would remain on their previous individual employment agreements and the terms and conditions settled with the unions would not be passed on. An unspecified number of non-union employees did not take up the new offers although quite why they may have failed or declined to do so is not clear. It is not to the point that no individual employment agreement employee sought to negotiate the particular terms of Pact's proffered new form of individual employment agreement with the employer. The emphasis is on Pact's conduct and it made an apparently genuine offer in this regard. There is nothing to suggest that it would not have negotiated with individual employees and although it acknowledges it would have been very unlikely to have agreed to a greater percentage wage increase, that does not mean cl 37 was not complied with.

[46] Non-union employees had a legitimate expectation of a wage rise in the circumstances. It is difficult to know what more, realistically and practicably, Pact

could have done to ensure that the terms and conditions that it proposed be passed on to individual employment agreement employees, would be as a result of a genuine process entirely separate from, and independent of, the collective bargaining.

[47] For the foregoing reasons I am satisfied that passing on was not automatic and, therefore, there was no breach of cl 37 of the collective agreement. I respectfully disagree with the Authority's determination to the contrary. The defendants' claims of breach of cl 37 must be dismissed.

Breach of s 9?

[48] The interpretation and application of s 9 of the Act is not without controversy in this case. That is because the correctness of an early judgment of a full Court in *National Union of Public Employees Inc v Asure New Zealand Ltd*,[15] incorporating considerations of motive into the requirements of proof of unlawful preference under s 9, has been doubted subsequently in a number of judgments in analogous cases. It is, therefore, necessary to determine whether Pact's motive in providing preferential treatment to non-union employees is a necessary constituent of a breach of s 9.

[49] The first port of call, as always in matters of statutory interpretation, is the provision at issue. 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:

[15] *National Union of Public Employees Inc v Asure New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC).

(b) arising out of the relationship on which a collective agreement is based.

[50] Section 9 is to be interpreted as informed by s 7 which sets out the object of Part 3 (Freedom of association) of the Act. That object is to establish that:

(a) employees have the freedom to choose whether or not to form a union or be members of a union for the purpose of advancing their collective employment interests; and
(b) 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.

[51] It is common ground that Pact's form of individual employment agreement entered into with non-union employees constituted "a contract, agreement, or other arrangement between persons …" under subs (1). Nor is there any real dispute that these individual employment agreements conferred on the non-union employees "any preference in relation to terms or conditions of employment …" pursuant to subs (1)(b). The controversial question is whether the conferring of the benefit was "because the person [was] … not a member of a union".

[52] At [53] and following in *Asure* the full Court considered whether the word in s 9 "because" (formerly the materially identical "by reason of" under s 7 of the Employment Contracts Act 1991) indicated causation alone or whether it contemplated a more comprehensive test including the intention of the parties. The Court analysed the judgment of the High Court (under the Employment Contracts Act) in *Air New Zealand Ltd v Kippenberger* in which Randerson J considered that the then words of the equivalent provision "by reason of" required some causative link between the contract or arrangement and the preference.[16] The High Court found support for that proposition in the obiter views of a full Bench of the Employment Court in *New Zealand Educational Institute v State Services Commissioner.*[17]

[53] The full Court in *Asure*, however, noted that this was contrary to the view expressed by the former Chief Judge of this Court in *Postal Workers Union Inc v*

[16] *Air New Zealand Ltd v Kippenberger* [2000] 1 NZLR 418 (HC).
[17] *New Zealand Educational Institute v State Services Commissioner* [1997] ERNZ 381 (EmpC) at 397.

New Zealand Post Ltd where, interpreting the key words "by reason of", it was said that the focus of s 7 of the 1991 Act was on motive.[18] This had, in turn, made it necessary in the *NZ Post* case to have considered such matters as the commercial reasons that the employer had for inclusion of the preference.

[54] At [54] the full Court in *Asure* concluded:

> In the present case the Employment Relations Authority followed *NZ Post* and concluded that the law was that motive rather than just different terms resulting from union membership, was required for there to be a breach of the preference provisions. Counsel for Asure appeared at one point to concede that the relevant test was causation rather than motive and therefore could not sustain this part of the Authority's reasoning. We were initially disposed to agree with that concession, partly because of the change in wording from "by reason of" to the "because" which suggests on its face, causation. But on reflection, we consider that the concession ought not to have been made. We have already found that "because" is synonymous with "by reason of" and this involves not only issues of causation but consideration of the reasons or the motive for the preference. We cannot find in the full Court's decision in the *NZEI* case any obiter reference to a "by reason of" requiring a causative link but we have no doubt that there must be an element of causation. A preference cannot lawfully be conferred simply because a person is a member or non-member of a union. If it were conferred for some entirely different purpose, for example because that the employee has conferred a greater benefit on the employer by agreeing to work extra hours, it would not amount to an unlawful preference for the purposes of s 9. In the end it is a matter of fact whether there is a preference and if so, what was its purpose.

[55] The commentary to s 9 in *Brookers Employment Law* still affirms the importance of motive. The relevant passage states:[19]

> Motive is important in determining whether a preference is unlawful. In *Meat and Related Trades Workers Union of Aotearoa Inc v Taylor Preston Ltd* (2007) 8 NZELC 99,022 (ERA), the Authority found that the employer had conferred a preference on non-union members in the form of a pay increase. However, the Authority concluded that it was not unlawful because the employer acted in response to bargaining concerns (it did not want the union members to get a pay rise, not settle a collective agreement, and be able to go on strike) rather than because of union membership concerns. The Authority also observed that the use of the word "confer" in s 9(1) implied that the relevant time for assessment was at the time the preference was initiated, and that what occurred later was irrelevant. … The Authority decision was challenged and overturned in the Employment Court: *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd* [2009] ERNZ 54 (EmpC). The employer unsuccessfully sought leave to appeal the Employment Court decision: *Taylor Preston Ltd v New Zealand*

[18] *Postal Workers Union Inc v New Zealand Post Ltd* EMC Wellington WEC65/96, 3 October 1996.
[19] *Employment Law* (online looseleafed, Brookers) at [ER9.03].

Meat Workers Union and Related Trades Union [2009] NZCA 372, (2009) 6 NZELR 828.

[56] The aforementioned judgment of the Court of Appeal in *Taylor Preston Ltd v New Zealand Meat Workers Union and Related Trades Union* is decisive of the issue.[20] In response to a proposed question of law as to whether s 9 had been breached if the employer's subjective reason for conferring a preference did not involve favouring non-union employees or disadvantaging union members, the Court of Appeal noted:

> [26] As to the second question this is also at odds with the factual findings in the Employment Court that the preference was given to non-union members because they did not belong to the union. That is sufficient to meet the test in s 9. There is no warrant in the wording of that section to require a further inquiry into subjective motive once the statutory test is met.

[57] That is strengthened, albeit by analogy, in a line of cases decided by this Court, the Court of Appeal, and the Supreme Court, interpreting s 104 (Discrimination) of the Act. That section includes the phrase "by reason directly or indirectly of …".

[58] In *McAlister v Air New Zealand Ltd* Judge Shaw dealt at first instance with questions of causation and intention in relation to detriment to employees and prohibited grounds of discrimination.[21] In that case, the employer denied liability for discrimination by asserting that an apparently discriminatory act would only be unlawful if the detriment was caused, or different terms or conditions were offered, by reason directly or indirectly of that prohibited ground of discrimination. The employer said that it had discriminated against the employee not by reason of his age (ie unlawfully) but, lawfully, because international conventions and rules required the employer to have a policy which was discriminatory by reference to age. Judge Shaw defined the question as one of causation.[22] The Judge noted that in two earlier judgments of this Court, it had been said that there was a need objectively to establish the employer's intention to discriminate as part of finding a causal link

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[20] *Taylor Preston Ltd v New Zealand Meat Workers Union and Related Trades Union* [2009] NZCA 372, (2009) 6 NZELR 828.
[21] *McAlister v Air New Zealand Ltd* [2006] ERNZ 979 (EmpC) at [77]-[99].
[22] At [77].

between a dismissal or disadvantage, and an act of discrimination.[23] In *McAlister*, however, Judge Shaw concluded:

> [84] However, where there is evidence that a ground of discrimination was at least one factor which influenced the employer's actions then the question of whether the employer intended to discriminate is not relevant. In *Human Rights Commission v Eric Sides Motors Co Ltd*, it was held that it is not necessary to establish that the discriminator had an intention to discriminate. The important question is whether the complainant had been treated less favourably or discriminated against. As Kirby J said in *Christie* the absence of a subjective intention to discriminate does not convert discriminatory conduct into neutral policy. He went on:
>
> > The [Australian] Act operates in the highly practical circumstances of an employment relationship. This warrants the adoption of a commonsense approach to the statutory requirements. The Act is fundamentally designed to achieve social change by the removal of artificial stereotypes. Unless otherwise excused, it requires, in effect, the assessment of an employee's capacities upon that employee's individual merits. Requiring this approach has a price. In part, that price is economic, involving various adjustments to accommodate the needs of particular employees. In part, the cost may involve a challenge to the political, moral or other biases of the employer. The Parliament must be taken to have accepted that, to conform to Australia's international obligations and to achieve the objectives which they set, such costs must be borne unless the employer is exempted or excused.
>
> …
>
> [86] In summary, therefore, the legal principles which apply to an inquiry into whether there has been an act of discrimination are:
>
> (1) There must be a causal link between the detriment to the employee and the prohibited ground of discrimination.
> (2) The intention of the employer is irrelevant to this consideration where there is prima facie evidence that a decision was at least, in part, based on a prohibited ground.
> (3) Where there may be more than one reason for an employer's action the test is whether the prohibited ground is a substantial operative factor.

[59] In the Court of Appeal, the judgment of the Employment Court in *McAlister* was set aside as erroneous.[24] Although the result in the Court of Appeal was arrived at principally on other grounds, that Court nevertheless dealt with questions of causation.[25] Addressing a submission by counsel for the employee on appeal that in the inquiry into causation it was not necessary to establish an intention to discriminate, the Court of Appeal concluded:

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[23] At [81] citing *NZ Workers IUOW v Sarita Farm Partnership* [1991] 1 ERNZ 510 (EmpC); and *Trilford v Car Haulaways Ltd* [1996] 2 ERNZ 351 (EmpC).
[24] *Air New Zealand Ltd v McAlister* [2008] NZCA 264, [2008] 3 NZLR 794.
[25] At [100]-[105].

> [103] We consider that, in principle, [counsel for the employee] is correct in submitting that a straightforward factual inquiry is involved at this stage. As we see it, the structure of the statutory provisions requires such an approach. To take s 104(1)(c) as an example, the ERA provides a justification or defence to a claim under that paragraph where age is a genuine occupational qualification (s 30), but that justification is subject to a "reasonable accommodation" limitation (s 35). A purposive approach to causation would, at least in some cases (perhaps all), incorporate the genuine occupational qualification justification into the causation analysis. The effect would be to minimise the role of s 30 and exclude consideration of the "reasonable accommodation" limitation.
>
> …
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> [105] It follows from this that we do not agree with the approach taken in *Trilford*.

[60] On further appeal in the Supreme Court, the judgment of the Employment Court was restored.[26] There appears to have been no question that "intention" was irrelevant in determining causation ("because").

[61] I consider that the *Asure* case was wrongly decided on the matter of intent. The word "because" in s 9(1) connotes consequence but does not require proof of intention to achieve that consequence.

[62] Even if, contrary to my conclusion, motivation is relevant, Pact's case is that it offered preferential terms and conditions of employment because it wished to maintain the traditional and established 1 July backdate for non-union staff. It claims that it did not wish to influence its unionised employees against union membership and against collective agreement coverage by paying them less than employees who had chosen not to be union members.

[63] I do not accept, however, that this was Pact's sole, or even a predominant or significant motivation in offering preferential remuneration terms to non-union employees. There was an immediate background of very difficult and even antagonistic employment relations which had characterised many months of collective bargaining and, on the issue of a general wage increase at least in which Pact had succeeded in achieving its apparently non-negotiable stance. It is not difficult to conclude that its motivation in offering preferred terms and conditions to

[26] *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153.

non-union employees was more than to preserve and repeat existing arrangements and expectations.

[64] Statutory presumptions assist in deciding whether the preference of increased remuneration was conferred by Pact on its non-union employees because they were not members of a union. Since 2000 and the passing of the Act in that year, union membership and coverage by a collective agreement have been inextricably linked. So long as the work performed is covered by the collective agreement's coverage clause, a member of a union employed in a workplace where there is a collective agreement to which that union is a party, is covered by the collective agreement.[27] It follows, as a matter of law, that the fundamental terms and conditions of employment of that employee are set by the collective agreement. Similarly, to be covered by a collective agreement, an employee must be a member of the relevant union.

[65] So it follows that the preference conferred on the non-union employees by Pact was, in law, conferred because they were not members of a union.

[66] Regard must also be had to subs (2) of s 9. On its face, this says that the prohibition just discussed under subs (1) will not apply "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".

[67] Counsel for Pact did not argue for an absence of unlawful preference simply on the basis that the remuneration of non-union staff was different to that of the defendants' members. In any event, the plaintiff's case is of more than simple disparity as between employees. This is a case of passing on a higher rate of remuneration to employees who were not members of either union than was received by those employees in materially identical circumstances but who were members of one or other of the unions.

[68] Subsection (3) of s 9 is not at issue in this case.

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[27] Employment Relations Act 2000, s 56(1).

[69] When the remuneration disparity between unionised and non-unionised employees was put to him in cross-examination, Paul Chamberlain, Director of Corporate Services for Pact, responded more than once that there was no disparity because all employees were paid a wage increase of two per cent. Given that Mr Chamberlain is a qualified chartered accountant and must be well aware of arithmetic nuances, I do not accept this justification for Pact's conduct. The disparity between the two groups of employees arose because of the very different dates upon which the same percentage increase applied, that is, by reference to the extent of the backdating.

[70] Similarly, Mr Chamberlain's response to the proposition put to him in cross-examination that some employees received preferential terms and conditions of employment because they were not union members, was also unsatisfactory. Mr Chamberlain claimed that any preference in arrangements made with employees who were not union members was attributable to the individual as opposed to the collective status of their employment agreements. Such a conclusion could only be drawn by ignoring conveniently, but unrealistically, the links between union membership and collective agreement coverage on the one hand and, on the other, absence of union membership and individual agreement status.

[71] These justifications for Pact's conduct do not survive realistic scrutiny and I do not accept them.

[72] In circumstances, as here, where both groups of employees (i.e. union members and non-union members) performed the same work and all other things were equal as between them, the reason that the non-union members were paid more by Pact was just that, because they were not members of one of the two unions. Being a member of one of those two unions precluded a Pact employee from the extended backdating provision and, thereby, from receiving increased remuneration.

[73] The defendants' claim of breach of s 9 succeeds. Pact bestowed an unlawful preference on its non-union employees. There is, nevertheless, a controversial question about what remedy may be available for this breach.

A remedy for breach of s 9?

[74] The defendants say that the Court should direct Pact to pay to their members the difference between what equivalent non-union employees were paid in the period 1 July to 4 November 2011, together with interest on those sums. That differential was about $249 (before tax) per employee and, with 213 union member employees, would amount to about $53,000 without the addition of interest for late payment.

[75] The plaintiff submits, however, that Parliament has provided an exclusive remedial code for breaches of s 9 which is contained in s 10 of the Act. That provides materially that "… a contract, agreement or other arrangement has no force or effect to the extent that it is inconsistent with section … 9." The plaintiff says, correctly, that the defendants have deliberately not pursued a s 10 remedy in this case because to do so would have declared ineffectual and without force, the backdated wages provisions of non-union members for the period from 1 July to 4 November 2011, about $249 (gross) per such employee. The defendants have no wish to deprive employees, who are not members of the unions, of remuneration that was paid to them (now long ago) but which the defendants say would be the consequence of seeking an order under s 10 if it is interpreted and applied literally.

[76] The Act does not provide explicitly for the remedy the defendants do claim, that is an order requiring Pact to top up their members' wages by the preferential amounts paid to non-union employees, and to pay interest on these sums.

[77] Can the same result be achieved by a compliance order? The remedy of a compliance order is the primary remedy in the Act for a range of claims including, in particular, claims about bargaining and the operation in practice of the legislation's good faith obligations. It is not a remedy that is confined to an ongoing and/or potentially future course of conduct although compliance orders can, of course, address such cases remedially. Section 137 is worded broadly allowing the Authority or the Court to craft an appropriate and just solution for an established wrong which might not otherwise be provided specifically in the Act. That is the position with this case in which I am satisfied that s 10 does not cater justly to rectify the breach of s 9 that the defendants have established.

[78] Although s 137 empowers the Authority to make compliance orders, on a challenge such as this, the Court has the same powers as the Authority derivatively.[28]

[79] The material parts of s 137 which provide a remedy to the defendants are as follows:

> **137 Power of Authority to order compliance**
> (1) This section applies where any person has not observed or complied with—
> (a) any provision of—
> …
> (ii) Parts …1, 3 to 6 … [of this Act]
> …
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision …
> (3) The Authority must specify a time within which the order is to be obeyed.
> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
> (a) any person (being [a] … union … who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1):
> …

Arguments for Pact against compliance order

[80] Pact submits that because the defendants did not seek compliance orders in the Authority, for the Authority to have granted an order it would have had to have done so of its own motion. Whilst that may be so however, the position is that the defendants have now applied for an order in the course of the hearing of the plaintiff's challenge de novo. The defendants are not disqualified from so applying now.

[81] Next, Mr Dorking submits that there is no direct precedent for enforcing a finding of breach of s 9 of the Act by a compliance order. That too may be correct

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

but it is not a convincing argument for not doing so. There must be a first time for everything, even if belatedly.

[82] Further, Mr Dorking for Pact submits that the Court has jurisdiction to order a compliance order under s 137(2) (rather than s 139(2)) if, and only if, the Court is satisfied that the Authority should have ordered compliance in the proceedings brought by way of a challenge. Authority for this proposition is said to be the judgment of the Court in *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc.*[29]

[83] The *Norske Skog* case addressed an argument that this Court's power to make compliance orders is limited to situations covered by ss 139-140 of the Act and does not extend, on a challenge, to the powers conferred expressly on the Authority under ss 137-138. Although the Court concluded that it had derivative power on a challenge to make compliance orders pursuant to the same sections as empower the Authority, Mr Dorking relies on the following statement of the Court:[30]

> … there must be an implied power for the Court to make such orders as it is satisfied the Authority ought to have made in proceedings brought by way of challenge. This has been described as a derivative jurisdiction or power.

[84] In these circumstances, counsel argues that there is no basis for considering that the Authority should have ordered compliance so that the Court does not have derivative jurisdiction under s 137 to do so.

[85] Those submissions are, however, misconceived. On a challenge by hearing de novo to a determination of the Authority, the Court has available to it the powers that were available to the Authority. If the remedy of compliance was, in law, available to the Authority to remediate a breach of s 9, then irrespective of whether the Authority exercised that power, it is available potentially to the Court to do so.

[86] The real question is, however, whether a compliance order was intended by Parliament to be a remedy or one of the remedies available for breach of s 9. Put

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[29] At [35]-[42].
[30] At [37].

another way, as Mr Dorking argues, did Parliament intend that s 10 of the Act was to be the only remedy for, or to contain the only consequence of, breach of s 9?

[87] In support of its argument that a compliance order is not available, Pact points first to the objects of the Act, which includes building productive relationships through the promotion of good faith in all aspects of the employment environment by, among other things, reducing the need for judicial intervention. Mr Dorking submits that a compliance order is a discretionary remedy, as well as a coercive tool in the nature of a mandatory injunction and, accordingly, the discretion should be exercised with care and restraint. Counsel cites the judgment of this Court in *Corrections Association of New Zealand v Department of Corrections.*[31] Counsel also adopted the reasoning of the Court in an earlier judgment, *Counties Manukau Health Ltd t/a South Auckland Health v Pack* that before issuing compliance orders, the Court should allow parties to settle their disputes with the benefit of a legal decision on the merits from the Court.[32] Mr Dorking submits that, as the Court observed in *Pack*, most parties do accept the Court's decisions and modify their employment relationship strategies accordingly without the need to be coerced to do so by a compliance order.

[88] That is so, but in this case that has already been attempted after the Authority's finding of a breach of s 9 and has not been able to be achieved. Although I do not suggest that Pact would not comply with its legal obligations, if the only effective way of righting the wrong is by stating those in a compliance order, then this should be made.

[89] Next, Mr Dorking argued that, as in the case of injunctions preventing breaches of contract, a compliance order will be appropriate where a breach is shown to be "reasonably imminent".[33] Mr Dorking submits that irrespective of whether the breach is one of contract or statute, an injunction should only issue to protect the rights of an innocent party which are at risk of imminent breach. Counsel submits

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[31] *Corrections Association of New Zealand v Department of Corrections* [2005] ERNZ 135 (EmpC) at [5].
[32] *Counties Manukau Health Ltd t/a South Auckland Health v Pack* [2000] 1 ERNZ 518 (EmpC) at [31].
[33] See *Kumar v Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61 (EmpC) at 67.

that even if the Court finds that Pact breached s 9 of the Act, there is no evidence of the likelihood of any future breach by it.

[90] That, however, ignores the ongoing nature of the breach which the Court has already identified, that is the continuing inequality of payment of employees in an unlawfully discriminatory manner. If the Court can issue a compliance order for breach of s 9, I conclude this is an appropriate case in which to do so.

[91] Next, Mr Dorking submits that the proposed wording of a compliance order suggested by the defendants is insufficiently clear and unambiguous to allow such an order to be made. That is said to be required because of the grave consequences of failure to comply with an order and the entitlement of persons subject to it to know what it is that they are required to do.

[92] I disagree. The proposed wording is, with some minor exceptions, sufficiently clear in my view to enable Pact to know what it is to do and by when. Variations can cure any minor uncertainties.

[93] Nor do I accept Mr Dorking's further submission that "… an action which is in breach of section 9 can be distinguished from one which is not, only by examining the employer's reasons for acting as it did." I have already concluded that motive is not a relevant consideration in determining whether there was a breach of s 9. It is sufficient, as the defendants have established, that their members were disadvantaged by reason of their membership of the defendant unions.

[94] Next, I reject also the plaintiff's submission that to remedy a breach of s 9 by making a compliance order "would attract more severe penalties than those directly provided by the Act." Assuming the latter refers to s 10, it can hardly be said that a compliance order requiring a person to do what that person ought to have done in the first place, attracts liability for more severe penalties than an order under s 10. Indeed, an order under s 10 does not attract penalties in any event. I think the submission confuses the nature of a compliance order with the consequence of disobedience of one. In the latter case, penalties can attach but depend upon a

further breach by the party of legal requirements and, in this case, requirements directed specifically by the Court in clear terms.

[95] Nor do I accept the further submission by Mr Dorking that to make a compliance order in this case would "offend against the principle that it (the Court) should not interfere with the plaintiff's right to the management of its business and the control of its staff." In this regard, counsel relies on the judgment in *National Union of Public Employees Inc v Asure New Zealand Ltd*.[34] It is, with respect, difficult to give this argument much credence. The plaintiff is expected to comply with employment law. What it terms its rights to manage and to control its staff must accord with those legal obligations and yield to them if they are in conflict. The situation is essentially no different from any other case in which an employer has acted unlawfully in respect of its employees.

[96] Next, the plaintiff submits, more soundly in my view, that a compliance order should not be a back door method for achieving the defendants' claims to back pay for their members but without specific statutory support or authority for such an order. Mr Dorking submits that simply renaming the remedy does not provide a lawful basis for it to be granted.

[97] However, and as Mr Dorking points out, ss 137 and 139 of the Act provide that compliance orders are available where there has been non-observance or non-compliance with agreements, orders, statutes etc, and that the purpose of a compliance order is to prevent further non-observance or non-compliance by the party subject to the order. Counsel submits that this makes it clear that the jurisdiction to grant a compliance order relates only to circumstances of future breach and not to provide a remedy for past breaches.

[98] I do not agree. First, and jurisdictionally, a compliance order can only be made where there has been a breach. It is not a purely anticipatory order. Some breaches, as in this case, are both past in the sense that they have already occurred, but are also continuing in the sense that the wrong that has been perpetuated by the breach continues to affect another or others adversely. Whether or not there may be

[34] *Asure*, above n 15, at [59]-[60].

an independent, similar and future breach (which a compliance order can no doubt address), that is not the same thing as righting a continuing wrong. Such a situation is amenable to a compliance order.

[99] Further, counsel submits, a compliance order as sought by the defendants is in the nature of a penalty for breach but with all of the penalty being paid to the defendants' members despite the fact that no penalty is provided for in the Act for breach of s 9 and that the accumulated amount of any compliance order would be significantly greater than penalties provided under the Act.

[100] This submission confuses the nature of the remedy effectively to be provided. Here the defendants claim the payment of wage arrears in order to expunge the preference given to non-union employees in breach of s 9. These payments are not, and are not in the nature of, penalties. They do not punish for breach but, rather, compensate employees for consequences of the breach. It is not to the point that the aggregate amount of any such compensation might exceed the amount of a penalty that may be allowed elsewhere under the Act.

[101] Counsel submits that Parliament had the opportunity to provide a remedy for breach of s 9 when it enacted the Act in 2000. That is illustrated by the fact that although s 7 of the Employment Contracts Act 1991 is materially identical to the current s 9, the earlier legislation provided no particularised remedy at all for breach. In 2000, however, Parliament enacted s 10. So, Mr Dorking argues, Parliament turned its mind directly to what should be the consequences of breach of s 9 and legislated accordingly.

[102] I agree that, in 2000, Parliament did address the matter of the consequence of a breach of s 9. It did so by allowing the Authority or the Court to declare, as ineffectual, any preference bestowed in breach of s 9 but, at the same time, maintaining the viability of any other associated contractual arrangements or agreements. As was common ground, a s 10 remedy, in the circumstances of this case, would be to declare ineffectual the four months' back pay received by non-union Pact employees. Not only, however, do the defendants not wish to deprive those persons of payments that they received long ago, but it is doubtful how this

might be able to be achieved in practice, at least in the present proceedings. Could the unions sue the non-union employees for the return by them to their employer of those payments? Even if it was inclined to do so, could Pact sue for recovery of these monies? Both of these improbable scenarios and other conceivable ones illustrate the abject ineffectiveness of s 10 in cases such as this.

[103] Parliament could not be taken to have intended such circumstances of breaches as arise in this case, to go without effective remedy. The discretionary and flexible remedy of an order for compliance fills what at first sight might be that gap.

[104] There is no doubt that s 10 deals at least with a consequence of s 9 and would require a finding of a breach of that section. Section 10 is remedial also in respect of s 8 (Voluntary membership of unions) which is not in issue in this case. Section 10 is directed to the legal status of "contracts, agreements or other arrangements" which are inconsistent with ss 8 or 9. It says that contracts, agreements or other arrangements which are inconsistent with ss 8 or 9 have "no force or effect to the extent …" of such inconsistency. It follows that such contracts, agreements or other arrangements are not affected other than to the extent of their inconsistency with ss 8 or 9.

[105] But the language of s 10 is not one of its contents being a direct remedy for a breach of s 9. More importantly, its language is not of remedial exclusivity. What must be examined, also, is the language of s 137. Its opening words ("This section applies where any person has not observed or complied with … any provision of … Parts … 3 to 6 …") do not, on their face, exclude non-observation of or non-compliance with, s 9. Also persuasive are the words in s 137(2): "Where this section applies, the Authority may, in addition to any other power it may exercise, by order require …".

[106] There is little doubt, and Mr Dorking does not argue against this proposition, that where there is an anticipated breach of s 9, following on from an earlier breach of s 9, a compliance order could be sought to prevent that anticipated breach. There is nothing in the remainder of s 137 which appears to limit its application to circumstances other than breaches of s 9. Indeed, by referring to "Parts … 3 to 6" of

the Act in which s 9 falls, there is a presumption that no section is excluded from that coverage.

[107] It is also notable that s 137 is not applicable universally. It applies to any provision of Part 6A "except subpart 2". Had Parliament intended to exclude s 137 from applying to s 9, it would have provided for an express exclusion as in the case of subpart 2 of Part 6A.

[108] Further, if Parliament had intended s 10 to be the sole remedy for breach of s 9, that would have extended logically also to breaches of s 8. This would, in turn, have left only s 11 in Part 3 and it is unlikely, in my assessment, that Parliament would have so confined the application of s 137 to s 11 by providing expressly that it applies to Part 3.

[109] I conclude that the remedy of a compliance order under s 137 is available in cases of breach of s 9 of the Act including in cases where the breach has occurred and its effects are, as here, ongoing. As the Court concluded in *New Zealand Airline Pilots' Assoc IUOW v Bilmans Management Ltd (t/a Ansett NZ Ltd)*, a single act that may have an ongoing effect that brings it within the definition of "further non-observance … or non-compliance" may be susceptible to a compliance order.[35]

[110] That case is also authority for the proposition that a compliance order may be appropriate even although other remedies are also available. The availability of other remedies may be a factor in the exercise of the discretion whether to order compliance.

[111] The defendant unions have alleged that they have been affected by the plaintiff's non-compliance with s 9. Although, on its face, s 137(4)(a) requires only an allegation to this effect, I am satisfied also that the unions have indeed been affected. The evidence establishes that some non-union employees have questioned openly and critically the value of union membership if, as occurred, union members are disadvantaged because of that status despite having paid union fees, committed

[35] *New Zealand Airline Pilots' Assoc IUOW v Bilmans Management Ltd (t/a Ansett NZ Ltd)* [1991] 1 ERNZ 670 (LC) at 672.

time and resources to collective bargaining, and, in some instances, suffered the consequences of lockout action against them. Indeed, if a broader view of what constitutes the union is taken in that it is not simply an incorporated society entity but also the collective of its members, then those members have clearly been affected to the extent that gives their union standing in law to seek a compliance order.

[112] I have already concluded that Pact breached, or (to use the words of s 137) did not observe or comply with, s 9 of the Act. Although it may be argued that Pact's non-compliance concluded with its payment of wage arrears to non-union employees, that is not so in my assessment. That is because those non-union employees who received back pay, when members of the defendants did not, have continued to enjoy that comparative advantage even although the notional pay periods from 1 July to 4 November 2011 are well in the past.

[113] The particular compliance order sought by the defendants would require the plaintiff to pay to each of their members employed by the plaintiff between 1 July and 4 November 2011, an additional two per cent of the gross salary or wages that each earned during that period. The defendants say that the plaintiff should be required to comply with such an order within 28 days of the date of this judgment.

Breach of good faith?

[114] The communications (oral and written) from Pact to the unions and to employees, as set out earlier in this judgment misled or deceived the defendants. The unions relied on the truth of them and that Pact would not contradict them by its subsequent conduct. Their falsity was revealed only when Pact passed on wage increases to non-unionised staff which amounted to the equivalent of more than one per cent. That was because although they were at the same rate of two per cent as settled on for the defendants' members, the different backdating meant that they constituted an effective increase of approximately 1.8 per cent per annum. The union negotiators acted in reliance on Pact's assurance that it could not afford an effective increase of more than one per cent per annum in agreeing to settle the 2011-2012 collective agreement with Pact.

[115] Mr Dorking argued that such conduct by Pact was, nevertheless, not unlawful. Rather, he submitted that it was simply part of the strategic cut and thrust of robust industrial bargaining which has taken place from time immemorial, and in which the unions also acted misleadingly or deceitfully in the same negotiations. Counsel submits that the unions themselves said that they would not recommend a wage increase of less than 3.5 per cent to their members but shortly after which the unions recommended a one per cent increase. Misleading and deceptive conduct was, I took Mr Dorking to infer, sauce for the goose.

[116] First, however, it is important to be careful to identify just what the unions said about this in the same way that a careful analysis of Pact's statements has also been undertaken. Details and, I am satisfied, accurate notes of the negotiations were produced in evidence. These notes record that towards the end of the bargaining on 31 August 2011, Mr Duncan invited the Pact management to make its best offer. He said that the union negotiators had a "duty" to take that offer to their members but that any offer of less than a 3.5 per cent wage increase would not be recommended to the members for acceptance. Mr Duncan advised Pact that he presumed that employee members would reject an offer of less than 3.5 per cent.

[117] There is no evidence about whether Pact's "best" offer was taken back to members bearing in mind that its "best" offer on wages was its only offer, that is a one per cent increase (then impliedly to be backdated to 1 May 2011). I do not consider that these events establish misleading or deceptive conduct on the part of the unions in the bargaining.

[118] In any event, the unions' conduct in bargaining is not on trial in this case.

[119] Whether or not misleading or deceptive statements may have previously been acceptable collective bargaining tactics, that changed with the enactment of s 4 of the Act in 2000. This makes it very clear that in a number of employment relationship interactions including collective bargaining, misleading or deceiving or engaging in conduct which is likely to mislead or deceive, whether directly or indirectly, will not be acting in good faith. Such parties are required to act in good faith towards each

other. That there can be any doubt about this, after almost 14 years of the existence of this statutory requirement, is surprising.

[120] Pact paid to a significant number of its employees wage increases of more than one per cent per annum after assuring the unions that it could not afford to do so. Those assurances had induced the unions to agree to wage increases equivalent to one per cent per annum. Pact has been shown to have misled or deceived the defendants and so acted in bad faith towards them.

A penalty for breach of good faith?

[121] To succeed in their claim for a penalty or penalties against Pact for breach of s 4(1) of the Act, the unions must establish three cumulative tests before Pact may be liable. Its breach of s 4 must be each of deliberate, serious and sustained.[36] Taking each of these three tests I decide as follows.

[122] Pact's statements to the unions in the course of collective bargaining were deliberate. They were made by experienced managers, including one who is a chartered accountant and is responsible for Pact's financial affairs. They were not made hastily or mistakenly in the sense of being a slip or innocent error that could and would have been expected to be corrected with an appropriate acknowledgement of that error. The position conveyed orally was consistent with considered written statements made by Pact which went to the unions and its employees. There can really be no doubt that Pact's statements about the unaffordability to it of wage increases which exceeded as a percentage the one per cent increase it had received in funding, were deliberate statements.

[123] Next, was Pact's bad faith "serious"? More value judgment applies to this second test than to the first and third tests of deliberateness and sustainability. The seriousness of the breach must be assessed in context which includes a number of relevant factors. First, the statements of unaffordability of any more than a quite specific percentage increase were made by senior managerial representatives of the Trust who were in the best position to know of its financial circumstances. Although

[36] See s 4A(a).

it would have been theoretically possible for the unions to have challenged the accuracy of those statements, there is really no suggestion that the employer's position portrayed was misleading or deceptive in the sense of being factually inaccurate. Rather, the deceptiveness or misleading nature of the advice conveyed to the union negotiators was Pact's purported expert managerial assessment of its financial position and its intentions for wage increases generally across its business. The financial significance of the back payments subsequently made to non-union employees was not modest, at least when taken across a workforce of about 150 employees. It amounted to an expenditure of more than $37,000 which Pact had asserted repeatedly that it could not afford. That was said to be because even a one per cent per annum equivalent increase across the board would, by Pact's account, have exceeded the additional net income it enjoyed for the relevant year when such other factors as inflation, GST refunds, and the like were factored in.

[124] It was also serious bad faith because Pact acknowledged repeatedly, and apparently solemnly, that it would have wished to have paid its employees (including union member employees) more than it said it was able and prepared to pay. It acknowledged that a one per cent per annum wage increase would amount in real terms to a reduction in disposable income for employees whose services it said it not only valued but were vital to its success. The employees concerned are paid very modestly for performing challenging and important social work. Pact representatives listened to, and acknowledged, accounts of personal and family hardship presented to them by staff but, while not unsympathetic, remained unmoved. They compared its corporate financial circumstances to those of its employees in refusing adamantly to agree in bargaining to any more than a one per cent wage increase but a greater amount than which, shortly afterwards, it offered of its own volition to non-union staff.

[125] Finally, the misleading or deceptive statements made in and about the bargaining were sustained. They were made repeatedly, consistently, and over the whole course of the bargaining process which lasted for several months. Pact's position on the amount of a general across-the-board wage increase was consistently non-negotiable as is illustrated as much, if anything, by the achievement of that stated aim in the collective agreement which ensued.

[126] For all these reasons, I conclude that Pact's bad faith conduct in bargaining (misleading and deceiving) was sufficiently serious to meet the test for a penalty in s 4A. A penalty may be awarded and I am satisfied, as was the Authority, that this is a proper case in which to mark the Court's disapproval of bad faith conduct in bargaining by the imposition of a penalty and to attempt to ensure its non-repetition.

[127] The maximum penalty for any breach of the statutory obligations of good faith is, in the case of a corporate entity (as opposed to an individual person) as I am satisfied Pact is, $20,000.[37] To its credit is the fact that there is no suggestion or proof that Pact has behaved similarly in the past or certainly that it has been found by the Court or the Authority to have done so. Indeed, all the evidence seems to suggest that its actions in bargaining in 2011 were an aberration although even now, more than two years after those events, I apprehend that there is still much bridge building to be completed between Pact and its union member employees for which, in the circumstances, Pact must take responsibility.

[128] Although not urged on me particularly by its counsel in submissions, I nevertheless acknowledge the nature of Pact's business. It is a social services provider whose income is both limited and should, where possible, be committed to the valuable social service it performs in the community. That is not to say, of course, that this should be at the expense of either its legal obligations or of its particular obligations to a generally long serving and loyal staff.

[129] Although there have been few, if any, cases about good faith conduct of collective bargaining, at least at an authoritative and well publicised level, the requirements of s 4 of the Act have been in force and known to persons engaged in the field for almost 14 years. Pact can scarcely plead ignorance of the law about good faith.

[130] Although in other circumstances a penalty closer to 50 per cent of the maximum may have been warranted, I consider that the level set by the Authority was right in all the circumstances and make the same orders for penalties for breach of s 4(1) as it did at first instance. The plaintiff is ordered to pay a penalty of $5,000

[37] Employment Relations Act 2000, s 135(2)(b).

for breaches of s 4(1) of the Act. One-half of that penalty is to be paid to the Registrar of the Employment Court at Wellington, with the balance of the penalty being paid in equal proportions to the two defendant unions.

Postscript

[131] Nearly three years after these events, it is clear there is still a significant level of disaffection within the majority of Pact's workforce attributable to what is perceived to have been its duplicity. Not only are labour costs by far the greatest expenditure for Pact but I have little doubt that the quality and goodwill of its employees are or should be amongst its most valued assets. Whilst the results of this case in the Authority, and now in this Court, may contribute to a sense of vindication on the part of those employees affected, I detect that there is still much bridge building to be done to restore a fully harmonious relationship between Pact and its unionised staff. Responsibility for initiating that rests with Pact and its management as the party responsible for the relationship deterioration and breakdown. That said, however, the unions' delegates also have a responsibility to put this litigation in the past and to commit to both restored good faith relationships and to the important work in the community performed by Pact and its employees.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Tuesday 8 July 2014