

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Ken Donald Fyfe Fletcher (Applicant)  
**AND** Chief Executive, Statistics New Zealand (Respondent)  
**REPRESENTATIVES** Tanya Kennedy for the applicant  
Richard Searle for the respondent  
**MEMBER OF AUTHORITY** James Wilson  
**INVESTIGATION MEETING** Christchurch 14 and 15 August 2006  
**DATE OF DETERMINATION** 10 November 2006

DETERMINATION OF THE AUTHORITY

**Mr Fletcher's employment relationship problem**

[1] Mr Ken Fletcher has been employed by Statistics New Zealand (SNZ) since 1985. Not long after his appointment Mr Fletcher was elected a PSA delegate for the Christchurch office. Over the next few years Mr Fletcher became recognised as a senior PSA delegate at the Christchurch office and played a major role in this capacity both locally and at a national level. This appears to have caused no difficulties until his performance and salary review for the year ended 30 June 2001. Following that review Mr Fletcher received only a \$1000 increase in salary, a decision which he appealed. The result of this appeal was that the earlier decision had not sufficiently recognised his PSA activity and his salary was increased by a further \$1000.

[2] Following the June 2002 performance and salary review Mr Fletcher received no increase, a decision which he believed did not properly acknowledge his PSA delegate contribution. However Mr Fletcher did not appeal this decision because SNZ had previously advised that due to a budget blow-out there would be few salary increases awarded that year.

[3] During the June 2003 performance review Mr Fletcher received an overall "meets standards" performance rating. In November 2003 he was notified that his salary would be increased by \$2500. Mr Fletcher refused to sign his performance and salary review, noting that he believed his delegate work had not been given sufficient weight. He subsequently lodged an appeal against this review on the grounds that he had received insufficient recognition of his PSA role and contribution to the workplace as a delegate. In March 2004 SNZ rejected this appeal. **Mr Fletcher says that he has a personal grievance against SNZ in that he has been unjustifiably disadvantaged by the actions of his employer in not properly recognising his PSA delegate role when carrying out the 2003 salary and performance review.**

[4] In May 2003 SNZ were allocated additional special funding to be used in the form of a "key staff allowance" (KSA) to retain staff who were deemed by SNZ to be "at risk of losing" due to discrepancies between SNZ salaries and market salary rates. This additional funding and the allowances were intended to be for a short term until a new remuneration system could be put in place. While some discussions were held with the PSA, the Union did not condone the *secretive discriminatory and temporary actions of SNZ* and disagreed with SNZ's proposed restrictions on the scope of eligibility for the allowance. There was no agreement between the PSA and SNZ regarding the criteria or the process to be used to select recipients of the KSA.

[5] In early July 2003 the selected staff were advised, by letter, that they would be receiving the key staff allowance. This allowance ranged from \$6,000 to upwards of \$9,000 for staff at the same level as Mr Fletcher. Despite believing that he fitted well within the scope of eligibility for the allowance, Mr Fletcher did not receive a KSA. He says that in a discussion with his manager, Mr Jeffrey Cope, Mr Cope *made it clear that consideration had not been given to his involvement in PSA activities as a delegate*. **Mr Fletcher believes that he has a second personal grievance against SNZ in that he has been unjustifiably disadvantaged by the non-payment of the key staff allowance.**

## PSA - SNZ Relationship Agreement

[6] The Collective Employment Contract (CEC) agreed between SNZ and the PSA in 1999 (and expiring 15 March 2002) contained a section headed **PSA - SNZ Relationship Agreement**. Mr Fletcher says that his PSA activities came under the umbrella of this agreement. SNZ argue that the relationship agreement is not enforceable as the CEC (by then CEA) expired in March 2002 and at best can be considered a *collateral contract* to Mr Fletcher's individual terms and conditions. SNZ also argue that, in any event, they did not breach any of the terms set out in the relationship agreement and complied with the terms regarding delegates being given *appropriate time training and resources and responsibilities* to do their duties in the period 2002 to 2003.

[7] I find it somewhat disingenuous of SNZ to suggest that this Relationship Agreement is *unenforceable*. Even if it is technically correct that the CEA had expired and that Mr Fletcher cannot rely on it in bringing this claim, such an argument ignores the fact that over the period of time in question Mr Fletcher was not discouraged from undertaking his delegate role nor advised that the Relationship Agreement did not apply. In fact it appears that both SNZ and the PSA continued to interact on the assumption that the agreement continued in force. Even if the collective agreement had expired there is no doubt that Mr Fletcher's conditions of employment were based on that collective and he was entitled to rely on that agreement, including the Relationship Agreement.

[8] The Relationship Agreement had the stated aim of:

*... to meet the needs of employees and business, Statistics New Zealand (SNZ) and the NZ Public Service Association (PSA) will continue to work together to build an environment based on mutual trust and responsibility.*

And under the heading *Making this relationship work* said:

*To make this relationship fully effective, it is recognised that time and resources must be devoted to it. The delegate structure of the PSA will have primary responsibility for enacting the PSA's responsibilities and will be given appropriate time, training, resources and responsibility to do so. Delegates and other members involved will receive due recognition for the skills and abilities they bring to the relationship, and their performance in assisting the relationship to meet expectations....*

And under the heading *Responsibilities of SNZ in fulfilling this relationship* says:

*SNZ recognises that the active involvement of PSA delegates and members is critical to the success of this relationship. SNZ will provide appropriate time, resources and encouragement to allow delegates to fulfil their responsibilities effectively.*

[9] As I have outlined above, Mr Fletcher was entitled to rely on the conditions set out in the expired collective employment agreement (CEA) and the relationship agreement set out in the CEA. In their evidence to the Authority, SNZ managers did not, in fact, argue that the relationship agreement did not apply. Rather they said that Mr Fletcher's delegate duties had been taken into account and had been given due weight when assessing his performance and salary.

### **The extent of Mr Fletcher's PSA activities**

[10] In order to put Mr Fletcher's claims into some perspective, it is appropriate to set out the level of his PSA activities over the past few years. The percentages listed are not disputed by the parties. Prior to 1999 these activities were less than 10% of Mr Fletcher's work time. In the year ended June 2000, due to the amount of time spent in assisting to negotiate the collective contract, his role as a PSA delegate amounted to approximately 30% of his time. The following year (to 30 June 2001) approximately 10 percent of his time was PSA activities. In the year to June 2002 approximately 37% and to June 2003, approx. 39%. It is also important to emphasise that SNZ, in their evidence to the Authority, accepted that Mr Fletcher's PSA activities should be given equal weighting with his other duties.

### **Mr Fletcher's role as a PSA delegate**

[11] Before discussing Mr Fletcher's specific claims it is appropriate to make some general comments regarding his role as a PSA delegate and his relationship with his employer, SNZ. As I indicated to both SNZ and PSA representatives at the Authority's investigation meeting it is regrettable and that an individual employee, in this case Mr Fletcher, has become the victim of a lack of clarity between his employer and his union as to the appropriate level of time a PSA delegate should be engaged in delegate duties and the weight to be given to those duties by his employer when considering the delegates overall performance. This is a matter which should have been more clearly defined by SNZ and the PSA and should never have reached the point where an individual delegate/employee felt the need to pursue a personal grievance claim. It is clear that Mr Fletcher is a conscientious employee who has, for a number of years been prepared to dedicate a good deal of his time and emotional energy to representing his fellow employees as a PSA delegate. Mr Fletcher believes that he has been financially disadvantaged as a result of his dedication to what he understood were activities which his employer accepted as legitimate. He believed that his union activities would be treated by his employer as part of his "normal" duties and given equal weight to his other duties when assessing his performance and subsequent salary reviews.

[12] Given Mr Fletcher's genuinely held belief that his delegate activities would be given equal weight to his SNZ duties, and his belief that he has been financially disadvantaged, it is not at all surprising that he feels aggrieved. However in determining whether or not Mr Fletcher has a personal grievance against his employer, the Authority must consider whether or not Mr Fletcher was disadvantaged and secondly whether or not that disadvantage was due to unjustified actions of his employer.

## Mr Fletcher's first personal grievance claim: June 2003 performance and salary review

### Chronology

[13] In his 2000 performance review Mr Fletcher's manager (Mr Cope) noted Mr Fletcher's delegate activities and assessed his overall performance as *meets standards*. Mr Cope also commented:

*(Mr Fletcher) has made a very good contribution in a number of areas over the year... However, his contribution to (National Accounts) has been less than ideal due to his PSA work. The situation is accepted and, from a corporate perspective, he has more than made up for it through his contribution to the employment contract negotiations, and his more general advice/counsel provided to staff on PSA related issues. I look forward to getting (Mr Fletcher) back on a more full-time basis, as he has a lot to contribute to our area.*

As a result of this review Mr Fletcher received a salary increase of \$1500.

[14] In the June 2001 review Mr Fletcher's performance was again rated as *meets standards*. In this review Mr Cope said:

*(Mr Fletcher) has made a very good contribution to SNZ outside the (National Accounts) Division, and this is acknowledged above. However, I still see his prime role - and that which should take priority when faced with conflicting work tasks - as his advisory role in the ESG, especially this year as we completed a major upgrade to the accounts which placed a premium on high quality technical input.*

Also in this review the *Approving Officer* (Mr Ian Ewing) said:

*(Mr Fletcher) makes the point that as a PSA delegate he performs a corporate function of benefit to SNZ as well as a service to the union. I think that the argument has some merit, and if the HR division agree this they (HR) should specify what the time requirements are...*

...

*There are, however, personal benefits (both private and career wise) that an individual gets from the union delegate and overseas roles (Mr Fletcher) undertakes, and I would expect that some extra personal effort is made by people taking on these roles to reduce the impact on their "core work".*

*While accepting the line of (Mr Fletcher's) argument, I do agree with (Mr Cope's) overall assessment of (Mr Fletcher's) work which is of a good standard and I thank him for it.*

As a result of this assessment Mr Fletcher received a \$1000 increase in his salary. He appealed this decision arguing that the performance review did not give sufficient recognition or value to his delegate activity. As a result of his appeal his salary was increased by a further \$1000. The report of the appeal committee, recommending that further increase, included the commented that:

*...Consequently the assessment of (Mr Fletcher's) role as an adviser on National Accounts is based on unrealistic expectation's given the time he spent on overseas consultancies and PSA work. The revision of the (performance review) by Mr Cope did address this, and the PR does incorporate assessments of (Mr Fletcher's) performance in his role of international consultant and PSA representative. However the review committee considers that the focus of the overall assessment strongly relates to (Mr Fletcher's) role as an adviser in National Accounts i.e. insufficient weight is given to his other roles which is important and given the significant time spent on them and the impact of reduced time on his primary role. Our interpretation of the performance review is that once due account is taken of the reduced time (Mr Fletcher) had to*

*perform his duties as National Accounts adviser, he performed well across all of these roles (National accounts is adviser, international consultant and PSA representative)...*

[15] Mr Fletcher's June 2002 performance review again rated his overall performance as *meets standards*. In this review Mr Cope said:

*((Mr Fletcher) also continues to make a very valuable contribution to SNZ outside the NA division through his role as a PSA representative...*

...

*(Mr Fletcher) is an invaluable member of the NA team. From the team's perspective, it is a pity that his excellent contributions are constrained by his availability.*

Mr Fletcher received no salary increase following this review. However as noted earlier he decided not to appeal the decision as staff had previously been advised that only the minimum contractually required salary increases would be paid due to a budget blow-out.

[16] Mr Fletcher's 2003 performance review once again rated him as *meets standards* overall. Once again Mr Cope commented on Mr Fletcher's a PSA activities saying:

*(Mr Fletcher) has had a very busy year as a PSA delegate and, in this role, has clearly excelled. The consequence has been that - from an NA perspective - (Mr Fletcher) has been a victim of his own success. Even less of his time was able to be dedicated to NA and related ESG work - and even the time that was set aside for this was not as effective as desired due to its disrupted nature. These fragmented contributions to our work programme are preventing (Mr Fletcher) from providing the statistical leadership and input he is capable of and which the division needs.*

*I acknowledge that this reduced NA/ESG. input has coloured my assessment of (Mr Fletcher's) overall performance...*

Following the June 2003 review Mr Fletcher was given a \$2500 salary increase. He says that he expected his performance rating to be *exceeds competency* which would have mandated a minimum increase of \$7,500. He immediately sought a review of this decision.

[17] In an e-mail supporting his appeal Mr Fletcher argued that his performance review did not give sufficient weight to the contribution of his PSA role both in terms of the outputs delivered or the competencies and that, consequently, the overall ratings understated his performance and contribution to SNZ. In this e-mail he says:

*the effect of my corporate roles on the national accounts work is presented negatively and seems to have carried most weight in coming to the overall assessment of "met expectations", with the high achievements in the corporate role being given insufficient weight and the overall assessment.*

By "corporate roles" Mr Fletcher is referring to his role as a PSA delegate.

[18] The review committee rejected Mr Fletcher's appeal and confirmed the overall assessment of "meets expectations". In declining to Mr Fletcher's appeal the review panel said:

*...the review panel supports your managers overall Rating of "meets". In making this assessment we note that:*

- *There is full documentation of your PSA contribution in section B.*
- *The expectation for a competency rating at Exceeds would be for a high level of performance across all roles (i.e. National accounts and PSA work).*
- *What appears to be reasonable expectations in respect of your National accounts work have not been met fully; and in particular*
- *Your balancing of priorities between PSA work and National accounts work has impacted on your ability to deliver your core National accounts work.*

[19] Mr Fletcher says that the declining of his appeal amounts to an unjustified action to his disadvantage. He says that his role as a lead delegate is an important one from the perspective of both the PSA and SNZ. He says that despite the need for recognition of the delegate role in terms of the Relationship Agreement, SNZ has failed to recognise and place due weight to the contribution he has made. Mr Fletcher says that in failing to do so SNZ have unjustifiably disadvantaged him and breached the Relationship Agreement.

## Discussion

[20] How employees at SNZ were to receive an annual performance and salary review was set out in the collective agreement. The salary scales provide for progression through a range of salaries with each grade providing for salary steps for those employees who are deemed to "meet competencies" and those who "exceed competencies". There is no definition in the CEA as to how an employee achieves the "exceed competencies" rating. However the June 2003 assessment forms presented in evidence to the Authority is divided into various sections i.e. "Key contribution to deliverables", "making the difference", and "personal and career development". There is a section entitled "competencies" which lists 12 individual competencies. At the conclusion of the form there is a section headed "overall performance rating and rotation" and a further section headed "staff members comments".

[21] In Mr Fletcher's 2003 review he was assessed as having "achieved" his key result areas, projects and personal development. His rating on output and objectives was noted as "met expectations". Of the 12 competencies listed Mr Fletcher was assessed as exceeding standards in six, meeting the standard in five and one competency not tested. Mr Fletcher's manager assessed his overall performance as "meeting standards". In terms of the salary progression criteria this overall assessment was insufficient to move Mr Fletcher to the "exceeds competency" rating and receive a substantial salary increase.

[22] The CEA provides that employees who are unhappy with the annual performance and salary review may request a review of those decisions. Mr Fletcher requested a review. How these reviews are to be carried out in practice is not spelt out in either the CEA or the SNZ HR policy manual. However the usual practice is for a review committee of "independent" managers to review the assessment. In Mr Fletcher's case this review was carried out by Deborah Renton-Green, the General Manager Human Resources and Mr David Archer, Acting Deputy Government Statisticians.

[23] I am satisfied from the documents provided to me and from the written and oral evidence of the SNZ managers, in particular Mr Archer, that this review was carried out fairly. Mr Archer told me, and I accept, that in his opinion Mr Fletcher's manager had given proper weight to Mr Fletcher's PSA involvement. He said that for Mr Fletcher to be rated as "exceeds" standards he would need to be exceeding standards not only in his PSA role but also as an adviser in the National Accounts team. Mr Archer says that, even if Mr Fletcher's work with the PSA did "exceed" standards that did not mean that his overall performance should be rated "exceeds" when weighed against his National Accounts performance.

[24] I have some sympathy for Mr Fletcher's frustration at not being able to convince his employer that his overall performance merited a further salary increase. However, it is not the role of the Authority to determine whether or not Mr Fletcher's performance was correctly assessed. That is a matter for the employer and unless there is evidence that the assessment was carried out unfairly it is not for the Authority to substitute its assessment for that of the employer. I have found no such evidence. The CEA provides for performance assessment and salary review and for these decisions to be reviewed. Mr Fletcher's manager, Mr Cope, says that in carrying out his assessment he gave appropriate weight to all aspects of Mr Fletcher's performance, including his work as a PSA delegate. Mr Cope's assessment was endorsed by his manager and subsequently upheld by the review panel. His employer, having followed the appropriate process came to the justifiable conclusion that Mr Fletcher was being remunerated at the appropriate level. **Mr Fletcher does not have a personal grievance against his employer in respect to his June 2003 performance assessment and salary review.**

## Mr Fletcher's second personal grievance claim: Non payment of key staff allowance

### Chronology

[25] In the budget in May 2003 the Government allocated additional funding to SNZ. This funding was to be used, according to SNZ, *to respond to recruitment and retention difficulties where the SNZ remuneration was less than competitive*. The funding was *to be targeted to certain statistical staff who SNZ saw as key, as a risk limitation measure*. On 28 May 2003 SNZ met with the PSA. In respect of the Key staff allowance the notes of the meeting record:

*PSA have opted to take a neutral position. SNZ to establish the process of setting criteria and paying this allowance to Key staff. Members (of the PSA) would like to see the criteria for selection be transparent and these criteria to be worked through with the PSA but the selection process be up to management.*

Following this meeting Mr Fletcher wrote to SNZ setting out some personal thoughts on how the allowance might be implemented. However, in an e-mail to managers dated 11 June 2003 the human resource manager involved in implementing this programme, Mr Alan McIntyre, said that HR had discussed with the PSA a proposal for the payment of an allowance to a targeted group of statisticians, and:

*The PSA expressed concerns about fairness and transparency of the proposed payments but expressed a desire not to be involved in how the allowance was determined.*

Mr McIntyre's email then went on to set out the initial criteria which managers were to use to nominate staff to receive the allowance.

[26] According to SNZ the first round of nominations saw only very few staff nominated for the KSA. The criteria was then refined and further nominations called for. These nominations were then considered by the three Deputy Government Statisticians and a final list of nominees referred to the Government Statisticians (i.e. Chief Executive) for approval.

[27] On or about 1 July 2003 those individuals who were to be paid an allowance were advised in writing. These letters included a requirement that the recipient keep their remuneration details, including the allowance, confidential. Regrettably, but understandably, several of the recipients of this letter approached Mr Fletcher asking him about his allowance. This caused Mr Fletcher some embarrassment as, he says, it was clear that other staff assumed that he would receive an allowance.

[28] Mr Fletcher says that shortly after being advised that he was not to receive the KSA he approached his manager, Mr Cope. He says that it is was clear from the discussion that no consideration had been given to his involvement in PSA activities in deciding whether or not he should receive an allowance. Mr Fletcher believes that in not taking into account his PSA activities in this decision SNZ has breached the SNZ/PSA Relationship Agreement.

### Discussion

[29] The remuneration payable to Mr Fletcher is set out in his employment agreement i.e. the CEA. There is nothing in that an agreement which requires him to receive the KSA and any payment to him was at the discretion of his employer. In exercising its discretion in this regard SNZ had an obligation to make its decision as to whom would receive the allowance fairly. The funding for this allowance was specifically made available to address short term retention difficulties being experienced by SNZ. In assessing how these funds should be applied SNZ developed criteria to be applied and called for nominations from managers as to who should receive the allowance. The criteria were, at the outset of this exercise:

- *Whether there is an identifiable recruitment/retention issue for the nominated person.*
- *Whether there is evidence of pay disparity.*
- *Whether they add value.*

In the first instance it was required that, to be eligible for the allowance, the nominated employee had to meet all three criteria. However, according to SNZ very few employees were initially nominated because few staff meet all three criteria. The criteria was then reviewed and divisional managers were asked to focus on staff who were judged as *very important to statistical business continuity*.

[30] Once the nominations were received a group of senior managers met to consider all of the nominated employees and the amount to be paid to each. Following this meeting a list of successful nominees was taken to the Chief Executive to approve. Mr Fletcher was not nominated for a KSA. In explaining this decision the Acting General Manager Corporate Services for SNZ, Dallas Welsh, said in her evidence:

*Mr Fletcher added value as an adviser and as a PSA delegate but he did not fit the relevant criteria. He was not in a position that was so pivotal it would affect the organisation. Had he left at that time (mid 2003) he may have been able to leave Statistics and claim a higher salary elsewhere, but I believe his leaving was not a significant risk to the organisation, nor that his role was key. I am not dismissing the work that Mr Fletcher did in National Accounts nor with the PSA, but as at 2003 he was not in a role that Statistics could not do without.*

[31] Mr Fletcher says that SNZ had failed to recognise his role as a PSA delegate when considering whether or not he should receive a KSA and that this is a breach of the Relationship Agreement. However the KSA was not a payment to which he was entitled as of right. It was within the discretion of SNZ to determine who should receive the allowance. The criteria developed by SNZ was not unreasonable given the purpose for which the funding had been made available. The criteria did not include the employee's level of performance (whether on National Statistics as a PSA delegate). Rather they focused on the danger that, should the employee resign, the work of Statistics NZ would be threatened. There is no evidence that the criteria was unfairly applied nor that Mr Fletcher was unfairly discriminated against.

**[32] Mr Fletcher does not have a personal grievance against SNZ in respect to the non payment of the key staff allowance.**

## **General comment**

[33] I wish to formally acknowledge that the events outlined in this determination have caused Mr Fletcher a good deal of personal stress. During the period in which these events took place his wife suffered a serious illness. Despite the stress he was under both at work at home he continued to devote himself diligently, and with good humour, to his duties both as an employee of SNZ and a PSA delegate. Encouraged by the wording of the Relationship Agreement he assumed that his dedication would be rewarded. I have no doubt whatsoever that both the management of SNZ and the PSA took advantage of his willingness to contribute his time and energy to the relationship between his employer and his union. I note that both SNZ management and PSA officials have acknowledged Mr Fletcher's contribution to this relationship over many years. It is unfortunate that Mr Fletcher feels that he has been disadvantaged by the time and effort he has expended as a PSA delegate and I strongly recommend that SNZ and the PSA review and clarify their mutual understanding of the role of delegates, and the value to be placed on delegates contributions, to ensure that this situation does not recur.

[34] Finally I would like to apologise to the parties, particularly Mr Fletcher, for the delay in issuing this determination and any additional stress this delay may have caused.

## Summary of Determination

[35] By way of summary of the findings set out above I have found that:

- **Mr Fletcher does not have a personal grievance against his employer, Statistics New Zealand, in respect to his June 2003 performance assessment and salary review; and**
- **He does not have a personal grievance against SNZ in respect to the non payment of the key staff allowance.**

I am therefore unable to award him the remedies he seeks from his employer.

## Costs

[36] Costs are reserved. The parties are urged to attempt to settle this issue between themselves in the first instance. If they are unable to do so SNZ may file an application for an award in respect to costs within 28 days of the date of this determination. If such an application is filed Mr Fletcher will have 14 days in which to respond.

James Wilson  
Member of Employment Relations Authority