IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 113
5406419

	BETWEEN	TASMAN DISTRICT COUNCIL Applicant
	A N D	NEW ZEALAND PUBLIC SERVICE ASSOCIATION Respondent

Member of Authority:	David Appleton
Representatives:	Joanna Cranness, Advocate for Applicant Caroline Mayston, Counsel for Respondent
Investigation meeting:	On the papers by consent
Submissions Received:	29 April and 27 May 2013 from Applicant 15 May 2013 from Respondent
Date of Determination:	18 June 2013

DETERMINATION OF THE AUTHORITY

A. The appropriate market for establishing the 2012 salary movement under the 2011 - 2013 Officers' Collective Employment Agreement between the parties is the local government market, not the general market.

B. Costs are reserved.

Employment relationship problem

[1] Tasman District Council (the Council) and the respondent (the PSA) seek the assistance of the Authority to determine the meaning of a clause in the 2011 to 2013 Tasman District Council Officers' Collective Employment Agreement (the collective agreement).

[2] Although not specified, it is understood that the application is made under s. 129(1) of the Employment Relations Act 2000 (the Act), which provides that, where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute in accordance with Part 10. Section 129(2) requires that, if the dispute relates to a collective agreement, the party pursuing the dispute must ensure that all union and employer parties to the agreement have notice of the existence of the dispute. In this case, only the parties to the application are parties to the agreement, so I am satisfied that this requirement has been satisfied. The Authority has jurisdiction to make a determination in respect of this application pursuant to s.161(1)(a) of the Employment Relations Act 2000 (the Act), as this employment relationship problem relates to a dispute about the interpretation, application or operation of an employment agreement.

The material terms of the collective agreement

[3] The collective agreement commenced on 1 July 2011 and remains in force until its expiry on 30 June 2013. It applies to all professional, administrative, clerical and technical officers employed by the Council whose conditions of employment are based on an annual salary, with the exception of the chief executive officer, departmental managers, divisional managers and other positions named in Schedule 1 of the collective agreement.

[4] The clauses that are subject to disagreement are clauses 33 and 17, which state as follows:

> ***CLAUSE 33 – 1 JULY 2012 MARKET SALARY MOVEMENT***
>
> *33.1* *The Employer will apply the annual market salary movement to the salary bands contained in clause 17.1.2.*
> *33.2* *The Employer shall provide the PSA written confirmation of the new salary band market rates no later than 1 June 2012.*
> *33.2* [sic] *The annual market salary movement will be effective from Monday 2 July 2012.*

[5] Clause 17.1.2 is a subclause under the main heading of clause 17 relating to remuneration. Clause 17 provides as follows:

> ***CLAUSE 17 – REMUNERATION***
>
> *Council policy is to establish fair and affordable salaries for employees that enables the Council to recruit and retain staff based*

on the objective of meeting the median of market rates while providing for employees to be rewarded for increasing performance and exceeding job requirements.

The object of providing career pathways is to provide greater opportunities for career development, to more appropriately recognise expertise, to recognise management as a discipline, and to secure in-house capability in the long-term. To facilitate the process the employer will undertake annual market salary movement checks.

17.1 Salary Scale

17.1.1 Each employee will be paid within the scale contained in this clause.

17.1.2 The following salary bands represent the salary scale for each of the roles under the Council's remuneration system. The salary bands are 85% to 115% of the market rate stated.

Salary Band	*Market Rate (100%)*
B	*33,400*
C	*38,770*
D	*45,540*
E	*52,740*
F	*62,120*
G	*72,840*
H	*84,830*

Remaining sub-clauses under s. 17 have been omitted as they are not material.

[6] Other material clauses are as follows:

Previous Terms and Conditions

1.8 The terms and conditions in this agreement replace any previous written contracts, agreements or understandings.

4.4 ***Guiding Principles***

- *Employment conditions should be comparable with alternate employers.*

…

- *Remuneration and employment benefits are set at a level that attracts and retains both skilled staff and work.*

- *Remuneration will take into consideration what the market is paying.*

CLAUSE 34 – VARIATION TO AGREEMENT

34.1 This agreement or any part of it may be varied at any time by written agreement between the directly affected parties. Any

> *variation must be ratified by a majority vote of union members affected by the variation before being signed by the affected union party or parties, provided such variations are not inconsistent with the terms of this agreement.*
>
> *34.2 In no case of variation shall this agreement be so varied so as to establish a new agreement in total.*
>
> *34.3 The Employer shall be responsible for providing a written copy of any and all such variations which must be recorded including a timeframe and sent to the Union/s.*

[7] The parties differ as to their interpretation of what constitutes *annual market salary movement checks* as referred to in clause 17 and *annual market salary movement* as stated in clause 33. It is the position of the PSA that the term *annual market salary movement* requires the application of a variation to the salary bands contained in clause 17.1.2 based upon general or open market rates, as collated by the organisation Strategic Pay Limited (Strategic Pay) or by some other similar organisation. The Council, on the other hand, takes the view that it is not obliged to pay rates based upon a movement in the general market and that the offer it has made to the PSA to apply an average of the general market rate and local government market rates to the salary bands complies with the obligations of the collective agreement.

The issue

[8] The issue for the Authority to determine is how the term *annual market salary movement* is to be interpreted in the collective agreement.

The parties' submissions

The Council's submissions

[9] Turning first to the Council's submissions, the Council argues that it is not obliged to pay the Strategic Pay general market movement on the basis that:

(a) The words of clause 33 do not state the Strategic Pay general market movement is to apply;

(b) Other clauses in the collective agreement do not support the contention of the PSA;

(c) The parties did not agree at the time of negotiating the collective agreement that the Strategic Pay general market movement would be applied; and

(d) Previous negotiations did not determine the content of the current collective agreement as the final written agreement supersedes these negotiations.

[10] The Council draws to my attention the principles of construction applicable to contracts, including collective agreements. The Council refers to the Employment Court case of *Association of Staff in Tertiary Education Inc: ASTE Te hau Takitini o Aotearoa v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491. His Honour Judge Colgan distilled the principles from *ASTE* in his later judgment of *Chief Executive Officer of the Department of Corrections v. Corrections Association of New Zealand Inc* [2005] ERNZ 984. Those principles as set out in that judgment are as follows:

- *Agreements are interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.*

- *One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*

- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.*

- *Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.*

- *Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements.*

- *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the "business" in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent.*

> *If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfied business commonsense and fulfils the parties' purpose.*
>
> - *Nevertheless, if the words are clear and can have only one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.*

[11] The Council also refers me to the decision of His Honour Judge Travis in *Hansells (NZ) Ltd v. Ma* [2007] ERNZ 637. The principles promulgated in this case can be summarised as follows:

(a) Words must be given their ordinary and grammatical meaning unless this would lead to an absurd or irrational result;

(b) The Courts may, in appropriate cases, have regard to prior collective agreements to ascertain the history of the clause under consideration, to obtain some guide to industry practice and to assist in the interpretation of the current collective agreement;

(c) The whole collective agreement is to be taken into account in ascertaining the meaning of any particular aspect of it.

[12] The Council also refers me to the Supreme Court case of *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 in which, at para.[199], Wilson J stated:

> *The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.*

[13] The Council submits that, looking first at the words used in the ordinary meaning of the words in clause 33, it does not state that the pay increase to be applied effective from 2 July 2012 is the *Strategic Pay general market movement*, and so clause 33.1 does not limit the Council to using only the Strategic Pay general market data in determining what movement is to be applied to the salary bands.

[14] The Council submits that it is necessary to refer to the surrounding circumstances in the collective agreement as a whole, and draws my attention to clause 17 of the collective agreement and the reference in the preamble of that clause to the statement that *to facilitate the* [remuneration] *process the employer will*

undertake annual market salary movement checks. The Council notes that the word *checks* is plural and not singular and that, therefore, the Council is contractually obliged to consider more than one annual market salary movement. When the employer has undertaken annual salary movement checks, the result of these checks will form the basis of the annual market salary movement specified in clause 33.1.

[15] I note that the preamble of clause 17 also refers to the objective of *meeting the median of market rates*. Again, the phrase *market rates* is in the plural, and not the singular. I shall consider this below.

[16] The Council submits that the movement must also meet the other stated remuneration policy requirements in clause 17, such as establishing fair and reasonable salaries that enable the recruitment and retention of staff by paying the median of the market rates, while rewarding performance in exceeding job requirements. The Council argues that if the Strategic Pay general market movement is applied, the Council would not be able to apply performance-based pay that was due in December 2012 because of budget constraints. That would put the Council in breach of the remuneration policy specified in clause 17 requiring reward for increasing performance and exceeding job requirements.

[17] The Council also refers me to the guiding principles at clause 4.4 and in particular the principle that *remuneration will take into consideration what the market is paying*. The Council states that there is no definition of *market* in the collective agreement and it does not limit the applicable market to the Strategic Pay general market. It relies on the evidence, given in affidavit form, of Ms Joanna Cranness, Human Resources Manager of the Council, in which she states that the labour market the Council recruits from and loses employees to is primarily a combination of its geographic location (the Nelson and Tasman regions) and its industry sector, local government.

[18] The Council also refers to clause 4.2 of the collective agreement which states that the objective (presumably of the collective agreement) is *to establish employment conditions that are fair for all, easily understood and recognise the environment in which the organisation operates*. Council submits that environmental considerations for the Council are economic and political constraints. The Authority's attention is drawn to a memorandum from Mr MacKenzie, the current Chief Executive of the Council, dated 19 June 2012 in which he states:

> *I acknowledge the past practice of applying the General Market adjustment but it is not a contractual provision of the CEA and the consequence of the current pressures on all budgets means that the proposed 3.5% increase to salary budgets was too high politically.*

[19] The Council also argues that the stated intentions of the parties, as evidenced in the affidavits of Mr Verstappen (a staff liaison member and PSA delegate) and Mr Page (a PSA delegate) are not relevant or admissible, in view of the principle set out by His Honour Judge Colgan in *ASTE* at para.[20] when he stated:

> *What matters is not what the parties say they actually intended the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. That is because if such evidence was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed. Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed provision which might involve a compromise of the respective parties' positions. Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who are not privy to the negotiations. This is particularly so in the case of employment agreements. Those other parties may include new employees, persons wishing to purchase a business whose operations are covered by an employment agreement and other employer/employee/unions in the same sector looking to settle their agreements.*

[20] The Council refers to the affidavit of Ms Cranness in relation to the negotiations that took place on 5 July 2011 between the Council and the PSA. Ms Cranness deposes that the parties had earlier negotiated on and agreed to apply the Strategic Pay general market movement in year 1 of the collective agreement, effective from 1 July 2011. No agreement had been reached on what increase would be applied in the second year of the term of the agreement and the negotiations on 5 July 2011 primarily focused on what increase would be applied. Ms Cranness deposes that the parties had not had a two year term for the collective agreement since the introduction of the new remuneration strategy in 2007.

[21] Despite the respondent's submissions about the inadmissibility of evidence about the parties' intentions during negotiations, Ms Cranness deposes that the Council specifically did not want to tie itself into the Strategic Pay general market movement or into any other individually specified market movements for the second year of the agreement. Ms Cranness deposes that she recalls that both parties contributed suggestions to the initial wording for the new clause 33 to provide for the

year 2 pay increase. She deposes that the Council discussed with the PSA that the Council did not want the clause wording to be specifically tied to the Strategic Pay market movements and she refers to handwritten notes exhibited to her affidavit which show the wording of clause 33. This handwritten note, which is hard to decipher exactly because of interlineal insertions, appears to record the proposed wording of clause 33 as follows:

> *Clause 33 (New)*
>
> *1 July 2012*
>
> *Market salary movement*
>
> *Remwise*
>
> *The ~~strategic Pay~~ annual market salary movement, data provided from the Council's remwise remuneration will be automatically applied to all salary bands, effective the salary bands contained in 17.1.2.*

[22] Ms Cranness deposes that the words *Strategic Pay* were specifically crossed out because of the Council not wanting the clause wording to be specifically tied to the Strategic Pay market movements. Ms Cranness deposes that she made changes to the collective agreement and that, although she did not forward the new clause 33 separately to the PSA for review, as the PSA had already agreed to the wording in principle at the negotiations, the completed collective agreement was forwarded to the Union for review and ratification. This collective agreement was ratified and subsequently signed by both parties.

[23] Ms Cranness states in her affidavit that, in writing the clause, as well as ensuring that she drafted what had been agreed to at the negotiations, she was aware of the need to ensure that the new clause was consistent with the rest of the document, and that specifying *Strategic Pay* as the source of the market data in clause 33 would have made it potentially inconsistent.

[24] Finally, the Council submits that the basis for determining the mid-term remuneration increase should not be the methodology used in previous negotiations as that is precluded by clause 1.8 of the collective agreement. Memoranda from the Council to the PSA exhibited by the PSA are not relevant to the negotiations in relation to the 2012 pay increase, the Council states. The Council asserts that each of the negotiations is stand-alone, and are not determined by agreements reached in

previous years. Either party can raise claims, seek to alter clauses, respond, agree and disagree. Agreement on a clause for a number of years does not prevent either party seeking to alter it subsequently. In addition, the Council submits that, as this was the first time a mid-term remuneration had been negotiated, there was no precedent which enables the Authority to look back at how this clause was previously applied.

The PSA's submissions

[25] The respondent refers to the previous negotiations between the Council and the PSA and the decision of the chief executive at the time, Mr Wylie, to move away from the old practice of applying the Consumers Price Index (CPI) adjustment to salaries in favour of applying open market rates. It refers to market data being obtained from Strategic Pay Limited and increases in remuneration being based on the Strategic Pay general (or open) market data. It states that, following the 2007 collective agreement, three further collective agreements, all of 12 month terms, were negotiated between the parties and in each the general market rate was to apply to salaries annually through the remuneration clause.

[26] The respondent takes issue with the evidence in the affidavit of Ms Cranness that it was discussed with the PSA that the Council did not want the wording of the new clause 33 to be specifically tied to the Strategic Pay market movements or specific to any other market provider of market movements. The respondent points out that this is in direct contradiction to the evidence of Mr Verstappen who deposes in his affidavit that:

> *The clear understanding was that any and all references to "market", such as occurs in clause 17.1.2 "market rate" and Clause 33.1, 33.2, and 33.3 "market salary movement" referred to the SP annual salary survey General market or Open – all employers rate as had been applied by Mr Wylie in the past.*

[27] The respondent submits that the handwritten notes exhibited to Ms Cranness' affidavit suggest that clause 33 was drafted during bargaining with reference to Strategic Pay included. The respondent submits that the totality of evidence suggests that the fact that no reference was made to Strategic Pay in clause 33 was not because it reflected any discussion or agreement during bargaining, but because Ms Cranness drafted the clause so as to be consistent with the remuneration clause, clause 17. The respondent also submits that, even if such discussion did take place, it only concerned

the type of market data provider that might be used and not which market rate (i.e. general/open or local government for example) would be applied.

[28] The respondent also submits that the term *the annual market salary movement* must mean the general or open market rate because, if it was to mean a specific rate, such as the local government rate or perhaps some combination of the two, this would have been clearly articulated. The respondent submits that this is supported by the use of the word *the* before *annual market salary movement* which indicates that the parties intended an agreed rate to apply rather than leaving it to the Council's discretion to select a rate or a combination of rates.

[29] The respondent submits that an examination of the background and context to the 2011-2013 collective agreement makes it clear that the parties intended the words *annual market salary movement* to mean the *general/open salary market movement* as determined by Strategic Pay Limited, and that a reasonable person placed in the position of the parties at the time would share this view. The background and context relied on by the respondent is the historical position from 2007, when the approach of paying open market rates was established and from when it was applied up until and including the first term of the 2011-2013 agreement.

[30] The respondent argues that no mention was made of any decision to change from the open market rate approach during the negotiations and that, if the parties had intended to depart from such a well established and well articulated approach, they would have expressly said so.

[31] The respondent argues that clause 17, which refers to *annual market salary movement* (the same wording as used in clause 33), always involved the application of the general or open market rates as determined by Strategic Pay Limited to the salary band contained within that provision. Those words had developed a particular meaning for the parties, the respondent argues; namely the general/open market salary movement as determined by Strategic Pay Limited. The respondent argues that, therefore, a consensus as to the meaning of the words *annual market salary movement* operating between the parties at the time the clause was negotiated.

[32] The respondent argues that it was unlikely and contrary to common business sense for the parties to have intended to leave such an important matter uncertain, or to discretion at a later date.

[33] The respondent also argues that the language of clause 33 is unequivocal, saying that the employer *will apply the annual salary movement*, creating a contractual obligation that overrides any policy objectives.

Determination

[34] The parties raise a number of arguments which merit examination.

Previous meanings attributed to the term "annual market salary movement"

[35] The first point to address is the relevance and admissibility of evidence relating to the approach adopted in the years 2007 to 2010 inclusive. This evidence is given in the affidavits of Mr Page and Mr Verstappen, and of Mr Cunliffe, an organiser with the PSA.

[36] It has been recognised by the Courts that evidence in earlier employment contracts or agreements of the interpretation of a provision at issue would be admissible as it would be artificial to draw an *impenetrable veil* across the employment history of the parties as contained in earlier arrangements: *Dwyer v. Air New Zealand Ltd* [1996] 2 ERNZ 146 and *Dwyer v. Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435.

[37] However, it is also clearly necessary to consider the contested clause against the context of the overall agreement in which it is contained and it is therefore necessary to take heed of clause 1.8 of the 2011-2013 collective agreement which states:

> *The terms and conditions in this agreement replace any previous written contracts, agreements or understandings.*

[38] The terms of clause 1.8 are, in my view, widely drafted and unequivocal. They undoubtedly mean that the position agreed by the Council in previous years, that the open or general market was to be used to determine salary movements, cannot dictate the meaning of the term *annual market salary movement* for the purposes of the 2012 salary increase. That agreement between the Council and the PSA, which was in operation in the years 2007 to 2010, was clearly superseded in the 2011-2013 agreement for the purposes of the 2012 salary movement by virtue of clause 1.8.

[39] That is not to say that the Authority cannot pay any attention to any evidence concerning previous practice in the wider sense. However, clause 1.8 means that the

evidence given by the officers of the PSA in their affidavits of the previous agreements in determining the market for the salary movements for previous years does not assist the Authority in determining what is meant by the term *annual market salary movement* for the purposes of the 2012 salary movement.

Evidence of the parties' intentions and understanding

[40] Similarly, in accordance with the principles established in the *Dwyer* cases referred to above, evidence given by Mr Cunliffe as to the intention of the PSA in respect of clause 33 and evidence given by Messrs Verstappen and Page as to their understanding of what was meant by references to *market* during negotiations is not admissible. The *Dwyer* cases made clear that the meaning conveyed by a document is to be determined by reference to what the parties said; it is not assisted by evidence from the parties as to their interpretation of the documents any more than it is by evidence from them as to what they intended the words to mean. To rely on such evidence is to err in law, *Dwyer* held.

Evidence of previous drafts

[41] His Honour Chief Judge Colgan stated in *Chief Executive Officer of the Department of Corrections* that evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. Therefore, I believe that I may not take not account the evidence of Ms Cranness when she sets out in her affidavit words that had been written down by her in recording discussions as to what clause 33 should say, and the fact that the words *Strategic Pay* had been crossed out. The fact that the words recorded in her written note are different from those that ended up in clause 33.1 inform me that that was an earlier draft and that those words are therefore inadmissible.

Evidence of what was discussed and agreed in direct conflict

[42] Notwithstanding the inadmissibility of evidence about the negotiations, the evidence from the parties as to what was discussed and agreed in relation to the meaning of clause 33 is in direct conflict in any event, with no clear way of deciding whose account is correct. The respective documentary evidence presented by Ms Cranness and Mr Page in the form of their written notes does not assist, as Mr Page's

notes do not seem to refer to the market rate, and Ms Cranness' note shows a draft clause 33 which changed in its final form. Furthermore, Ms Cranness' email to Mr Wylie attaching the wording of what was to be the final form of clause 33.1 referred to the words *Strategic Pay* being removed for consistency, not because it had been agreed that open market rates were no longer to be used.

[43] Evidence of emails sent by the PSA also does not particularly assist. An email from Mr Verstappen dated 24 June 2011 to the union's members refers to a response from the Council about a one off 1% payment in lieu of market increase (as market rates had not kept up with the CPI). The response of the council as reported by Mr Verstappen in his email refers to the phrase *we have a market rates system based on all markets, not just Local Govt and this has been maintained in the face of Councillor pressure*. However, this discussion may well have been about the fixing of the 2011 pay rates, and no mention is made of the following years' pay rates and the basis of how they would be fixed.

[44] Mr Verstappen's email to members dated 7 July 2011 which replicated the terms of clause 33 does not make mention of which market is meant by the words, possibly because he believed that it would be the open market rate. However, his belief does not provide proof of what was agreed between the parties.

[45] All in all, this conflicting evidence as to what was discussed and agreed does not assist me to interpret clause 33.

The words used, and the surrounding circumstances

[46] Taking all this into account, I must go to the starting point, as referred to by His Honour Chief Judge Colgan in *Chief Executive Officer of the Department of Corrections*; namely, the words used, and then the surrounding circumstances, to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

[47] Clause 33.1 makes reference to *<u>the</u> annual market salary movement*, (emphasis added). The use of the word *market* in the clause is either used as an adjective, qualifying the words *salary movement*, or is part of a compound phrase *market salary movement.* Either way, the word *market* cannot be divorced from the words *salary movement*.

[48] The use of the definite article implies either that the identity of the market in the phrase *annual market salary movement* has already been established previously in the agreement, or that the identity is already well known between the parties and does not need definition. A simple example to illustrate the first possibility is in the two sentences: *We've just bought a cat and a dog. The dog is brown.* Which dog is meant in the second sentence, out of all possible dogs, is established in the first sentence; namely *the one we've just bought*. The second possibility is illustrated by the question: *Have you fed the dog?* when it is asked by, say, a wife to a husband, where they both know already which dog is meant – namely, the dog they own – without having to first expressly establish which one out of all possible dogs is being referred to.

[49] The respondent adopts this latter argument, submitting that the use of the word *the* in the phrase *the annual market salary movement* indicates that the parties intended an already agreed rate to apply rather than leaving it to the Council's discretion to select a rate or a combination of rates. In other words, they are saying that it is well known between the parties which market is being referred to.

[50] However, it could equally be the case that the term refers back to the phrase *annual market salary movement* which has been used previously in the agreement. The word *market* is first used in clause 4.4 as one of the guiding principles (*Remuneration will take into consideration what the market is paying*). This also uses the definite article without any further explanation and so does not assist to interpret clause 33.1.

[51] The next use of the term market is in the preamble to clause 7 (*Council policy is to establish fair and affordable salaries for employees that enables the Council to recruit and retain staff based on the objective of meeting the median of market rates…*). This phrase *market rates* does not use a definite article, and is in the plural.

[52] The phrase *market rates* is in itself ambiguous and could refer either to rates established by different markets or to the different rates applicable to each salary band from a single market. I believe that the second interpretation is the most likely. First, there must be at least three markets to be assessed in order to be able to select a median rate from them and if the council is selecting between the open market and the local government market, there are only two markets, and so it is not possible to select a median. This suggests that it is the rates from which one must select a median.

[53] Secondly, the practice of the Council up until 2011 was to obtain data from Strategic Pay Limited in respect of the employees from the participating organisations whose roles equated to each salary band within the Council. So, for example, to determine the market movement for salary band F, the market rate for that salary band was calculated by working out the median of all the salary data submitted from every participating organisation for employees in grades equivalent to salary band F. This practice would also support an interpretation of the meaning of *market rates* which did not necessarily refer to different markets.

[54] However, the phrase is literally ambiguous and could, on its face, equally refer to a median being obtained in respect of a number of markets, if the local government markets were regarded as more than a single market. Ultimately, this ambiguity of the phrase *market* rates means that it does not assist in the interpretation of the phrase *the annual market salary movement.*

[55] The other reference to *market* occurs in the second half of the preamble to clause 17 which refers to the employer undertaking *annual market salary movement checks*. The Council relies upon the fact that the word *checks* is in the plural to support an interpretation that checks can be obtained from more than one market. Actually, though, this phrase is also ambiguous and the plurality of the phrase can refer to one or more concepts:

a. Several checks being done annually; and/or

b. Several markets being scrutinised annually; and/or

c. Several movements being analysed annually; and/or

d. Several salaries being scrutinised annually.

[56] The possible interplay between these words can result in several different meanings, some of which are unlikely. For example, I do not believe that the phrase refers to several checks being done annually as carrying out market salary movement checks is no small task and there would be no reason to carry out such checks more than once a year given that there was no obligation on the Council to increase the salary scales of its employees more than once a year. However, the phrase could mean simply (c) above and/or (d) above. It could also mean (b) above, but it is impossible to tell from the words alone.

[57] Turning back to the phrase *the annual market salary movement* in clause 33.1, an examination of previous references in the agreement does not assist in fixing the meaning, as they are either ambiguous or just repeat the term *the market*. Therefore, the argument submitted by the PSA, that the use of the word *the* in the phrase *the annual market salary movement* must refer to a meaning already well known to both parties would seem to be favoured. That is, a meaning that would refer to the open market, as that is one that has been used hitherto.

[58] However, a close examination of the words used in an interpretive vacuum can lead one into overly technical analysis and result in strained and artificial answers. This is especially a risk when complex portmanteau phrases are used (such as *annual market salary movement checks*) which, when unpicked, can have several meanings.

[59] Therefore, bearing in mind the words of Colgan CJ that *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense*, it is necessary to examine the wider context in which the collective agreement is operative.

What clause 33.1 does not say

[60] Both parties relied upon submissions based upon what clause 33.1 does not say. The Council states that it does not say that the Strategic Pay Limited rate will be applied. The PSA says that clause 33.1 does not say that rates calculated from the median of Strategic Pay general market and local government market rates would be used. With respect, neither argument particularly assists the Authority as there is potentially an infinite number of additional words that could have been stated in the clause, but which have not. The absence of any particular words, therefore, does not help to steer me in one direction or the other.

[61] It is therefore necessary to now turn to what His Honour Chief Judge Colgan referred to as the *factual matrix* or *surrounding circumstances* of the agreement.

The factual matrix and surrounding circumstances

[62] Firstly, one should consider the fact that the 100% market rate stated in clause 17.1.2 of each salary band was based upon an open or general market rate. However,

I do not accept that that fact alone imposes upon the Council an obligation to use the general or open market rate when calculating salary movements for 2012. Clause 33.1 deals specifically and only with the salary movement to be applied in 2012 and it is irrelevant what salary movement applied in 2011 and how that movement was calculated.

[63] It is necessary to take into account the *business* of the employer. In this case, the employer is in the business of local government and that is a context which is very important when considering the meaning of the term *annual market salary movement*. If the business of the applicant were, say, dairy farming, then one would expect an owner of a dairy farm operating in Canterbury seeking to employ a farm manager to take into account what other dairy farmers in Canterbury of a similar size were paying their farm managers. That would be the natural market of that particular dairy farmer.

[64] Therefore, turning to the Council, one would expect it to wish to take into account what other local government organisations were paying. That would be the Council's natural *market*. Indeed, I take into account the evidence of Ms Cranness in her affidavit when she states that the Council's market is *primarily a combination of its geographic location, the Nelson and Tasman regions, and its industry sector, local government*. It is to be expected that many of the Council's employees, if wishing to move to a new employer, would consider moving to another local government organisation. Whilst the rest of the world of work is obviously open to them as well, an employee of the Council subject to its collective agreement would be reasonably likely to move to a similar position in another Council if one were available at a higher pay (although, it is accepted, that that might involve relocating).

[65] Under those circumstances, I believe that it does make sense from a *commercial* point of view to consider what other local government organisations are paying when the Council seeks to set its salaries. This is reflected in the third guiding principle of clause 4.4 of the collective agreement, which states *remuneration and employment benefits are set at a level that attracts and retains both skilled staff and work*.

[66] I also take into account the evidence of Ms Cranness that the Council has a policy of establishing:

> *... fair and affordable salaries for employees that enables the Council to recruit and retain staff based on the objective of meeting*

> *the median of market rates while providing the employees to be rewarded for increasing performance and exceeding job requirements.*

[67] Ms Cranness deposed that, if the Council had applied the general market movement, it would have had insufficient funds to comply with what she calls the requirement to provide for employees to be rewarded for increasing performance and exceeding job requirements.

[68] Taking into account that, in interpreting the collective agreement, the Authority must do so by reference to its factual matrix or surrounding circumstances, I believe that the fact that the Council operates within a real market of other government organisations is a strong argument for concluding that the phrase in clause 33.1 refers to that market. The Authority also cannot ignore the preamble to clause 17 which, although stated as policy, does set out its underlying approach to remuneration.

Conclusion

[69] After an examination of the words used in clause 33.1, I have leant towards an interpretation of the phrase *the annual market salary movement* to refer to a market that has been used before by the parties; namely the open market. However, that interpretation was really reached on a *faute de mieux* basis, as the use of corresponding terms elsewhere in the agreement did not assist, and that interpretation depends solely on the use of the definite article. I must be cautious of reaching an interpretation that is so narrowly focussed, especially in light of the principles expounded by Colgan CJ, set out above.

[70] Therefore, I have to also take into account the wider context in which the Council operates, and that leads me to the fact that it is a local government organisation. It is a compelling argument that staff working for the Council will tend to look to other local government organisations to see what they could get paid. Similarly, the council will attract staff from other local government organisations. To be bound to widen the market from which it obtains its pay data misses the fact that its natural market is other local governments.

[71] Balancing the narrow interpretation of clause 33.1 as meaning the open market against the wider interpretation that it means the local government market, I must

favour the wider interpretation as it is the one favoured by the principles of contractual interpretation set out above.

[72] Therefore, it is my conclusion that, taking all of the evidence into account, clause 33.1 refers to a market that is equivalent to a market comprising of local government organisations and not an open or general market. Therefore, the Council offering an increase effective from 1 July 2012 which was the average of the general market and the local government market was in compliance with the Council's obligations under clause 33.1.

Costs

[73] The parties are to seek to agree how costs are to be dealt with between them. In the absence of such an agreement within 28 days of the date of this determination, any party seeking contribution towards its legal costs is to serve and lodge a memorandum setting out its case and any memorandum in opposition is to be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority