Employment Court of New Zealand

White v Reserve Bank of New Zealand [2012] NZEmpC 20 (17 February 2012)

Last Updated: 24 February 2012

IN THE EMPLOYMENT COURT WELLINGTON

[2012] NZEmpC 20

WRC 17/10

IN THE MATTER OF proceedings removed in full from the

Employment Relations Authority

BETWEEN BRUCE WHITE, IAN HARRISON, PETER KATZ, PETER LEDINGHAM AND DAVID ARCHER

Plaintiffs

AND RESERVE BANK OF NEW ZEALAND Defendant

Hearing: 23, 24, 25 and 26 August 2011 (Heard at Wellington)

Appearances: Geoff O'Sullivan and Nikkii Flint, counsel for the plaintiffs

Peter Chemis and Andrea Pazin, counsel for the defendant

Judgment: 17 February 2012

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Introduction

[1] In a determination[1] dated 1 June 2010, the Employment Relations Authority ordered the removal of this proceeding to the Court for hearing at first instance without any further investigation by the Authority. The application was made pursuant to s 178 of the Employment Relations Act 2000. In terms of the criteria for removal set out in s 178, the Authority concluded that the case involved an important question of law and that it was appropriate in all circumstances that the Court should

determine the matter.

[2] The Authority specifically rejected an additional claim by the plaintiffs that the case was of such a nature and of such urgency that it was in the public interest that it should be removed immediately to the Court. In this regard, the Authority correctly noted that the issues between the parties had existed for approximately

20 years, that the statement of problem had not been filed until December 2008 and it was not until April 2010 that the plaintiffs had filed their application for removal. The Authority did, however, accept that the issues involved were complex and involved potential jurisdictional difficulties.

[3] The plaintiffs, with the exception of Mr Ian Harrison, are all former employees of the defendant, who for convenience I shall refer to simply as “the Bank” or “the defendant”. Mr Harrison continues to be a Bank employee. All the plaintiffs were members of the Bank’s Staff Superannuation and Provident Fund (the Fund).

[4] The plaintiffs allege that in 1988 the Bank introduced a new remuneration structure under which their salary for

superannuation and retirement gratuity purposes ("superable salary") would be fixed at a specified percentage of total remuneration, including certain non-salary benefits. They claim that at the same time, the Bank undertook "regularly to review and adjust the percentage to maintain appropriate market relativity". The plaintiffs plead that the undertaking to regularly review and adjust the percentage became "an integral element of the defendant's superannuation scheme, membership of which is established as a term of employment in the respective individual employment agreements" which they subsequently entered into.

[5] It is alleged by the plaintiffs that the Bank failed to fulfil its obligation to periodically review and adjust the superable salary percentage, despite its contractual undertaking to do so. An order is sought requiring the Bank to "retrospectively review and recalculate annual superable salary percentages until the cessation of the respective employment of each of the plaintiffs."

[6] Counsel for the defendant, Mr Chemis, described the Bank's case as "a very simple one". Counsel submitted that the superable salary percentage issue was agreed to between the parties and is recorded in their respective employment

contracts and individual employment agreements entered into in 1992 and beyond which state "that salary for superannuation purposes (ultimately referred to as *"superable salary"*) would be a certain percentage (or dollar figure) *"unless otherwise agreed in writing"*. Mr Chemis submitted that any obligations arising out of the alleged 1988 undertaking did not survive or override this specific contractual provision in the plaintiffs' employment agreements.

[7] Although the Limitation Act 1950 was pleaded, Mr Chemis accepted that if the plaintiffs were able to establish that the undertaking in question had survived as an additional term in their employment agreements then there was no Limitation Act issue except in relation to the assessment of any damages.

The Fund

[8] The evidence indicated that the Fund was created in the 1930s, at the same time as the Bank was established. It is operated by a group of trustees in accordance with the Fund rules. Currently, it has a defined benefit and a defined contribution division but in the early 1980s the Fund constituted only the defined benefit division. Membership of the Fund was compulsory for most of the staff. The evidence was that during the relevant time period, staff numbers at the Bank, which had been in the order of 400, reduced to a little over 200. The rules provided that staff were to contribute at the rate of 6 per cent of their salary. Prior to 1994, the Bank contributed for each member an amount equivalent to 12 per cent of their salary. In

1994 the rules were changed so that the Bank became liable only to make contributions to the Fund as the actuary considered necessary to provide the benefits payable to members.

[9] One of the witnesses the Court heard from was Mr Peter Cornish a director of Hay Group Limited. Hay Group was described as a global human resources consulting firm with over 2,000 professional staff in 47 countries. Mr Cornish has an impressive background, including a detailed and practical knowledge of remuneration issues faced by New Zealand employers, in particular by banks, since the mid-1980s. Mr Cornish described the mid 1980s as "a time when far reaching changes to human resources and remuneration practices occurred". He told the Court that typically at that time remuneration for organisations such as the Bank

would have taken the form of cash salary and a range of non-cash benefits but in the late 1980s the government introduced Employer Superannuation Contribution Withholding Tax which, the witness explained, "significantly increased the cost to employers of providing defined benefit super schemes. This caused employers to look at the whole basis of superannuation provision."

[10] Mr Cornish explained how the introduction of the withholding tax and other developments, such as a more mobile workforce, "caused defined benefit superannuation schemes (usually with long vesting scales and requiring many years of service with one employer) to become unworkable and banks began to replace them in the late 1980s and early 1990s with defined contribution schemes." He described how defined contribution schemes were, "based on the premise that the employee chooses his or her level of contribution and the value of their interest in the Fund is dependent upon those contributions, the employer's contribution, and the performance of the Fund, rather than a defined pension. The benefit to employees was a greater transportability of contributions."

Superable salary

[11] Evidence was also given about the introduction of the "superable salary"

concept. When banks first introduced remuneration packages (around the late

1980s) the general practice was to deem a percentage of the package as salary for superannuation purposes and the term "superable salary" was sometimes used to describe the resulting figure. Up until that point, salary for superannuation purposes had been based on ordinary salary. Mr Cornish explained that, "Superable salary generally remained constant even

though an individual's cash salary, as a proportion of a total remuneration package, could go up and down." The witness continued:

4.2 The purpose of superable salary was to protect the actuarial soundness of defined benefit schemes. This was because pensions were typically based on final salary over the three to five-year period before the employee retired. Without this protection, employees had the opportunity to manipulate final salary by reducing their take-up of non-cash benefits in those final years. Deeming a percentage of their remuneration package as superable salary, irrespective of the actual cash/non-cash benefit mix, prevented abuse and protected the integrity of the superannuation fund.

[12] Mr Cornish said that at the time total remuneration packages were first introduced around the late 1980s it was possible for his company to make comparisons for superable salary purposes because banks and other employers were still offering a range of non-cash benefits and still providing defined benefit superannuation schemes. But he stressed that each bank made its own determination of the percentage of total remuneration that constituted "superable salary". The witness then went on to state that the situation changed during the early 1990s as defined benefit schemes were replaced with defined contribution schemes and most employers were no longer concerned with the concept of superable salary. He said that: "From the mid-1990s onwards Hay has advised clients not to rely on a simple comparison between market based salary and total package data for the purpose of assessing a *„market"* superable salary."

The 1988 Executive Remuneration paper

[13] The "undertaking" by the Bank which the plaintiffs' case is based on is said

to have been contained in a paper written by Mr Richard Lang. Mr Lang retired in

1991 after 41 years' of service with the Bank. Over the years, he had held a number of senior positions with the Bank including the post of Deputy Governor. Not surprisingly perhaps, as with many of the former and present Bank employees who gave evidence in the case, I found Mr Lang to be a most impressive witness with, seemingly, a remarkable recollection of relevant historical events. The paper he produced is headed "EXECUTIVE REMUNERATION" and it appears to have first been published on 28 October 1988. It was referred to by counsel as the "ERP" and for convenience I will continue to use the same description.

[14] The ERP explained that its objective was to introduce total remuneration packages for the Bank's senior staff. The intention was to provide remuneration packages which were at least as attractive as packages being paid to executives by similar organisations at the time. In this way, the Bank anticipated being able to "recruit, develop and retain good quality highly motivated staff in order to carry out its functions in the most efficient and cost-effective manner." The ERP explained that an employee's base salary was to be 70 per cent of the total remuneration package and it identified certain benefits, such as concessional staff loans, car parks and expense allowances that were substitutable for an equivalent cash value.

[15] Mr Lang said in evidence that a complicating issue in introducing the total remuneration packages concept was how to determine salary for superannuation purposes (or superable salary). Until that point, salary for superannuation purposes had been based on ordinary salary. Mr Lang noted that "superable salary", once determined, was going to be used by the Bank to calculate staff and Bank contributions to the superannuation scheme, retirement gratuity payments, redundancy payments and pension entitlements. He explained that if only the cash salary portion of the remuneration package was going to be used to determine "superable salary" then that would provide an opportunity for staff to "play against the Fund by varying the composition of the packages as they approached retirement."

[16] Mr Lang continued:

4.16 After considerable investigation and discussion, which included the receipt of advice from Hay Group and others, the Bank concluded that the fairest option was to base superannuation contributions and subsequent pensions on a notional "salary for superannuation purposes" or "superable salary" (the terms were used interchangeably).

Ultimately, the Bank decided to set its superable salary at the level of 70 per cent.

[17] Certain passages in the ERP received particular attention in the course of the hearing and, for completeness, I now set them out in full:

a) The introductory paragraphs to the ERP state:

This paper outlines proposals for Bank executive remuneration based on a total package approach. They have been developed by management in consultation with representatives of the Executive Association. As yet the proposals have not been referred to the Bank's Board.

It should be stated from the outset that the proposals are intended to provide a framework rather than a rigid structure for remuneration determination. If implemented, no doubt some aspects will be found to be impractical or inequitable. Hence it is envisaged that the overall impact of the proposals and the impact on individual executives will be kept under review.

b) On page 2, under the heading “Remuneration Packages”, there is a paragraph

which reads:

For the purposes of retirement gratuities, contributions to the staff Superannuation Fund and calculation of pensions, salary will be deemed to be 70% of total package entitlement irrespective of whether some part of it is substituted for additional benefits (see later section, this may be varied as part of the implementation/transitional arrangements and will need to be reviewed from time to time in line with market indicators).

c) The “later section” referred to in brackets in b) above appears on page 7 of the ERP, under the heading “Superannuation”. This is the passage upon which the plaintiffs’ claim is principally based:

The proposal is to set base salary for superannuation and retirement gratuity purposes at 70% of total package (excluding bonuses) for the time being. This is intended to broadly maintain the status quo. It will need to be regularly reviewed to maintain appropriate market relativity.

[18] Mr Lang explained the steps taken to ensure the protection of accrued superannuation entitlements up to the time of the introduction of the ERP and he said the setting of the superable salary percentage at 70 per cent was “as near as possible to the status quo for most members”. The changes outlined in the ERP came into effect in early 1989. They applied only to senior Bank staff.

[19] Mr Lang told the Court that after the introduction of the ERP, the Bank’s practice was to consider data about market superable salary at the same time as it carried out annual remuneration reviews. He said that by the end of 1990, survey information indicated that the market average superable salary levels were somewhere between 72/73 per cent and 77/78 per cent. In 1991, therefore, the Bank decided to increase the superable salary percentage from 70 per cent to 75 per cent.

Employment contracts/agreements

[20] The evidence was that in the lead-up to and following the passage of the Employment Contracts Act 1991, the Bank sought to negotiate employment contracts with its entire senior staff. The negotiations were protracted, extending for more than a year between April 1991 and mid-1992. The draft employment contract first proposed by the Bank changed significantly over that time. Relevantly, the initial draft contracts proposed that the superable salary would be deemed to be

70 per cent of the total remuneration package “unless otherwise mutually agreed”.

That percentage figure was subsequently increased before the contracts were signed to 75 per cent.

[21] Four of the five plaintiffs signed their employment contracts between April and July 1992. Mr Peter Ledingham did not sign his first contract until October

1995. The contracts contained certain standard provisions which Mr Chemis

referred to as “critical clauses”. The first provided:

For the purposes of this contract unless otherwise agreed in writing, superable salary shall be deemed to be 75 per cent of total remuneration package.

The second was a complete agreement clause which provided:

The terms and conditions set out in this contract shall represent all of the terms and conditions of employment (other than matters which are implied by law) and shall supersede all terms and conditions of employment which may have previously existed between the Bank and the employee. The terms and conditions of this contract shall not be amended, waived, or in any way altered unless both parties agree in writing.

[22] There were some minor variations in Mr David Archer’s contract because, as he told the Court, he thought the standard form contract proposed by the Bank was “unnecessarily longwinded”. He subsequently signed further contracts, however, which regularised the situation. There was also a difference in Mr Harrison’s initial contract in that, apart from the standard provisions referred to, it provided:

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The employee will be entitled to continued membership of the Bank’s superannuation schemes in line with the general policies of those schemes.

[23] Over the years the plaintiffs, with the exception of Mr Ledingham, signed three other employment contracts and one variation. Mr Ledingham signed only the one contract in 1995 in which he agreed to the standard provisions and in 2000 he and the Bank agreed that his 1995 contract would be rolled over.

[24] Mr Chemis stressed in his submissions on behalf of the Bank that the focus must be on the contracts that were in place prior to the cessation of the plaintiffs' employment or, in the case of Mr Harrison, his current employment agreement.

With the exception of Mr Peter Katz, the most recent contracts and employment agreements contained the same standard provisions relating to superable salary. Mr Katz's position was rather exceptional. He took on different roles and negotiated a formula for determining superable salary which contained a reference to a specific dollar value rather than a percentage but, prior to this litigation, he does not appear to have ever sought reviews or adjustments in terms of the plaintiffs' existing claims.

[25] At the end of 1992, the Bank again reviewed the available market figures for superable salary and found that the average ratios ran from about 73 per cent to

83 per cent. The Bank decided, however, not to make any adjustment to the

75 per cent figure at the time.

[26] Mr Lang told the Court how in late 1993, after again considering the market data, he proposed that the Bank increase the superable salary percentage for senior employees from 75 per cent to 80 per cent and for more junior employees from

75 per cent to 85 per cent. He then explained what happened:

9.3 In 1994, the Bank proposed to staff that it increase the superable salary percentage using the figures set out in my paper.

9.4 At the same time, the Bank proposed restructuring the remuneration packages to have the Bank's contributions on behalf of defined benefit members reflected in the value of total remuneration packages as a non-cash benefit. The Bank's contribution also became substitutable for cash if the employee withdrew from the defined benefit division of the Fund or froze their contributions to the Fund.

9.5 As a result, total remuneration was adjusted upwards to account for the recognition of the Bank's nominal contribution as a benefit. The cash salary of members was not affected. The proposed increase to superable salary levels of 80% and 85% were adjusted to 73% and

77% to reflect the inclusion of the Bank's contributions.

[27] This case is concerned with the position only in relation to senior employees. The proposed adjustment from 80 per cent to 73 per cent related to the Bank's senior employees. The changes recommended by Mr Lang were formally documented as variations to the relevant employment contracts and, in due course, signed by each of the plaintiffs. (Mr Ledingham signed his first contract in 1995). The reference to superable salary set out in the variation reads as follows:

For the purposes of this contract, unless otherwise agreed in writing, superable salary shall be deemed to be $ [x] (actual salary stated) *per annum or 73% of total remuneration, whichever is the higher.*

Submissions

[28] Against that background, Mr O'Sullivan, made extensive submissions on behalf of the plaintiffs and invited the Court to conclude that the question posed by the case was "quite simply" whether the defendant was "required to review and adjust the plaintiffs' superable salary?" Mr O'Sullivan further submitted:

This is not simply a contractual interpretation case, requiring the Court to focus simply on a single written document. It is about the parties' shared intention and what they both agreed.

Counsel for the plaintiff invited the Court not to simply look at the written contracts

but "at other documentation and the behaviour of the parties".

[29] Mr O'Sullivan stressed that the evidence given by the plaintiffs about the "undertakings" contained in the 1988 ERP was unchallenged and he submitted that that evidence established "a requirement to review and maintain superable salary levels and thus also retirement gratuities." In counsel's words:

23. Accordingly the only issue before the Court is whether or not the contractual requirement to review and maintain superable salary levels (and thus also retirement gratuities) was ever removed.

...

28. It is submitted the individual employment contracts/agreements offered to the plaintiffs in respect of superannuation reflected the status quo. No indication was given that these contracts would have any impact on existing arrangements with respect to superannuation.

[30] Mr O'Sullivan submitted that the second basis for the plaintiffs' claim was

that the defendant:

a) established a clear pattern of actually conducting reviews for a number of years subsequently (to 1988)

b) increased the percentage on two occasions; and

c) never discussed any change with members or taken (sic) any action to amend or withdraw the undertaking.

[31] Mr O'Sullivan also made submissions in relation to certain amendments to the rules relating to the Fund in August 1991. He stated that the changes were "quite different from that agreed by the Trustees and approved by the Board." Counsel invited the Court to conclude that it was implicit in the rule changes that the 1988

ERP "undertakings were to remain in place and not be removed by individual

employment contracts".

[32] Although estoppel was not pleaded, Mr O'Sullivan invited the Court to consider estoppel and conclude that, "the conduct of the defendant at the relevant times estopped it from progressing its current defence".

[33] In response to the submissions made on behalf of the plaintiffs, Mr Chemis repeated the challenge he made frequently during the course of the hearing that much of the evidence produced by the plaintiffs was irrelevant and inadmissible in that it was evidence of the plaintiffs' subjective intentions about the meaning of their employment contracts and opinion and speculation about why certain things were done or how things should be seen to have happened.

[34] Mr Chemis submitted that the words used by the parties in the employment contracts/agreements were clear and straightforward and he highlighted the fact that no ambiguity, mistake or claim for rectification had been claimed or pleaded. Significantly in relation to the relevant wording in the contracts/agreements, he also submitted:

7.2 these words do not provide room for the terms contended for by the plaintiffs (i.e. obligations to review and adjust). The plaintiffs' alleged terms contradict the express contractual terms the parties agreed upon repeatedly over many years.

7.3 any obligations arising out of the ERP did not survive the contractual process or at least do not override the parties' contracts or bind the parties in a contractual sense. (Note that many aspects of the ERP were included specifically in the employment contracts in 1992 and beyond. This included various obligations to review.)

[35] In relation to the 1991 rule changes to the Fund, Mr Chemis submitted:

15. The plaintiffs say that the rule changes:

"provide a backdrop to the environment which existed at the time, and help explain the plaintiffs" view regarding their contractual arrangements with the Bank".

16. It is not open to the plaintiffs to rely on the alleged unlawfulness or invalidity of rule changes as the foundation for a cause of action. No such matters are pleaded. Second, arguments of this nature would need to be made against the Trustees. Third, arguments of this nature are out of time.

17. And, fourth, the arguments do not work. Unlawful or invalid rule changes (denied by the Bank) do not and cannot make the ERP (or parts of it) contractual terms. Rather, the plaintiffs have to establish, on ordinary principles, that they and the Bank agreed that the ERP (or parts of it) became terms of their employment.

[36] In response to the suggestion by Mr O'Sullivan that estoppel applied; apart from noting that estoppel had not been pleaded, Mr Chemis submitted that the proposition contended for could only mean that the plaintiffs were suggesting that the Bank could not rely on the parties' employment contracts and, in counsel's words: "On any analysis, this is not a sustainable proposition".

Discussion

[37] Although it is not pleaded in such terms, the case for the plaintiffs appears to proceed on the basis that the contracts/employment agreements do not express the complete agreement between the parties. The submissions made on behalf of the plaintiffs focused on countless matters other than the relevant wording of the contractual documents. That approach ignores the well-established principle

conveniently summarised by Richardson J in *Attorney-General v Sears*[2] in these

terms:

While a contract may need to be seen in its factual and legal setting, thus having regard to its genesis and its object, the true

character of a transaction is determined according to the terms of the legal arrangements actually entered and carried out, unless they are a sham or there are controlling statutory provisions requiring a different approach in the circumstances of the particular case. That is elementary law restated on numerous occasions in this Court. The focus must be on the contract into which these parties entered. What was their agreement?

[38] Although the situation in other jurisdictions needs to be approached with a degree of caution, the principle referred to in *Sears* was recently reaffirmed by the

United Kingdom Supreme Court in *Autoclenz Ltd v Belcher*,[3] where Lord Clarke SCJ, delivering the judgment of the Supreme Court, affirmed: "The essential question in each case is what were the terms of the agreement."[4] Lord Clarke expressed agreement with the judgment of Lord Justice Aikens in the Court of Appeal stating:

[32] Aikens LJ stressed at paras [90]-[92] the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi*'s[5] case and in paras [47]-[53] in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in [*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 4 All ER 677 at [64]- [65], [2009] UKHL 38; [2009] AC 1101]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.

[39] The relevant provisions in the contracts/agreements in the present case were not a sham nor were they inaccurate or in conflict with any controlling statutory provisions. The contracts/agreements were not silent on the issue of superable salary percentages. They contained the two standard clauses referred to in [21] above, subsequently modified as recorded in [27].

[40] In several relatively recent judgments, including *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*,[6] this Court has noted that the current leading authority on contract interpretation is the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[7] Although that decision related to the construction of a commercial contract, the Court of Appeal in

Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc[8]

made it clear that *Vector* had equal application to the interpretation of employment agreements. The Court is required to apply a principled approach to the interpretation of employment agreements and any dispute as to meanings must be determined objectively.

[41] In the *Firefighters Union* case, after citing extracts from *Vector*, I attempted to summarise, in the following terms, the relevant principles relating to contractual interpretation:

[17] In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. (McGrath J at [80]) It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. (Tipping J at [26]) If the language used is, on its face, ambiguous or flouts business common sense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. (Wilson J at [127]) Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. (Tipping J at [31]) Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time. (Tipping J at [19])

[42] As noted above, there is no allegation by the plaintiffs in the present case that the relevant words in the contracts/agreements relating to superable salary percentages were ambiguous or flouted business common sense. Although it is important to keep in mind that employment agreements must be interpreted in an employment law framework, no sound basis was established in this case for requiring the Court to go beyond the plain and unambiguous meaning used in ascertaining what was agreed between the parties. I accept Mr Chemis' submission that much of the plaintiffs' evidence related to their subjective intentions and

understandings and to that extent I did not find it particularly relevant or helpful. As

Justice Tipping stated in *Gibbons Holdings Ltd v Wholesale Distributors Ltd*:[9]

The parties are not allowed, on an interpretation issue, to tell the court what they intended the words to mean or what they thought the words meant.

[43] An estoppel argument was tentatively raised by Mr O'Sullivan in his closing submissions but I did not find it persuasive. Essentially, it was based on the review and adjustment of the superable salary percentage made in 1994. However, the 1994 change in the superable salary percentage from 75 to 73 per cent did not give rise to an estoppel situation but was entirely consistent with the contractual provisions. In other words, the parties agreed to the change in the percentage figure and the change was formally reduced to writing as a variation of the contract. There was no mutual assumption outside the contractual language that the plaintiffs might have been able

to base an estoppel argument on.[10] Rather, the agreed variation was precisely what

the relevant wording in the employment contracts provided for.

[44] At one point in his submissions in reply, Mr O'Sullivan said, "The defendant has not presented any compelling evidence to the Court that there would be difficulty in reviewing superable salary ratios against market comparators." That statement, of course, begs the question. The real issue is not whether review was a realistic option but whether or not the Bank was under a contractual obligation to regularly review and adjust the superable salary percentage. My conclusion is that the Bank was not under any such obligation.

[45] There were other allegations made by the plaintiffs in relation to changes made to the rules of the Fund but I accept the submissions made in response by Mr Chemis as detailed in [35] above. There was also an allegation of breach of good faith on the part of the Bank in allegedly failing to engage with the plaintiffs in more recent years over the issues arising in this litigation. Putting to one side the issue of whether any such claim is statute barred, for the record I confirm that I found no

evidence of breach of good faith on the part of the Bank.

[46] The plaintiffs fail in their claim. The defendant is entitled to costs. If this issue cannot be agreed between the parties then Mr Chemis is to file submissions within 21 days and Mr O'Sullivan will have a like time in which to respond.

A D Ford

Judge

Judgment signed at 2.00 pm on 17 February 2012

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[1] WA 107/10

[2] [1995] NZCA 777; [1995] 1 ERNZ 627 at 629.
[3] [2011] UKSC 41, [2011] 4 All ER 745.
[4] At [20].
[5] *Szilagyi v Protectacoat Firthglow Ltd* [2009] EWCA Civ 98, [2009] IRLR 365, [2009] ICR 835.
[6] [2011] NZEmpC 149.
[7] [2010] NZSC 5, [2010] 2 NZLR 444.

[8] [2010] NZCA 317, [2010] ERNZ 317.
[9] [2007] NZSC 37, [2008] 1 NZLR 277 [56].
[10] *Vector Gas* at [68]-[69].
