

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 27/06  
WRC 7/06**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN ANZ NATIONAL BANK LTD  
Plaintiff

AND JAMES RICHARD CORTRIGHT  
First Defendant

AND FINSEC INCORPORATED  
Second Defendant

Hearing: 25 September 2006  
(Heard at Wellington)

Appearances: H P Kynaston and S M Deegan, Counsel for the Plaintiff  
K I Jefferies, Counsel for the First and Second Defendants

Judgment: 18 December 2006

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**JUDGMENT OF JUDGE C M SHAW**

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[1] The question to be decided in this de novo challenge from a determination of the Employment Relations Authority is whether Mr Cortright is covered by a collective employment agreement and therefore entitled to benefits conferred under it or if he is precluded from coverage because of his salary and/or his position.

[2] Mr Cortright was employed by the National Bank of New Zealand as a senior analyst programmer from 1999. In 2003 the National Bank merged with ANZ. It became ANZ National Bank Ltd (the bank) and since then has been his employer.

[3] In April 2004 Mr Cortright joined FINSEC Incorporated (Finsec), the bank officers' union, and asked his employer if he could go on the "*collective contract*". The bank refused because it took the view that Mr Cortright's position was not covered by the collective agreement and that it had no obligation to offer the agreement to him.

[4] Finsec and Mr Cortright are in dispute with the bank about the interpretation of the coverage clause of the collective agreement. Finsec asked the Employment Relations Authority to enforce it.

### **The Authority's determination**

[5] Counsel advised that the case before the Court was in very similar terms to that presented to the Authority although, unlike the Court, the Authority did not hold an oral hearing and decided the matter on the papers.

[6] The Authority determined two issues. The first was whether salary level determines coverage in the collective agreement. The Authority decided that there is no salary cap or bar in the collective agreement which prevented the bank from paying more than the top rate specified in the salary scales and there was nothing preventing coverage under a collective agreement when the bank agrees with an individual that it will pay more than the top rate.

[7] The second issue was whether Mr Cortright held a management role. The Authority found that he clearly did not because there did not appear to have been any agreement on this.

[8] The Authority concluded that Mr Cortright held a specialist role as described in the collective agreement and was entitled to coverage under the agreement. It held that the bank's method of determining coverage by salary rather than under the coverage clause was incorrect.

[9] The bank disputes these findings.

## Terms of employment

[10] Mr Cortright's 1999 letter of employment contained his terms and conditions of employment. It incorporated a document called "ROLE AND RESPONSIBILITY STATEMENT" which describes his position functions. As a senior analyst programmer his key responsibilities are to develop, enhance, maintain, and support the more complex retail banking mainframe applications. According to the role and responsibility statement, his position has no organisational dimensions including financial, no direct or indirect reports, and no management responsibilities.

[11] He was employed on a total remuneration package and his hours of work were not limited. The letter of appointment said that he agreed to work such reasonable hours as may be required to fulfil his duties under the contract on the basis that consideration for this was included in his salary. His leave entitlements, termination, dispute and grievance procedures were those as set out in the employment terms and conditions for managers and executives (the managers' booklet).

[12] The letter of employment concluded:

10. *COMPLETENESS*

*Subject to clause 9, this contract, its schedules, the Managers booklet and the Bank's personnel guide (as amended from time to time) contain the entire agreement between yourself and the Bank and supersede any previous representations or agreements or understandings between yourself and the Bank (whether written or oral) relating to your employment with the Bank.*

[13] In spite of these indications, Mr Cortright does not consider himself to be a manager and denies being informed that he was a manager. He says that people doing virtually identical work to him have been permitted to be covered by the collective contract and he feels discriminated against.

[14] The bank has three standard forms of employment agreement:

- The collective agreement with Finsec;
- Individual employment agreements based on the collective; and
- The managers' booklet.

[15] Only the collective agreement and the managers' booklet are relevant to these proceedings.

[16] The bank has two parallel pay frameworks, one for employees in non-management roles and the other for employees in management roles.

[17] Under the collective agreement, non-management employees are entitled to overtime. Their remuneration is increased as they move through various stages of competencies assessed against a competency assessment schedule (CAS). Their staged salary levels are set out in the collective agreement and differ according to the position. The position of senior analyst programmer does not have a CAS.

[18] Employees in different business units have the potential to earn bonuses. For example, in the IT unit non-management employees have a profit share scheme which is payable at the manager's discretion depending on performance.

[19] In contrast, managers are employed under the terms and conditions in the managers' booklet which the bank uses for all employees the bank considers to be in management or managerial equivalent positions. Their salary and bonuses are reviewed on the basis of performance. They do not receive overtime as reflected in Mr Cortright's letter of appointment and are not paid according to the salary scales.

### **The collective agreement**

[20] The relevant collective agreement is the ANZ National Bank Ltd collective employment agreement. This case is focused on the coverage clause.

[21] Until 1999 the coverage clause defined the parties to the collective agreement by listing members of bank staff in a schedule. It expressly excluded:

*... Managers, employees of equivalent status and printers, binders, storepersons, custodians, cafeteria and other similar staff who have Individual Employment Contracts) who are listed in the schedule filed as part of this contract at The Bank's Corporate Headquarters, Featherston Street, Wellington.*

[22] A group of employees who had what were termed specialist roles had their pay framework annexed to the collective employment agreement. Specialist roles were designated S1 to S4.

[23] In 1996, in order to meet the increasing need for IT employees, a schedule was added to the collective agreement to apply to “business systems and technology employees” who, because they were paid more than other specialists, were outside the scales of the collective contract.

[24] In 1999 the employee parties to the collective contract were described as:

*Those members of the Bank’s staff who have authorised FinSec to represent them and who the Bank has agreed may be covered by this contract; and other staff not represented by FinSec who are covered by mutual agreement with the Bank;*

[25] Following the introduction of the Employment Relations Act 2000, the coverage clause was changed substantially to the form of the clause which is the subject of the dispute. It reads:

**Coverage**

1. *This Agreement covers the following roles:*
  - (a) *Generalist Banking roles, which include:*
    - (i) *Customer Service Officer, Banking Consultant, Sales Consultant, Direct Service and Sales Representative, Direct Service and Sales Specialists 1 and 2, Lending Services Officer, Account Services Officer, Rural Banking Consultant, Corporate and Business Banking Consultant, Trade Finance Officer, Transactional Banking Consultant, Foreign Currency Accounts Officer, and their Team Leaders; and*
    - (ii) *Any new Generalist Banking roles which are formulated; and*
  - (b) *S1 – S4 Specialist roles as described in clause 30 of this Agreement.*
2. *This Agreement does not cover staff members in management roles.*

[26] The whole of clause 30 of the collective agreement is relevant. It is located in Part IV of the agreement entitled Salaries. The relevant parts of clause 30 are set out. Details about generalist banking roles are not included because it is common ground that Mr Cortright does not have a generalist role.

**Clause 30 Salary system and job roles**

*The salary system includes generalist Banking roles and specialist roles.*

...

- (b) *Specialist Roles*

*Roles may be defined as specialist roles.*

*Specialist job roles are also described in accordance with the core competencies required to perform them. Salary progression in these roles occurs in two phases:*

- *Development, and*
- *Consolidation*

*The CASs agreed between the parties on a collective or an individual basis define the competencies required for each salary increase. They should be read in conjunction with this Agreement and may be varied from time to time by agreement.*

(c) *Salary Scales*

*Salary scales for the core Generalist Banking roles are attached and form part of this Agreement.*

- (d) *Specialist roles covered by this Agreement have a salary scale determined with regard to the consideration of four descriptors relating to four standard salary bands. Jobs may directly align with these bands based on those criteria, or they may fall between the bands where the assessment indicates this is appropriate.*

*These descriptors are based upon*

- *Complexity of the role*
- *Degree of decision-making in the job*
- *Whether or not the role involves management of staff.*

S4. *Accountable for a diverse range of highly complex tasks which require considerable judgement and “in depth” analysis. Has discretion to make significant decisions affecting the operation of their business unit. Would normally have the assistance of support staff. Typically senior positions and senior supervisors.*

S3. *Supervisors and other experienced specialists undertaking duties where there is a requirement for “in depth” analysis. Duties are of a complex nature. Able to make decisions within defined parameters. Typically Senior Project Officers, Business Analysts, Legal.*

S2. *Staff in positions who provide a specialist service requiring analysis and operational judgement. May be a member of a team. May be a skilled administrative staff member where initiative and judgement are required.*

S1. *Staff who provide a specialist service either requiring operational judgement or undertaking administrative support activities.*

[27] Salary scales are attached to the collective agreement. There are a number of scales linked to various positions such as customer services officer, team leader personal banking, and specialists 1 to 4. Each scale sets out the competencies stages for each role. Each role has a number of stages which may include training, development 1, development 2, consolidation, and the top consolidation stage known as “Top Cons”. Each stage of each scale has a salary level beside it. The highest salary is at top cons level.

[28] Mr Vincent, the bank's former head of workplace relations, said that once an employee reaches the top consolidation stage in a particular role that employee's salary will only increase in line with the increment negotiated each year in collective bargaining. He made the point that in addition to these scale salaries employees have the ability to earn bonuses and be paid for overtime.

[29] The dispute between the bank and Finsec is whether he holds a specialist role as defined in clause 30(d). Mr Vincent said there are a wide range of specialist roles across the bank. The types of roles that have traditionally been regarded as specialist include secretary, telephonist, payroll officer, through to data entry, computer operator, administration officer, and user support helpdesk. He says that Mr Cortright's position is more senior than these types of roles and that he is in a management role.

[30] The terms "managerial role" and "managerial equivalent role" used to be used separately for the bank's internal purposes and in the collective agreements until 1999. This differentiation ceased however because the bank treats both types of role as the same and they receive the same benefits. The term "management role" is used in the 2004/05 and current collective agreements.

[31] From the bank's point of view, people in management roles do not have to have any staff reports, the word "manager" in the title, nor any financial discretion. It is a question of seniority. By way of example, Mr Vincent said that certain senior accountant roles, national training and business development manager, corporate counsel, investment analyst, strategic planning manager, and channels domain architect are all considered management roles but none have staff reporting to them.

[32] The bank's practice has been that when a new role is created it is evaluated and compared to other similar roles to determine the appropriate salary band and status for the role. If the salary exceeds the maximum amounts specified in the salary scale in the collective agreement, the individual is offered the managers' booklet.

[33] In relation to Mr Cortright, the bank's position is that his original employment conditions included the managers' booklet and since then he has been categorised for internal purposes as being a managerial equivalent. His performance and salary are reviewed in accordance with procedures for management roles.

[34] Apart from one other employee whose employment was regarded as an anomaly for historic reasons, the bank has not approved any employees who are paid above the scale to be covered by the collective agreement.

[35] The general secretary of Finsec, Andrew Casidy, was the advocate for the union team which negotiated the collective contracts in 1999 and 2000. He believes that Mr Cortright has been covered by the collective agreement or its predecessors since he joined the bank and that it is incorrect for the bank to determine coverage through an assessment of his job description and salary. He points to the descriptions of specialist roles in the collective agreement as evidence that Mr Cortright's position is in such a role; he believes he falls into category S.3.

### *Discussion*

[36] To determine the main question whether Mr Cortright's employment is able to be covered by the collective agreement, three issues arise:

1. Is Mr Cortright's position a specialist role in terms of clause 30(d)?
2. Is Mr Cortright's position a management role?
3. Is Mr Cortright's salary, which is in excess of the salary scales in the collective agreement, inconsistent with the collective agreement and contrary to s61(1)(b) of the Employment Relations Act 2000? This question requires a decision as to whether the collective agreement salary scales set minimum and maximum salaries.

[37] These issues involve in part the construction of the collective agreement. In doing this, I apply the usual principles of contractual interpretation by considering the natural and ordinary meaning of the words used in the agreement in the context



of the document as a whole and then considering the surrounding circumstances to test whether the natural and ordinary meaning is correct or requires modification.

[38] The test is an objective one based on what a reasonable person in the relevant field, knowing all the background, would take the words to mean.

## **Issue 1**

### ***Specialist roles***

[39] Mr Jefferies argued for Mr Cortright that his work is a specialist role as defined in clause 30 and as such is covered by the agreement. This is because the coverage clause says that the agreement covers specialist roles and the clause 30(d) description of specialist roles describes the work done by Mr Cortright.

[40] Mr Kynaston submitted the coverage clause should be interpreted in its context. This includes the description of the specialist positions in clause 30 and clause 30(d) which is the key provision referring to the salary scales for specialist roles. The salary scales are determined by three descriptors – complexity of the job, degree of decision-making, and whether the job involves management of staff.

[41] Mr Kynaston submitted that these descriptors are very broad and if viewed in isolation very few positions in the bank would fall outside them. If the only limitation on cover is that only strictly defined managers are excluded, then this would create a very significant issue for the bank because suddenly many previously uncovered positions would become covered under the collective agreement. In his submission the phrase in clause 30(d) “*Specialist roles covered by this Agreement have a salary scale determined with regard to the consideration of four descriptors relating to four standard salary bands*” shows that there are specialist roles that are not covered.

### ***Discussion***

[42] I begin with the relevant words. The coverage clause says that the agreement covers specialist roles as described in clause 30. Clause 30(d) refers to specialist roles covered by the agreement which indicates that there are some specialist roles which are not covered.

[43] Clause 30(b) defines specialist roles. Definitions within any contractual document cannot inform the meaning of terms other than in its own context. Therefore this definition must be limited to specialist roles covered by the collective agreement. Clause 30(b) says that specialist roles are also described in accordance with the core competencies required to perform them.

[44] Clause 30 as a whole places considerable significance on competencies of employees for the purposes of setting salaries. These are assessed against knowledge and skills categories. The integration of competencies allows for employees to progress through the salary scales which are appended to the collective agreement.

[45] Reading the words of clause 30(d) in their natural ordinary meaning, I conclude that only those specialist roles which have a salary scale attached to the agreement are covered by the collective agreement. This interpretation is confirmed by the context in which clause 30 sits. That context is Part IV of the collective agreement entitled "*Salaries*".

[46] Throughout clause 30 there are references to the link between competencies and salary levels. The clause itself is headed "*Salary system and job roles*". Having established that the salary system includes both generalist and specialist roles, it then deals with salary progression. This occurs through phases of training and development until a staff member is considered competent in their job role.

[47] Other clauses in Part IV confirm this linkage. Clause 31 deals with salary increases in more detail. These depend on employees acquiring competency and then maintaining it through the consolidation phase. Clause 32 sets an anniversary date for competency assessments and salary reviews. Clause 35 provides for overtime to be paid outside of set clock hours which are 7.5 a day or 37.5 a week.

[48] In summary, clause 30(d) makes it quite clear that specialist roles which have a salary scale which is determined by descriptors which in turn relate to standard salary bands are covered by the collective agreement. I find therefore that only those specialist roles that have a salary scale set out in the collective agreement are

covered by the agreement. While clause 30 does not expressly say this because it is located in the salary section and is linked to the assessment of competencies for the purpose of determining salary, this is the only logical meaning which it can hold.

[49] While the coverage clause is very general and appears at first sight to include any position that may fit into the S1 to S4 specialist roles as described, clause 30 of the agreement limits the specialist roles that are covered by defining them in accordance with core competencies and coverage by the salary scales in the agreement. As Mr Cortright's employment is not covered by a salary scale in the collective agreement, his position is not a specialist position and therefore is not covered by the agreement.

## **Issue 2**

### ***Management role***

[50] Mr Jefferies argued that Mr Cortright is not in a management role because he has no staff under his control, no power to discipline employees, and no command or regulatory duties. He argued that a person cannot be said to be in a management role simply because, as here, the bank has called him a manager when he did not agree to be a manager.

[51] It is the bank's position that, although Mr Cortright is not a manager in the normal sense of the word, he is at the level of managerial equivalent which is excluded from the collective agreement by the coverage clause. The bank says when he commenced employment he agreed that his role was a management role.

### ***Discussion***

[52] Mr Cortright's original terms of employment expressly incorporated the managers' booklet. Clause 10 of his letter of employment is unequivocal on this point. It was obviously in the contemplation of the parties at the time he entered the agreement that he was covered by the management terms and he has continued to be employed under those terms.

[53] There are a number of differences between employees employed as managers and those employed under the collective agreement. The most obvious example is

whether overtime applies to the employee. Mr Cortright's employment agreement included a total remuneration package. His agreement to work such reasonable hours as may be required and have those included in his salary is an express condition which is in direct conflict with the overtime provisions in the collective agreement. Although Mr Cortright now says that he did not agree to be employed under the terms of the managers' booklet I find that by his conduct since 1999 he has accepted those terms and conditions of employment.

[54] While there was much debate about whether he was actually a manager or not, on reflection I find that in this bank's employment environment such a distinction on the basis of the work performed in any position is illusory.

[55] The descriptions of the specialist roles in the agreement clearly contemplate that some specialist positions will have a management function. It is equally clear that a person, such as Mr Cortright, who is employed under the terms and conditions of the managers' booklet may not necessarily be performing strictly as a manager. The important factor in this case is that when he was employed he accepted the terms and conditions which apply to managers whether he was actually employed as a manager or not. Although his role is not managerial, he was employed as a manager and treated as if he were a manager for the purposes of his terms and conditions of employment. These include a total remuneration package with no provision for overtime, and a considerably higher salary than he would have received had he been covered by the collective agreement.

### **Issue 3**

#### ***Salary scales***

[56] It was an important plank of Mr Cortright's case that there are no salary caps in the collective agreement and the only prohibition on being covered by it is when an employee is in a management role. Mr Jefferies argued that there is nothing that prevents coverage under the collective agreement where an employee is paid more by arrangement under individual terms. Section 61 of the Employment Relations Act 2000 means that the parties may agree to additional terms and conditions of employment.

[57] From the bank's perspective, because of the differences between the way management and non-management employees are treated, Mr Cortright's salary is nearly \$30,000 more than the highest salary payable to employees under the 2004/2005 agreement. If he is covered by the agreement the consequence for the bank would be that he could reap the benefit of a substantial pay rise each time an increment was agreed in collective bargaining regardless of his performance. He would also be entitled to overtime when his salary was not structured this way. The cost of his overtime would be prohibitive.

[58] Mr Kynaston argued as the collective agreement provides for salary scales with minimum, interim, and maximum rates it would be inconsistent with the agreement and therefore contrary to s61(1)(b) of the Act to pay an employee covered by the collective agreement in excess of the scale. As well, the coverage clause in clause 30 excludes coverage where a position is paid in excess of the salary scale. The bank asks the Court for a ruling on whether the collective agreement salary scales establish minimum, interim, and maximum salaries.

[59] Apart from the four salary bands associated with the specialist roles, the agreement does not anticipate any other bands. Mr Kynaston referred to two clauses which mention maximum or minimum salaries. These are clause 4 which deals with relieving roles and clause 33 which deals with transfer between jobs.

[60] Clause 33 provides that the maximum salary levels will not be exceeded. Clause 34 refers to payment within the salary range applicable to the position. On the strength of these, he submitted that the 2004/05 collective agreement clearly provides for maxima. Special salary scales attached to earlier collective agreements have not been continued in the 2004/05 collective.

[61] Next, he says that s61(1)(b) of the Employment Relations Act 2000 means that agreed terms and conditions of an employee bound by a collective agreement must not be inconsistent with the terms and conditions in the collective agreement and submits that a salary above the maximum in collective agreements would be inconsistent.

## ***Discussion***

[62] Although the salary scales do not expressly refer to maximum or minimum salaries, I find that they effectively set these. The lowest level on any particular scale sets the minimum salary for that role. The highest top cons salary sets the maximum. However, within the scale there is flexibility depending on the competencies achieved by a particular employee.

[63] Apart from discretionary bonuses and variable overtime payments, the collective agreement does not provide for payments of salary other than in accordance with the scale and increments as negotiated collectively each year.

[64] Clearly, Mr Cortright's salary is well in excess of the highest scale in the collective agreement and therefore is inconsistent with the collective agreement. In addition, the employer and the employee under s61 must mutually agree to additional terms and conditions beyond those of the collective agreement and that has certainly not happened in this case.

[65] In summary I find that the salary scales in the collective agreement define the minimum and maximum base salaries of specified roles. Mr Cortright's salary is not aligned to any of these scales and is inconsistent with them.

## **Conclusions**

1. Mr Cortright's role is not a specialist role which is covered by the collective agreement as it has no salary scale attached to it and is not defined in terms of the competencies in the collective agreement.
2. While not strictly a manager, Mr Cortright's role is treated as a management role for the purposes of his conditions of employment. He was expressly employed as such in 1999 pursuant to the conditions in the managers' booklet. I find this was mutually agreed to at that time and can only be altered by mutual agreement.

3. Mr Cortright's salary is inconsistent with the salary scales in the collective agreement which set minimum and maximum salaries for defined roles.
4. The plaintiff's challenge to the Authority's determination is therefore successful.

### **Costs**

[66] This being a dispute over the interpretation of a collective agreement, there will be no order as to costs.

**C M Shaw**  
**JUDGE**

Judgment signed at 3.30pm on 18 December 2006