

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Whakatane District Council (Applicant)
AND Whakatane District Council Employees' Association Inc.(Respondent)
REPRESENTATIVES David Christison for applicant
Gaye Payze for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
CONSIDERATION OF PAPERS 1 February 2005
DATE OF DETERMINATION 2 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Council and the respondent Council Employees Association have a dispute over the interpretation, operation or application of the Hours of Work clause contained in the collective agreement that covers Association members employed by the Council. The dispute is about whether the Council is able to unilaterally require employees to change their current start and finishing times, or whether the employees consent to any such variation must be obtained.

[2] The dispute has arisen because it is the wish of the Council to close its offices to the public each day at the later time of 5.00 pm instead of 4.30 pm, while also retaining the current 8 am opening time. To do this the Council will need to have a number of employees starting later, at 8.30 am, so that they can finish at 5 pm without working for longer than the standard day of 7½ hours. The Council has ascertained that while some employees will voluntarily make this change, there are others who consider their consent is required first.

[3] Mediation as a means of fixing this problem has been considered, however the Authority has taken the same view as the parties that mediation is unlikely to constructively assist them to resolve this particular dispute. The parties representatives have agreed that I will issue a determination as a matter of urgency once I have considered all relevant information. It is also agreed that the statement of problem contains sufficient material for this purpose.

Provisions of the collective agreement

[4] Sub clauses (a) and (f) of the Hours of Work clause are at the heart of the dispute. They provide as follows;

6 HOURS OF WORK

- (a) *Except as hereinafter provided in sub clause (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k) hereof, 37 ½ hours shall constitute a week's work and shall be worked between the hours of 7.00 am and 5.30 pm on Monday to Friday both days inclusive, excluding not more than one hour for lunch. Such time to be worked within these hours as approved by the department head.*

.....

- (f) *Notwithstanding the provisions of sub clause (a) of clause 6 of this Employment Agreement, at the discretion of the employer, approval may be given to vary stated hours of work for individual employees by mutual arrangement or to introduce schemes providing for "flexible" working hours, and any such variation after consultation with the union shall be committed to writing.*

(my underlining above)

[5] The Council argues that sub clause (a) gives it the ability to fix starting and finishing times and that the consent of affected employees is not a requirement. The Association argues that sub clause (a) must be read in conjunction with sub clause (f) and also clause 4 of the Conditions of Appointment which apply to Council employees. Clause 4 provides as follows;

4 Office Hours

Ordinary office hours are 8.00 am to 4.30 pm but the appointee will be expected to devote such further time to the duties as the requirements of the position as provided for and defined in the Collective Agreement.

(my underlining above)

[6] The Association contends that the "office hours" as emphasised above in clause 4 are also the "stated hours of work" referred to in sub clause (f) of clause 6.

Determination

[7] By applying conventional rules of interpretation I find that "stated hours of work" in sub clause (f), is a reference to the hours between "7 am and 5.30 pm on Monday to Friday" in sub clause (a) of clause 6. That is a more preferable construction because the two relevant sub clauses are an integral part of a scheme to be found in the same document under a common heading "Hours of Work". There is nothing I find that supports even a mere inference that sub clause (f) was intended to refer to a separate, albeit associated, set of provisions to be found in the Conditions of Appointment.

[8] The "stated" hours referred to in sub clause (f) must be the hours between at 7 am to 5.30 pm, since there are no other hours precisely described or expressed in sub clause (a). If the "stated" hours were the "approved" hours as referred to in sub clause (a), then that could simply have been said. There would be an obvious contradiction within clause 6 of the Collective Agreement if the hours of work under sub clause (a) were between 7 am and 5.30 pm (say 7.30 am to 4 pm) but under sub clause (f) were 8 am to 4.30 pm.

[9] I find that the purpose of sub clause (f) of the Collective Agreement is to allow for a way in which an employee may, in special circumstances no doubt, routinely commence work before 7 am and/or finish after 5.30 pm. "Flexible" hours are able to be substituted under sub clause (f) as the "hours of work" under sub clause (a). It follows that overtime will not become payable under sub clause (b), because the "hours of work" so substituted will not be exceeded.

[10] As there is no proposal in this case to exceed the 7 am to 5.30 pm hours of work limits under sub clause (a), sub clause (f) can have no application.

[11] I find that the ability of the Council to fix an employees start and/or finish time is to be determined with reference to sub clause (a) alone.

[12] It is clear from sub clause (a) that the Council (department head) is to have some kind of input into the fixing of the exact hours that will be worked between 7 am and 5.30 pm by any employee, since there are 47 ½ hours over 5 days between those times (excluding an hour for lunch) but only 37 ½ hours constitute a weeks work. That input is not expressly described as being by direction from or at the requirement of the employer or by some similar exercise of a management prerogative. Nevertheless it is in that sense, I conclude, that the reference to hours "as approved" by the Council has been made.

[13] There is nothing in sub clause (a) or elsewhere in the Collective Agreement to require that once the Council has approved the hours to be worked the approval endures for the life of the employment relationship or until such time as the employee consents to alter the hours. Just as approval can be given, it can later be withdrawn. If the Council does that how will the new time to be worked be fixed in the absence of agreement? The answer must be that the Council has the ultimate say.

[14] I conclude therefore that the Council will be acting within its rights under the Collective Agreement if it directs employees to change their start or finishing times, provided the changed times remain between the hours of work of 7 am and 5.30 pm.

[15] The Councils obligations under s.4 of the Employment Relations Act 2000 (s.4(4)(d) in particular) to act in good faith will require it to consult affected employees and the Association about any proposed changes. The Council has acknowledged this obligation in the proposals outlined to the Association in its letter of 9 December 2004. As a fair employer the Council should also give reasonable notice before implementing such change in the absence of consent.