

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Southern Local Government Officers Union Inc (Applicant)

AND Christchurch City Council (Respondent)

REPRESENTATIVES Peter Lawson, Advocate for Applicant
Susan Hornsby - Geluk, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 26 May 2006

DATE OF DETERMINATION 9 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] During negotiations for a new collective employment agreement, Dr Lesley McTurk wrote directly to Council employees saying:

CCC management would like reiterate that no employees' remuneration will be reduced as a result of the negotiations or settlement of a new agreement.

Dr McTurk is the Council's chief executive. A new collective agreement was eventually settled that included changes to the working hours' provisions. Mr Neville Steans is a long serving Council employee who is bound by the collective agreement. The application of the new working hours' provisions initially gave him an increase in remuneration but then his remuneration was reduced. Part of the current problem is about the correct interpretation, application or operation of the working hours' provisions for Mr Steans and several others in the same position.

[2] Mr Peter Dow is employed by the Council as a community secretary servicing an elected Community Board. Each Community Board sets its own meeting and times and community secretaries must be in attendance for these meetings. In early 2006, Mr Dow was required to service a different Community Board which has resulted in some change to his hours of work. Mr Dow says that the hours of work provisions of the collective agreement mean that there can be no change to his hours of work without his consent. That too is a problem that must be resolved by determining the proper interpretation, application or operation of the collective agreement.

[3] At the investigation meeting, I was advised that there is some urgency about the resolution of these disputes because the parties are shortly to enter into negotiations for a new collective agreement. In order to complete this determination within the time available given other commitments, I will refer to as little of the material provided as possible.

Mr Steans' original hours of work

[4] Mr Steans is currently a contracts inspector. He had been a maintenance foreman. His standard hours of work have always been 40 per week and his salary has always been set by reference to the Council's salary scales plus an extra 2 ½ hours per week paid at ordinary time rates. The extra was paid because the salary was set for Council officers who worked only 37 ½ hours per week as their standard hours. The arrangements for Mr Steans and others were recognised in the collective agreement. For example, the agreement applicable between 1 January 2003 and 30 June 2004 provided:

B2.2 8 hours per day permitted under certain circumstances

Notwithstanding the foregoing, employees normally required to supervise the work of, or normally required to work closely with other Council employees, or contractors workers whose normal hours of work are 8 hours per day may be required to work an 8 hour day and shall receive an additional half an hour pay each day so worked at ordinary time rates.

[5] I have used the word standard to describe the hours required to be worked by Mr Steans for his salary. Clause B 2.2 refers to them as normal hours of work. They might also be called his ordinary hours of work because they did not attract any overtime payment. The 2003 agreement provided that wherever possible the ordinary hours will normally be worked between 6 am and 7 pm between Monday and Friday each week. Customary daily hours, that is the commencing and finishing times, were set by the team leader who could alter the customary hours by consultation if within Monday to Friday 6 am and 7 pm but only by agreement if outside those hours.

[6] The new collective agreement applies between 1 July 2005 and 30 June 2006. It resulted from an offer made before the date of Dr McTurk's communication referred to above. Mr Steans continued with his standard 8 hour days until December 2005 when the Council reduced his hours of work from 40 to 37 ½ in accordance (in its view) with the ... *latest Southern Local Government Officers Union collective agreement settlement...* The letter advising Mr Steans of this change also stated *your salary will be unchanged and you will continue to receive the same fortnightly salary as you do now.* Mr Steans' pay advice for the period ending 28 March 2005 shows *Salary Automatic...units 80 ... amount \$1,914.40.* His pay advice for the period ending 23 March 2006 shows *Salary Automatic... units 75 ... amount \$1,839.75.* I should also note that Mr Steans was paid time and a half for the difference between 37 ½ hours and 40 hours per week between 1 July 2005 and December 2005 when his hours of work were reduced.

[7] The 2005 collective agreement provides:

6. ORDINARY WORKING HOURS

7.5 Hours per Day, 5F Days per Week

The ordinary hours of work for full time employees shall be 7.5 consecutive hours (excluding the meal break) per day to be worked on 5 consecutive days each week.

...

Changes to Daily Hours

In the event that the employee, manager or team leader seeks to change the normal hours of work the employer will be consulted and individual needs considered. The employee will be given 4 weeks notice in writing of the desired time to make the change. No change will be made without the employee's agreement.

...

8. OVERTIME

Where the employee works in excess of the ordinary hours of work the employee will be paid at overtime rates of time and a half except on public holidays when the overtime

hours worked shall be paid at double the employee's ordinary hourly rate. The following provisions will apply:

- *The employee will be paid overtime rates where the employee works in excess of ordinary hours 7.5 hours a day or 37 ½ hours over 5 days.*
- *The employee may accumulate these hours instead of receiving payment and take the time as time in lieu to be managed and agreed between the employee and the team leader or manager. Where agreement cannot be reached, payment shall be made at overtime rates.*
- *All overtime must be authorised in advance by the team leader or manager.*

...

[8] The argument for the Council is as follows. Agreement is required for a change to normal hours of work. Normal hours of work are the days and times that employee works their ordinary hours of work which are 7 ½ hours per day for a full time employee. Mr Steans' extra 2 ½ hours per week are classified under the 2005 agreement as overtime. Overtime can never be *normal hours of work* so agreement is not required for the change to Mr Steans' hours of work. All that happened was the implementation of the 7 ½ hour working day for Mr Steans.

[9] The proper approach to interpretation of collective employment agreements is summarised in *ASTE v Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491. Agreements should be interpreted with reference to their factual matrix including matters such as the background to the transaction. One must look first at the words used by the parties, then at the surrounding circumstances to make sure that the meaning is correct and that nothing in the circumstances requires modification of that most natural meaning. What is required is an objective approach to interpretation of the final agreement. Evidence is not admissible of what a party thought the words meant or of preliminary negotiations or earlier drafts. The interpretation of an agreement should not be narrowly literal but should be in accord with business common sense. The interpretation should fulfil the purpose of the agreement even if the drafting is inept. However, if the words are clear and can have only one possible meaning, that should generally determine the matter.

[10] It must be said that the 2005 collective agreement resulted in significant amendment to the disputed provisions so it is not possible to bring forward settled meanings from the earlier agreement and apply them to the new arrangements. The opening part of clause 6 setting the ordinary hours of work for fulltime employees at 7.5 per day is clear and allows no exception. There are other clauses under which alternative working arrangements may be made but they are not relevant for present purposes. To be consistent with the opening part of clause 6, the clause under the heading ***Changes to Daily Hours*** must not refer to the duration of ordinary hours for a fulltime employee. This clause cannot refer to overtime that is habitually worked either. If it did, an employee could then refuse to accept a reduction in overtime hours even when there was no work to be done. It follows that this clause must refer only to when the employee actually performs their ordinary hours of work. This is the natural meaning of the words in context. The use of the word *normal* in this clause refers back to the use of the word *normally* in the preceding clause (not cited above) which deals with the span of hours and days during which ordinary hours of work must be performed *wherever possible*. Mr Steans cannot rely on the clause 6 requirement for agreement before any change to when he works his ordinary hours set at 7.5 per day under the 2005 agreement.

[11] Whether overtime must be provided or worked is a matter of contract between the employer and the employee: see *Northland Cooperative Dairy Company Ltd v The Northland Dairy Workers' Union Inc* [1995] 2 ERNZ 201. I accept that there may be an inference available from the requirement for prior authorisation of overtime that the Council can choose to offer or withdraw overtime depending on its needs. However, it may be that in individual cases there is specific agreement that the Council will provide and that the employee will work regular overtime. It was not suggested that this was so for Mr Steans. The result is that the Council need not have Mr Steans

work 40 hours per week as the 2005 collective agreement overrides his earlier individual arrangement to work 40 ordinary hours.

[12] That is not the end of the matter. Not only did the Council reduce Mr Steans' hours of work from 40 to 37½ per week, but it also reduced his remuneration. That is exactly what Dr McTurk promised would not happen. It is also contrary to the statement in the letter advising Mr Steans about the implementation of the new ordinary hours of work. Dr McTurk's promise was made during bargaining for the 2005 collective agreement and the promise in the letter relates to the implementation of the 2005 agreement while it is in force. Accordingly, the statutory duty of good faith applies. It falls well short of good faith to make promises such as these and not keep them.

[13] The route to a remedy for the problem is not entirely clear and was not fully argued during the investigation meeting. It may be that there is an estoppel preventing the Council from reducing Mr Steans' salary. Alternatively, the Authority may be empowered to order compliance with the duty of good faith as it should apply to Mr Steans. Possibly Mr Steans is entitled to a remedy such as damages pursuant to the enactments or rules of law referred to in section 162 of the Employment Relations Act 2000. I will reserve the point for further investigation if necessary. However, the parties should endeavour to sort out the problem in a way that is fair in light of the unequivocal promises referred to above.

Peter Dow's situation

[14] The factual background to Mr Dow's problem is quite different. In 1989 he was offered and accepted a position as committee secretary within the administration unit situated at the Fendalton Service Centre. The job description that accompanied the vacant positions explained that the Council proposed to appoint secretaries to service various committees of the Council and Community Boards located at either specific offices (3 positions) or the six service centres (6 positions). Under the heading *Hours of work* it stated *normal hours of work are between 8.30 am and 5 pm Monday to Friday but there is a requirement to work outside these hours as the exigencies of the position demand*. Then and now community secretaries must attend board meetings because they take minutes and generally service the needs of the board. Applicants were requested to indicate preference of location but the Council reserved the right to assign positions as necessary. Mr Dow worked as a committee secretary for the Fendalton/Waimairi Community Board located at Fendalton Service Centre until he was allocated to service the Spreydon/Heathcote Community Board in early 2006. Because of the different meeting times of the latter board, Mr Dow has had to work overtime on different days and for longer duration compared to when he serviced the Fendalton/Waimairi board.

[15] In the statement of problem, it is said that clause 6 of the 2005 collective agreement means that Mr Dow's agreement was required to assign him from the Fendalton/Waimairi board to any other board because the different meeting schedules necessarily meant that there would be a change to Mr Dow's normal hours of work. The statement of problem notes that there is a separate dispute as to whether the community secretaries were appointed to serve a specific board or whether the Council is entitled unilaterally to move them from one board to another. That dispute is not referred to the Authority by the present statement of problem so I will refrain from commenting on that point.

[16] Mr Dow's ordinary hours of work have always been 7 ½ hours per day or 37 ½ hours per week. Requirements of the Fendalton/Waimairi board meant that he usually worked beyond his usual finishing time on one Tuesday of each month. The 2003 collective agreement provided at Clause B 5.1 that *when the usual duties of an employee require attendance at ... Community Board meetings, the time spent shall not count as overtime, but time off in lieu will be granted to those employees required to attend these meetings outside their ordinary working hours*. But that was

subject to a right in certain circumstances, here irrelevant, to convert time in lieu to payment. The daily hours clause B 2.4, if applicable, required consultation with the employee if there was an alteration to the customary hours of work within the 6 am to 7 pm Monday to Friday span of hours. It is not necessary to consider clause B 2.4.2 because it cannot apply to Mr Dow's current problem having been deleted from the 2005 collective agreement.

[17] A relevant part of the factual matrix is that Community Boards set their own meetings, dates and times. Throughout the period of Mr Dow's service to the Fendalton/Waimairi board, it has always been possible for that board to change its meeting arrangements and Mr Dow accepted in evidence that he would have been bound to accept any new schedule. As it happened, there was no change by the Fendalton/Waimairi board. However, in making the 2005 collective agreement neither the Council nor the Union sought to impose any fetter on the recognised right of each Community Board. The phrase *normal hours of work* as part of clause 6 *ordinary working hours* must refer to the usual starting and finishing times and days of the week that the employee works ordinary time in accordance with their terms of employment. To find that the phrase means the days or hours of work normally performed including overtime would lead to the absurd result that Mr Dow would have gained a power of veto over when the Fendalton/Waimairi board proposed to meet.

[18] It follows that if the requirement for agreement to a change in daily hours is limited to a change in when the ordinary hours of work are performed, when and if overtime is worked must depend on clause 8 and the requirements of an individual's position. It is an undisputed requirement of Mr Dow's position that he must work overtime as necessary to service a Community Board. That point is clear from the 1989 position description. It was not negated by a consultation process initiated in August 2004 that resulted in some community secretaries being relocated from one service centre to another. Nor was it affected by a subsequent transfer of community secretaries to different boards.

[19] For the foregoing reasons Mr Dow's agreement under clause 6 of the July 2005 collective agreement was not required before the Council could oblige him to work overtime on a different day or for different hours to service the Spreydon/Heathcote Board.

[20] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority