IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Determination Number:
WA 70/08
File Numbers: 5123641 &
5124947

BETWEEN	THE NEW ZEALAND CHIEF AND DEPUTY CHIEF FIRE OFFICERS' SOCIETY Applicant 5123641
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION Respondent 5123641
AND BETWEEN	THE NEW ZEALAND PROFESSIONAL FIREFIGHTERS' UNION, BRUCE IRVINE and GARY LUFF Applicants 5125947
AND	THE NEW ZEALAND FIRE SERVICE COMMISSION and THE CHIEF EXECUTIVE OF THE NEW ZEALAND FIRE SERVICE Respondents 5125947

Member of Authority:	G J Wood
Representatives:	Bruce Corkill for Applicant 5123641 Peter Cranney for Applicants 5124947 Paul McBride for Respondents
Investigation Meeting:	23 May 2008
Determination:	23 May 2008
Reasons:	26 May 2008

REASONS FOR DETERMINATION OF THE AUTHORITY
ON INTERIM INJUNCTIONS

Employment Relationship Problem

[1] At the conclusion of the investigation meeting at 7.30pm on Friday 23 May 2008, I declined the interim injunctions sought by the applicants in both proceedings. Following are the reasons for those conclusions.

[2] These matters have been dealt with under extreme urgency, which necessarily has limited the parties and their representatives (particularly the Fire Service Commission and its Chief executive, as they have had to respond to claims formulated in advance) in best representing their positions.

[3] On 8 May 2008, the Chief Fire Officers' Society filed an application for an interim injunction restraining the Fire Service Commission from taking any further steps to employ Mr Ross Ditmer as Assistant/Region Manager, North Canterbury Fire District Trans-Alpine Fire Region and Mr Mark Boere to the role of Assistant Fire Region Commander/Principal Rural Fire Officer, West Coast Fire District Trans-Alpine Fire Region, until further order of the Authority.

[4] It was claimed that the Commission had breached the collective employment agreement by appointing them, contrary to the relevant collective agreement, without having proper regard to their operational and management capabilities, including training and experience. In particular, the Society considered that neither individual had the relevant competencies to carry out significant operational responsibilities, such as where an alarm incident involved a large number of fire appliances and personnel. It was noted that, unlike had previously been the case, the two appointees had not successfully completed the senior station officer programme of the Fire Service's training and progression system, or passed the Fire Service station officer examination, or held the rank of Senior Station Officer.

[5] In its substantive statement of problem, the Society seeks a compliance order with the collective agreement and orders setting aside any decision of the Commission to employ Messrs Ditmer and Boere, as well as restraining them from doing so.

[6] A conference call was convened the next day, 9 May. At the conference call, Mr McBride noted that the applicants would have expected to actually commence work on 26 May or thereabouts, subject to a review process for one of the appointees, but that they were already persons intending to work under the Employment Relations Act 2000 as they had been offered and accepted work with the Fire Service Commission.

[7] Given that the parties were to undertake mediation on 22 May, Mr Corkill, on behalf of the Society, requested that the interim injunction be dealt with the day after the mediation, being 23 May. No reason has ever been supplied to the Authority for the delay in mediation.

[8] The dates of 16 or 17 June were allocated for a substantive investigation and a timetable for the statement in reply and affidavits from both parties was set. Notice of these proceedings was then given to Messrs Ditmer and Boere, who provided affidavits through the Fire Service, but elected not to be represented at the interim injunction meeting. This was not a surprising election given the lack of time to respond.

[9] In its statement of reply, the Commission noted that the appointments were made in March, that it had had regard to the appointees' operational and management capabilities and that the applicant best suited for the position was appointed in each case. It was also submitted that the matter was one in the nature of judicial review and therefore outside the jurisdiction of the Authority.

[10] On 21 May 2008 Mr Cranney filed an application for interim injunction on behalf of the Fire Fighters' Union and two members (Messrs Irvine and Luff) who had been unsuccessful in applying for the Trans-Alpine management positions.

[11] While making the same claims as the Society, the union and its members also raised concerns over alleged bias on the part of a member of the selection panel, an incorrectly prepared job description and an irrational system of assessment. The union and its members also claim that the Chief Executive, who is the decision-maker for reviews to appointments, had predetermined his decision; that the review committee was inappropriately constituted; that Mr Luff's application for review was improperly rejected without consideration of its merits; that Mr Irvine was not fully and fairly heard about who should have been on the review committee; and that Mr Irvine's review application was not fully and fairly considered.

[12] On 22 May, 20 minutes before the conference call, Mr Corkill filed an amended statement of problem, incorporating the issues raised by the union into the Society's claim.

[13] A conference call was then held at 4pm on 22 May, given the union's wish to have proceedings consolidated with those of the Society set down for the next day. At that conference call, I determined to consolidate both those proceedings, despite the lack of time the Fire Service Commission and its Chief Executive would have to respond, on the basis that justice would best be served by determining the position in the interim before 26 May, when Mr Ditmer had agreed with

the Commission to commence his duties. Mr Boere is not scheduled to take up his new job until a brief period after 26 May, because of personal circumstances.

[14] The issue of the Chief of the Fire Service Commission's status as a party was deferred for argument at the investigation into the application for interim injunction. Any further affidavits from the Fire Service Commission were to be filed as soon as possible. Messrs Ditmer and Boere were served with the application that evening. Again they elected not to be represented, although Mr Ditmer was able to attend the first part of the investigation meeting.

[15] 90 minutes before the investigation meeting the Commission filed its statement in reply, together with supporting affidavits. It maintained its previous objections to the claims brought against it and rejected the union's claims of bias, predetermination, otherwise unfair process, and unfair outcomes.

[16] At the conclusion of the interim investigation into the application for interim injunction I declined the interim injunction applications.

The Evidence

[17] From the parties' statements of problem and in reply and the affidavit evidence provided, the following information can be distilled.

[18] Following the resignation of a senior member of the Fire Service management team in the Trans-Alpine region, it was decided to create two new roles, being an assistant fire region commander responsible for North Canterbury and an assistant fire region commander based on the West Coast (who would also take up the role of principal rural fire officer). Both positions were advertised on 25 January 2008, with applications closing on 8 February.

[19] Probably because they would not have constituted a promotion, no member of the Society applied for either position but Mr Irvine, a senior station officer at Christchurch applied for the North Canterbury position. Mr Luff, a senior station officer at the Fire Service's Christchurch training centre, applied for both positions.

[20] The appointment panels were both convened by Mr Robert Saunders, Fire Region Manager/Commander for the Trans-Alpine Fire Region, who would be the direct supervisor of the appointees to the two positions.

[21] Section 65 of the Fire Service Act 1975 provides that:

> *"The Chief Executive, in making an appointment, shall give preference to the person who is best suited to the position.*

[22] It is the Fire Service's policy to appoint the best suited person to any vacancy. The Fire Service's policy also provides that:

> *All selection processes must involve:*
> - *Shortlisting based on key competencies for the role;*
> - *Interviewing using behavioural or structured techniques; and*
> - *Reference checking for the preferred applicant.*
>
> *It is recommended best practice that selection also involve, where appropriate:*
> - *Assessment centres (if appropriate);*
> - *Work sample testing (if appropriate);*
> - *Applicant self-assessment;*
> - *Panel interview; and*
> - *Pre-entry physical testing for firefighter role.*

[23] Mr Irvine was interviewed for the North Canterbury position he had applied for. Mr Luff was not interviewed for the North Canterbury position, but was interviewed for the West Coast position.

[24] Both appointment panels looked at self-assessments and CVs from all applicants, and had them complete an online profile assessment determined by an external provider. Both panels then decided who to shortlist and interviewed each of those applicants, using behavioural-based interview questions and by assessment of presentations by the interviewees. The panels then scored the interviewees according to a matrix they had compiled and then conducted reference checks on the two successful applicants, including from senior professional fire fighters. The panel of three was unanimous in its recommendations, taking into account Messrs Ditmer and Boere's extensive rural fire backgrounds, including them having taken control of fire grounds where professional fire fighters were in attendance.

[25] On 15 March both appointees were informed that their applications had been successful and Messrs Irvine and Luff were told that their applications had been unsuccessful. Mr Ditmer and Mr Boere's appointments were gazetted by the Chief Executive on 20 March, with proposed start dates in May.

[26] Before the gazetting the Society had already formally raised its concerns about appointments at this level being made outside of those holding senior station officer qualifications or its

equivalent. On 31 March the Society raised a dispute seeking the cancellation of the appointments and their re-advertisement. This letter clearly followed a meeting held on 20 March, where the Society had raised these concerns directly with Mr Mike Hall, the Chief Executive of the Fire Service. On 1 April Mr Hall replied, confirming his position that he would not be cancelling any assistant regional fire commander appointments.

[27] On 15 April, Mr Cressey, then acting on behalf of the Society, wrote to Mr Hall stating that it if senior officers did not hold requisite qualifications and experience then this was an important issue that could affect the safety of its members and members of the public. The Fire Service was asked to take no further steps to implement the appointments and to attend urgent mediation.

[28] On behalf of the Fire Service Mr McBride responded on 16 April noting that the only power to cancel appointments comes about through a review process and that none of the Society's members had applied for either position. It was also noted on that the appointments had already been made and had been done so having regard to their operational and management capabilities. Subsequently, the Society filed its application.

[29] Matters were simultaneously going down a different track with Messrs Irvine and Luff, who had applied unsuccessfully for the positions.

[30] The employment agreements offered to the appointees on 13 and 19 March respectively, and accepted soon thereafter, were subject to any successful application for review of their appointments. The review process provided for under s.67 of the Fire Service Act provides for both informal and formal reviews. It is a policy referred to in the union's collective agreement.

[31] Generally, only employees applying for vacancies are eligible to have a formal review, which is not the same thing as stating that formal reviews may not be taken by non-applicants, such as members of the Society who had health and safety concerns over the appointments.

[32] Reviews can be brought on the grounds of both substance and process. Reviews must be made and received within 14 days and this is inclusive of any time spent on an informal review. Informal reviews simply involve the provision of information in regard to the appointment process and decision. Applications for formal review must include a statement setting out the basis for the complaint, the reason why the applicant considers he/she deserves further consideration and the remedies sought.

[33] Provided all requirements are met by an applicant, the Chief Executive will appoint a review committee, which has to complete the review and make recommendations to him within 21 days.

The Fire Service's policy recommends that review committees should, unless the applicant agrees otherwise, involve a senior human resources person and a senior operational person, other than anyone on the appointment panel. When making his decision on the make up of the committee the Chief Executive must consider any representations of the applicant. The committee must also consider any request by the applicant to appear in person and must take into account any written material supplied.

[34] The Chief Executive, on receipt of the committee's recommendation, is to make a final decision.

[35] As noted above, Mr Irvine was notified that he was not appointed the North Canterbury position on 15 March. On 17 March he applied for an informal review.

[36] Similarly, on 25 March, Mr Luff sought an informal review about his non-appointment to both positions. On 27 March he sought a formal review. Although obviously cognisant of the 14 day deadline he did not provide any statement of the basis of the complaint, or the reasons why he deserved further consideration, as required by the policy.

[37] On the same date Mr Irvine filed a formal review, which covered issues of substance and process and sought a re-advertisement and a new selection process for the North Canterbury position. He raised many of the matters highlighted above in the union's claim.

[38] On 31 March, Mr Irvine was informed that Mr Hall intended to convene a review committee consisting of an assistant fire region commander/manager and a legal adviser from human resources. Any comments Mr Irvine had on the composition of the committee were sought by 5pm on 8 April.

[39] On 3 April, Mr Irvine agreed with the panel's composition. The next day, Mr Irvine changed his mind and sought to withdraw his agreement to the make up of the review committee.

[40] Other more pressing matters to all parties arising out of a serious fire at Tamahere meant that it was agreed that events would not proceed with the speed required by the policy. During that period, the Christchurch members of the union passed motions of no confidence in Messrs Saunders, Ditmer and Boere and chose not to participate in the volunteer placement programme or district and regional health and safety committees.

[41] On behalf of Messrs Irvine and Luff, Mr Cranney wrote on 18 April seeking an independent person to constitute the review panel, such as a Labour Department mediator.

[42] In respect of Mr Irvine's desire to appear in person, the review panel sought more information in the following week. On 29 March, Mr Cranney replied noting that he was not aware of who the intended members were and therefore could not make any submissions on their suitability. Concern was then raised about the fact that an allegation of bias had been made against a member of the original selection panel and yet the reviewers were both junior in rank to him.

[43] On 30 April Mr Luff was informed that his review did not contain the appropriate information and that he had failed to provide it, despite having the information that he originally claimed to have needed to prepare his review. It was therefore decided by human resources that it would not forward his application for review to Mr Hall. Mr Boere was therefore advised that day that his appointment was confirmed and his employment agreement became unconditional, from the perspective of the parties to it at least. Mr Boere has made arrangements to move to the West Coast, including renting out his house, and has given away or sold prized possessions, such as his family's pets.

[44] Despite being invited to appear in person and/or provide further submissions in writing, Mr Irvine did not do so, perhaps on the advice of the union as a result of its concerns over the constitution of the panel.

[45] The panel looked into the issues raised in Mr Irvine's application for review but concluded that although there was a friendship between Messrs Saunders and Ditmer, it was declared and managed appropriately and there was no evidence of bias; that the grades awarded were supported by all documentary evidence; that the tertiary qualifications suggested as necessary by Mr Irvine were not; and that the role specification is a matter for the employer. The panel therefore recommended that Mr Ditmer's appointment be upheld.

[46] Mr Hall agreed and on 12 May both Mr Irvine and Mr Ditmer were advised that the appointment of Mr Ditmer was confirmed and his employment agreement therefore became unconditional from the Commission's perspective. Mr Ditmer then took steps to sell both his businesses, which are currently subject to sale and purchase agreements. He is unable therefore to earn an income from those businesses and would therefore be without income should the injunction have been granted.

[47] While mediation was still ongoing, the applicant parties required the Authority to make a determination on their applications for interim injunctions.

The Law

[48] The accepted approach for determining applications for interim injunctions is set out in *Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries* [1985] 2 NZLR 140. Cook J stated at 142:

> *In this Court we have drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of the formula….*
>
> *Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for bringing these applications. As the* NWL *speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way – as the Chief Justice did here – it will usually be right to be guided accordingly but if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.*

[49] In assessing the balance of convenience, the adequacy of damages is important. Other factors include a need to analyse the conduct of the parties, the strengths of each party's case, the impact on third parties and a preference for retaining the status quo.

Determination

[50] I accept that the union's undertaking as to damages on behalf of Messrs Irvine and Luff is adequate for the purpose of these proceedings.

[51] Mr Hall is not the employer in this case. For this reason, while he may conceivably be the subject of a compliance order at some point, he can not be the subject of an interim injunction.

[52] If the applicants can substantiate their claims of bias then clearly the appointments have not been properly made. Just because the applicants' concerns could be raised by way of judicial review, it does not mean that the Authority has no jurisdiction - see for example by way of analogy, *McCready v. Commissioner of Police* (unreported, Supreme Court, Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ, SC57/2007, 23 April 2008). For example, the Society is entitled to seek compliance with its collective agreement. Similarly the union, and its members, are entitled to seek compliance by the Commission with its statutory duties where it impacts on members' employment, even if (and that is highly arguable) they are not entitled to seek compliance with the policies referred to in its collective agreement. Clearly, therefore, there is a serious question to be tried here.

[53] I turn to assess the balance of convenience. I conclude that damages would not be an adequate remedy for any party. This is not a case about money, even at the interim injunction stage. Rather it is about seeking to preserve and maintain parties' rights and obligations, which unfortunately can not be reconciled, even for an interim period. For example, the applicants claim that if the injunction is not awarded then they will be subject to unacceptable health and safety risks. By contrast, the Commission would be required to breach employment agreements with the appointees and would suffer an unplanned ongoing reduction in its management resources.

[54] While damages are an inadequate remedy for the applicants, this is only to the extent that if the appointees start work it is allegedly less likely that the Authority would make any determination with the effect overturning their appointments. In fact, while the Authority would be loath to intervene in appointment processes, as an employer is in fact and law the best judge of the most suitable candidate, if bias or improper considerations were found to have occurred then suitable relief would follow. It would make no difference, therefore, if the appointments were not validly made, that the appointees had actually been "on the job" for a few weeks. This is a major factor indicating that the applicants would be less injuriously affected by the refusal of an interim injunction than the reverse.

[55] The strength of each party's case can be assessed both under the balance of convenience and the justice of the case. The union's claim of predetermination is not a strong one when the correspondence is taken into context. The issue of bias, by contrast, will need to be closely subsequently assessed, particularly given the implications of the term "apparent bias". The review process will also need to be subject to close scrutiny. Finally, while the phrase "having regard to the employees operational and management capabilities" must mean having proper regard to those matters, given the appointees' previous experience in command of large fire grounds and the extensive reference checking, the Commission appears to have a stronger case here. On balance, the Commission can be see to have a stronger case in two areas, but it may be that the applicants only need to succeed in only one given area for them to obtain the compliance orders they seek. Therefore no weighting in favour of either the applicants or the Commission should accrue.

[56] There can be no doubt there has been no delay by the Society. The Commission has been on notice of the Society's concerns from the outset. The same can not be said of the union. Mr Luff was informed on 30 April that he would not get a formal review. Given that Mr Luff had applied for both positions the union had from that time to bring the sort of claims that it did not do until 21 May. In the circumstances of this sort of case a delay of twenty one days is significant. Even with

Mr Irvine there was a delay of eight days. Given that the applicants are all seeking the same remedies, however, the union's delays should not count against the granting of the injunction.

[57] There are clearly two third parties here who will be significantly affected were the applications to be granted. Mr Ditmer expects to start work on Monday 26 May. Both men have made significant adjustments to their lives, which appear unable to be reversed easily, if at all. This is a factor against the granting of an interim injunction.

[58] I turn to address other factors. While none of the Society's members took a review of the appointment and they had the opportunity to ask for such a review, I accept that it could have reasonably been expected that this would be limited to an informal review, which would not have met the Society's needs. I take no account of the allegations made against all parties that they do not come to the Authority with 'clean hands'. The likely explanation for the allegations made in each case is a misunderstanding of the real position or a difference of view, rather than of conduct deserving of condemnation.

[59] I accept that the Commission made its appointments with its 'eyes wide open' to the concerns of the Society and the union. Therefore it is also clear that the status quo for the purposes of these applications is prior to the employment of Messrs Ditmer and Boere becoming unconditional.

[60] Balancing the risks of doing a greater injustice to the applicants than the Commission, I conclude that the balance of convenience favours the Commission. In particular, the Authority will be able to do justice to the applicants even if Messrs Ditmer and Boere were to start work. By contrast they, as third parties, would be injuriously affected were an interim injunction to be granted.

[61] There is nothing in the overall justice of the case that would lead to a different conclusion.

Costs

[62] Costs are reserved

G J Wood
Member of the Employment Relations Authority