

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 189/10
5135659

BETWEEN THE NEW ZEALAND FIRE
SERVICE COMMISSION
Applicant

AND STEVE WARNER AND
OTHERS, NAMED IN THE
ATTACHED SCHEDULE
Respondents

Member of Authority: P R Stapp

Representatives: Guido Ballara and Stephen Fraser, for the Applicant
Peter Cranney and Derek Best, for George Mihailoff,
Gerald Twiss, Allan Brown, Stephen Anderson, Nick
Fry and Simon Johnson.

Investigation Meeting: 1 September 2009 at Wellington¹

Submissions by: 20 October 2010

Determination: 18 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Fire Service Commission is seeking to recover an overpayment of wages following a refusal and/or failure by each of the named respondents to repay an overpayment received. The respondents have opposed the claims. A selected six respondents have been given an opportunity to be heard.

¹ Since the investigation meeting and time for the parties' to provide written submissions a matter was referred to the Employment Court on a question of law (*New Zealand Fire Service Commission v Warner and Ors* [2010] NZEMPC 90. Submissions have been received from Mr Cranney and Mr Ballara.

The facts

[2] The New Zealand Fire Service Commission (the Commission or the NZFS) and the New Zealand Professional Fire Fighters' Union (the NZPFU) are parties to the New Zealand Fire Service and New Zealand Professional Fire Fighters' Union Collective Agreement for Uniformed and Communications Centre Employees (the CEA).

[3] Most of the named respondents are members of the NZPFU. They are covered by the CEA. The selected six respondents are members of the Union.

[4] The CEA was renegotiated in 2007. It was ratified by the NZPFU's members covered by the CEA including the named respondents in October 2007. The agreement provided for some backdating of wage increases and allowances.

[5] This employment relationship problem relates to the backdating of allowances to 1 January 2007. A mistake was made on the backdating date for what is called the '*officership allowance*'.

[6] An "*officership allowance*" of \$1,500 gross per annum (but payable fortnightly) per eligible employee was also included in the CEA. This was ratified by the NZPFU's members covered by the agreement including the named respondents. The officership allowance was agreed only to be backdated to 1 July 2007. However, on or about 26 September 2007 the Commission made an error and paid the officership allowance to the respondents backdated to 1 January 2007. This payment was made along with payment for all other backdated wages and allowances to the same date. The error came to the notice of the Commission. Since then the Commission has attempted to recover the overpayments from the respondents.

[7] Since the application of the employment relationship problem was filed arrangements have been made by the NZFS with a number of the respondents to repay the money and those respondents have been withdrawn from the application. A number of the respondents remain a party to these proceedings. The remaining respondents are included in Schedule 1. The respondents withdrawn are named in Schedule 2 and these proceedings no longer relate to those named respondents.

[8] In the lead-up to the investigation meeting the NZFS agreed to name six representative respondents to be heard. The NZSF submitted the names of George Mihailoff, Gerald Twiss, Allan Brown, Stephen Anderson, Nick Fry and Simon Johnson.

[9] Messrs Fry and Johnson did not turn up to the Authority's investigation meeting. There was no good cause for their failure to attend. They were on notice and I was satisfied that they had been served and knew about the investigation meeting. I decided to proceed without them.

[10] Each of the other selected applicants (George Mihailoff, Gerald Twiss, Allan Brown and Stephen Anderson) swore or affirmed written statements of evidence presented on their behalf by the NZPFU.

[11] Messrs Mihailoff, Twiss, Brown and Anderson have questioned the amount of money at issue. They claimed they do not know under what heading the officership allowance back pay was included, or even if it had been included at all. They say they do not know if they are being paid correctly or overpaid or, in fact, if they had been underpaid. Each of them has been requested to pay back the nett sum of \$445.28 they were overpaid.

[12] Despite being requested to repay the back pay made in error, they have not complied with the Commission's request. They are asking for proof of any overpayment occurring. Further, they say, it was not until the end of February 2008 that the Fire Service notified them that an overpayment had been made.

[13] An important letter dated 21 February 2008 was sent to each of the applicants, except Mr Brown, who says he did not receive it. That letter read as follows:

Overpayment of Officership Allowance

As you will be aware it was agreed as part of the last settlement of the NZFS and NZPFU Collective Employment Agreement (CEA), that an ownership allowance would be paid fortnightly from 1 July 2007. This is outlined in Part 2, clause 2.6.21 of the CEA.

After the CEA lump sum back pay payments were paid in Pay 13 on 26 September 2007, it was determined that the officership allowance had been backdated in error to 1 January 2007 instead of 1 July 2007, as negotiated in the CEA.

The result of this error was that you were overpaid to the amount of \$445.28 in back pay for the officership allowance for the period

between 1 January 2007 and 30 June 2007. This is outlined in the Table below, which provides the breakdown of the lump-sum back pay payment you received (note: this does not include back pay for wages). A copy of your pay slip for Pay 13 can be obtained by accessing the employee kiosk on firenet.

Backdate Payment on 26 September			Overpayment made (arrears)			
<i>Contract Arrs O/Time/ALL (Total Backpay Payment Paid – consists of 1 and 2)</i>	<i>1. Other Allowance Backpay (e.g. overtime, other allowances)</i>	<i>2. Officership Backpay Paid</i>	<i>Correct Officership Allowance (i.e. what should have been paid)</i>	<i>Amount of Officership Allowance Overpaid</i>	<i>Tax on Officership Allowance Overpaid</i>	<i>Net Overpayment</i>
<i>\$1424.24</i>	<i>\$373.42</i>	<i>\$1050.82</i>	<i>\$304.95</i>	<i>\$745.87</i>	<i>\$300.58</i>	<i>\$445.28</i>

The NZFS is required to recover this overpayment from you. In order to do this, we propose three options for your consideration as follows:

1. One off payment of \$445.28 to come out of your pay day nominated by you.
2. Fortnightly deductions each pay day, commencing from the next pay following receipt of your authority form. We would recommend a minimum deduction of \$30 per fortnight.
3. Cease payment of the fortnightly officership allowance effective from the next pay following receipt of your authority form, for the required period until full recovery of the overpayment has been made.
4. Deduct the amount from your PCA payment.

Please complete and return the attached authority form indicating which option you wish to accept by 28 March 2008. Please be aware that if you do not provide your written approval, the NZFS will need to pursue alternative means for the recovery of this overpayment.

The NZFS has been in discussion with the NZPFU regarding this matter. The NZPFU have advised they wish members to liaise directly with the NZFS to determine appropriate arrangements for recovery.

If you have any questions regarding this matter or repayment options, please email Brian Tebbutt, NZFS payroll manager on ...

Thank you for your understanding with this matter. We do apologise for this error and any inconvenience this may cause.

[14] The NZPFU first became aware of this problem when the NZFS wrote to Mr Best, the NZPFU secretary, on 20 November 2007, outlining the general problem but in particular included the following details:

The following is a breakdown of constituent parts of the back-pay payment for a typical station officer. It should enable the Union to verify that there was an overpayment. We accept that such a breakdown would have been appropriate and should be used in any subsequent back-pays.

The arrears on the officers' allowance of \$1,500 per annum was calculated from 1 January 2007 to 12 September 2007 (255 days). It should have been 74 days (1 July 2007 – 12 September 2007) as agreed and as set out in Part 5 – Table 2. This had the result that all officers were overpaid \$745.87 gross (regardless of grade or driver's allowance).

[15] The Union's response was provided in its newsletters to members questioning the details and the amount of any overpayment. It is now common ground that if the NZFS is correct and that such an overpayment was made, the officership allowance back pay that was paid was \$1,050.82. The amount of the officership allowance that was overpaid was \$745.87 gross. The net overpayment was \$445.28. It is that sum that the four applicants are still seeking clarification on. They have raised that their payslips (some were provided) only indicated that the amount paid on 26 September 2007 referred to *Contract Arrs O/Time/ALL 13 September 2007*, was for example, \$1424.24 (*above*) and another example \$1,378.76. Messrs Mihailoff, Twiss, Brown and Anderson have questioned the amount of the other allowances included in the back pay total. They believe that they need to know whether that is correct or not to establish the correctness of the officership allowance that was back paid. The NZFS has provided details of the breakdown for each of them.

[16] I am satisfied that Mr Brown knows what the NZFS's claim is about and its request, along with the options, for the overpayment to be repaid.

The current proceedings

[17] This determination has been held back waiting an outcome from the Employment Court on jurisdiction. The Employment Court issued its Judgment on 19 July 2010 (*The New Zealand Fire Service Commission v Steve Warner and Others* [2010] NZEMPC 90) and confirmed the Authority's jurisdiction to deal with the matter. Since then the New Zealand Professional Fire Fighters Union (NZPFU) has become involved to represent a number of the respondents, which includes the

selected 6. There may be others involved who are not represented by the union, and this will need to be clarified.

[18] A new issue has been raised by Mr Cranney on behalf of the respondents represented by the union about what the Authority should now do with the application from the New Zealand Fire Service Commission. He has suggested that the matter be dealt with in two steps. First, the Authority should decide whether excess money was in fact received. He has asked that the applicant provide the NZPFU and the Authority with the actual workings for 10 or so randomly selected respondents. Second, from that information the NZPFU should be required to identify any objection it has to the calculations and if none are made or substantiated the methodology and amounts will be accepted for all respondents. If the amounts are correct many of the respondents are likely to make payment according to Mr Cranney and the NZPFU. The others are left to pursue any various defences available. Such an approach can then involve separate hearings.

[19] The applicant says that this will cause more delays and is unnecessary having regard to the investigation meeting held for the 6 selected respondents. The applicant has asked the Authority to issue a determination as to the selected 6 respondents on the information available.

Comment

[20] First the NZPFU is not a party to the proceedings. Therefore, whilst I accept it is representing the selected 6 respondents I have yet to be satisfied as to whom else on the list of active respondents the NZPFU is representing. Indeed Mr Cranney has pointed out that he and the NZPFU cannot properly or fully represent the numerous respondents because some may not be members and some have apparently retired.

[21] Therefore, the support officer will have to serve this determination on each named respondent and arrange to get clarification of their representation. I am sure the Commission can also assist to sort out the respondents it considers are still active to try and fix the matter collectively.

[22] Second, it is my decision to progress the matter on the suggestion made by Mr Ballara on the basis of the information and evidence given at the last investigation meeting concerning the selected 6 respondents. From that I will reserve leave for the applicant to endeavour to reach mutual agreement with the remaining respondents or

return for a further investigation meeting by arrangement. I note, as should all the respondents, that the Employment Court has suggested that if the claims within jurisdiction cannot be settled by negotiation with the respondents, and ideally using the union, it follows that the Authority should investigate and determine the issues. The matters on the selected 6 have not been sorted out since the Court's Judgment.

Determination of the Authority

[23] Since the Authority's investigation meeting it is clear that the union on behalf of at least the 6 selected respondents has accepted they received an erroneous payment of the 'officership allowance' despite the respondents denying the receipt of the payment earlier and requesting details from the applicant to prove it. I formalise that finding for the applicant.

[24] The query on the "other allowance" back payment amount is entirely a red herring. The fact of the matter is that the NZFS has established with the evidence produced in the Authority from Mr Brian Tebbutt, the payroll manager at the NZFS, that an error was made. The error was the wrong back pay date being used and thus the amount of the back pay for the 'officership allowance' was \$1,050 as he has calculated. The fact that an overpayment was made in regard to that allowance has been calculated by Mr Tebbutt whereby each of the selected 6 respondents owes the Commission \$445.28 nett that they were paid. Thus, I also conclude that from the best endeavours of the NZFS it has properly calculated the mistake, and I accept the individual sums sought to be recovered by the NZFS in respect of the 6 selected respondents. I am satisfied that in each of the 6 cases heard by me that the NZFS has provided sufficient details on the sums and the amount of the overpayment and as an error the overpayments were not voluntarily made.

[25] None of the six selected respondents have satisfied me that they have any reason to support the non repayment of the sum sought.

[26] In this instance I order Messrs Mihailoff, Twiss, Brown and Anderson to each repay to the NZFS the sums they individually owe.

[27] Nick Fry and Simon Johnson are also ordered to repay the NZFS the sums they each owe. They both defaulted in attending the Authority's investigation

meeting without any reason, but I accept they were represented by the union. I am satisfied that the information provided by the NZFS was sufficient to establish the claims against both of them. Also, they have no reason for refusing to pay the money back, I hold.

[28] As requested I grant leave for the applicant to return to the Authority to progress the overall matter as necessary, both in terms of the selected six and others. However, I would expect some attempt to be made now with each of the respondents to resolve the matter first.

Order of the Authority

[29] George Mihailoff, Gerald Twiss, Allan Brown and Stephen Anderson, Nick Fry and Simon Johnson are each to pay to the New Zealand Fire Service Commission the sum of \$445.28 nett.

[30] Costs are reserved.

P R Stapp
Member of the Authority