IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 228/10
5301585

BETWEEN	THE NEW ZEALAND FIRE SERVICE COMMISSION Applicant
A N D	NEW ZEALAND PROFESSIONAL FIREFIGHTERS' UNION First Respondent
A N D	ALAN MICHAEL CAHILL Second Respondent
A N D	CRAWFORD GRAHAM MORRIS Third Respondent

Member of Authority:	James Crichton
Representatives:	Geoff Davenport, Counsel for Applicant Peter Cranney, Counsel for Respondents
Investigation Meeting:	On the papers
Submissions Received:	9 and 29 August 2010 from Applicant 24 and 30 August 2010 from Respondents
Date of Determination:	10 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Commission (the Fire Service) seeks a determination that it may implement an on-call roster for Fire Safety Officers and amend that roster from time to time.

[2] The respondents (variously the Union, Mr Cahill, Mr Morris and/or the respondents) say that work rosters is a matter for negotiation and agreement and not

imposition by the Fire Service. As originally filed, Mr Morris also brought a counterclaim alleging personal grievance. This counterclaim has since been withdrawn and forms no further part of this proceeding.

[3] A telephone conference with the parties was held on 11 June 2010 which, amongst other things, proposed that counsel confer with a view to agreeing and filing a memorandum of facts. An investigation meeting was set down for 6 August 2010 at Dunedin, although the possibility that that date might be vacated in favour of the matter being dealt with on the papers, was foreshadowed during the telephone conference.

[4] There was difficulty about getting agreement on a memorandum of facts, but eventually the date for the investigation meeting was vacated by agreement between counsel, which was communicated to the Authority by email dated 28 July 2010. That email also recorded that a witness statement filed by the applicant was to be considered by the Authority, that the respondents would not file evidence themselves, that submissions would follow and that Mr Morris' counterclaim was to be withdrawn. The Authority accepted that proposal.

[5] The Fire Service employs Fire Risk Management Officers (Fire Safety Officers) for whom a principal duty is assisting in determining the cause of fires. Fire Safety Officers are called in by the officer in charge of fighting the fire where that officer considers that assistance is required in determining the cause of the fire.

[6] There are eight fire regions and within those regions there are a number of delineated areas. This particular matter before the Authority involves the Southern fire region which covers the geographical regions of Otago and Southland. Within that region, there are three areas, namely East Otago, Southland and Central and North Otago. To service the Southern fire region, the Fire Service currently employs four Fire Safety Officers, typically with two based in Otago and two based in Southland. The two Southland-based Fire Safety Officers are the second and third respondent in the present application before the Authority.

[7] The central issue of dispute between the parties is the meaning of clause 4.3.4 of the collective employment agreement (the agreement) which governs the employment relationship of the parties. That clause says:

> *Fire safety … officers may be rostered on call in accordance with an availability roster and may be called out in the event of an emergency incident.*

[8] The Fire Service says this clause entitles it to develop call rosters and to modify them from time to time. The Fire Service acknowledges that it consults affected staff about proposed changes to rosters, but denies it is necessary to obtain the agreement of Fire Safety Officers before implementing a change in a roster. The Fire Service essentially claims that operational necessity will, from time to time, require a change in arrangements as, for instance, when staffing levels change, or the location of Fire Safety Officers changes, or there is a change in the pattern of investigative work.

[9] For instance, for much of the recent past, there have been four Fire Safety Officers in the Southern region. Those Fire Safety Officers operated an *on-call* roster of one week on and one week off. The effect of this roster cycle in the Southern region was that at any one time there was one Southland-based Fire Safety Officer on-call for conducting fire investigations in the Southland area, and one Otago-based Fire Safety Officer to do the same role in the Otago area.

[10] In that general connection, the same sort of arrangement in terms of roster cycle operates in four of the eight fire regions in the country. All regions have some sort of on-call roster. The advantage of this particular roster cycle for the Southern region is that it reduces travel time for Fire Safety Officers. It means that a Southland-based Fire Safety Officer only need travel within Southland and an Otago-based Fire Safety Officer only need travel within the Otago area for fire investigation purposes.

[11] What brought the whole matter to a head was a reduction in the number of Fire Safety Officers in the Southern region from four to three. This happened in early 2008 and had the obvious mathematical consequence that the roster needed to change. The Fire Service proposed the roster change to one week on two weeks off. Consultation followed but was unsuccessful. The Fire Service implemented the change in any event. In fact, the new arrangements were unsatisfactory because there was now only one Fire Safety Officer covering the whole Southern fire region.

[12] The Fire Service was unhappy about that consequence and accordingly decided to recruit an additional Fire Safety Officer for the Southern region. No

appointment was made but Mr Morris, the third respondent in the present proceeding, was seconded on a temporary basis. Again, the Fire Service notified its intention to revert to the one-week-on/one-week-off roster because of Mr Morris' recruitment to the role. There was what the Fire Service calls a *detailed meeting* at Roxburgh on 20 October 2009 at which the issues around the proposed reversion to the old roster system of one week on and one week off was discussed. Notwithstanding that that roster pattern had been the custom and practice in the Southern fire region for many years (apart from a short period in 2008), there was still objection from Fire Safety Officers to the proposal to change back.

[13] The second respondent, Mr Cahill, advanced a completely different roster arrangement for the Fire Service to consider and this was raised and discussed, to some extent, at the 20 October 2009 meeting. The fire region commander for the Southern region, Mr Rooney, said that he took this new proposal away and looked carefully at it but that it was less than satisfactory than a return to the original roster sequence. Notice of the change back to the one-week-on/one-week-off cycle was formally given by the Fire Service on 29 October 2009 to take effect from 3 November 2009. A dispute was promptly initiated by the first respondent (the Union).

[14] In raising the dispute, the Union claimed that Fire Safety Officers were not obliged to be on call at all in the absence of a commitment to do so in their letter of appointment. Also, the Union said that the Fire Service could not unilaterally change rosters and that Fire Safety Officers had to agree to changes, despite the change proposed being a change back to what had been the longstanding status quo and despite the history of the matter not requiring agreement in the past.

[15] The Fire Service's evidence to the Authority is that there were extensive efforts to resolve matters by agreement but despite these various efforts, the Union and Messrs Cahill and Morris declined to move back to a one week on one week off roster. Those efforts included a mediation which, despite a wide attendance from Fire Service senior managers together with the respondents, was unsuccessful.

Can the contractual provision be given its plain meaning?

[16] The Fire Service encourages me to read the relevant provision as being capable of straightforward interpretation based on the usual meaning of the words

used by the parties. I am referred to decided cases which state and restate the fundamental precept of contractual interpretation, that if the meaning of the words is clear, they must be given their ordinary natural meaning. Looked at simplistically then, the relevant provision provides that Fire Safety Officers may work on a roster which provides for time on call and that they may be called out in the event of an emergency.

[17] The essence of the Fire Service's position is that that commonsense interpretation allows it to implement on-call rosters for Fire Safety Officers, to modify those rosters as required depending on operational needs, and to change them without the agreement of the employees if that is unable to be obtained.

[18] The Fire Service points out that there is nothing in the clause requiring negotiation or agreement or even consultation for that matter. Critically, the Fire Service draws my attention to the fact that the earlier clauses in the same sequence relating to hours of work all contemplate changes in employment conditions (such as work hours) **by agreement**. The requirement for agreement to be obtained is spelled out in the clauses. The Fire Service says that if the parties to the document had intended there be agreement in respect of Fire Safety Officers, they would have made such a provision. Plainly, the parties were not shy about the concept of seeking agreement as agreement is required in respect of the other kinds of change to the hours of work provisions. I am encouraged to conclude that because agreement is not required in respect of changing on-call rosters for Fire Safety Officers, the omission is deliberate rather than inadvertent.

[19] Next, the Fire Service directs me to the preamble to clause 4.3.4 which reads as follows:

> *Employees may from time to time be required to work in excess of 40 hours per week due to planned activities or the non emergency requirements of their roles.*

[20] It is suggested that this language, and especially the use of the word *required*, coupled with the act of rostering and the act of calling out a Fire Safety Officer, are all normal incidents of the operation of the Fire Service and therefore, as it were, powers that must vest in the employer, namely the Fire Service. Mr Davenport urges this proposition on me in the following way:

> *It would be an absurd reading of this clause to suggest the right to require work in excess of 40 hours or the right to roster the employees or the right to call out these employees is somehow bestowed on someone other than the employer.*

[21] The final point made in this general connection by the Fire Service is that the relevant clause refers to *an availability roster* not *the* availability roster. It follows, so the argument goes, that there is not one availability roster but potentially any number of permutations. The evidence before the Authority is that there are in fact a number of different ways in which the Fire Service arranges these rosters for this particular service across the country. Furthermore, it is evident that there is no on-call roster defined in the employment agreement. This is contrasted with the position in respect of operational firefighters whose rosters are explicitly defined in the agreement. Again, I am invited to deduce from these points the fact that if the parties had seen fit to provide further and better particulars on how the roster arrangements were to be worked out, they had that opportunity and indeed ample precedent for doing so but, it is suggested, actively chose not to.

[22] The respondents' views on this issue are, unsurprisingly, different. In essence, Mr Cranney urges on me the proposition that the relevant clause contains a lacuna. He said that lacuna is the failure to deal with how the roster is to be changed. He says that the effect of the Fire Service's application to the Authority is that the Authority is being asked to imply a term to allow the Fire Service to unilaterally impose roster changes on workers. It is argued for the respondents that if the parties to the agreement had wanted to give the employer power to unilaterally change rosters, it would have done so.

[23] But the essence of what the respondents say in their countervailing argument is that the **effect** of what the Fire Service is claiming is to *extract large numbers of additional on-call hours at will without extra payment*. Put another way, at the core of the respondents' objection to the Fire Service's application is not so much the right of the Fire Service to change a rostering arrangement, but rather the right of the Fire Service to increase the hours that a Fire Safety Officer might be on call. The respondents say that it is a general principle of employment law that hours of work are not changed unilaterally. In response, the Fire Service reminds the Authority of the nature of a Fire Safety Officer's role and that responding to fire safety emergencies and other rostered on-call obligations is *part and parcel of the role*.

[24] I conclude that the effect of giving the plain meaning to the contractual provision may well be not sufficient to deal completely with the operational requirements of the parties. In essence, the clause as it is written contemplates that Fire Safety Officers may participate in an on-call roster and may be called out in the event of an emergency incident. The dispute is not at all concerned with the second part of the provision relating to call outs for emergency incidents. It seems to be accepted by the parties that the nature of the role of fire safety officer involves such call outs; it is the way in which the roster is organised that is in issue. It is clear that the collective employment agreement does not define this roster as it does for other operational firefighters whose rosters are set out in the agreement. Equally, it is clear that the preceding clauses in the agreement relating to hours of work are all predicated on changes being agreed between the parties.

[25] It seems to follow from the foregoing analysis that in the negotiation process, the parties dealt with the fire safety officer role differently from the operational firefighter role. As to the latter, the parties provided shift sequences in the agreement and required agreement to changes in hours of work. With respect to fire safety officers, they did neither of those things. The respondents say that that is an omission but I think it more likely that it was deliberate. I am driven to that conclusion by the evidence that there are a variety of different rosters being worked around the country by fire safety officers. That suggests a degree of engagement between the parties to resolve operational matters in a practical commonsense way. On the face of it, it would suggest that different roster arrangements apply in different fire regions to suit the different situations in those fire regions.

[26] The very nature of the role of fire safety officer requires some expectation of work attendances outside the norm and that seems to be reflected in the drafting of the wider clause 4.3. For instance, in clause 4.3.2, the following words are found:

> *It is recognised that the role of ... fire safety ... support officer must be responsive to the operational needs of the employer ...*

[27] But it is perhaps more useful to look at the structure of the clause as a whole in order to discern how best to apply it. Clause 4.3.1 simply provides that employees will normally work an 8 hour day, 5 days a week between 7am and 6pm from Monday to Friday inclusive.

[28] Then, clause 4.3.2 recognises that specialist roles, including that of a fire safety officer, must be responsive to the operational needs of the employer. This means that there is an acknowledgment in the document that fire safety officers must respond to the realities of their vocation. The fighting of fires and the determination of what causes fires is, by its very nature, not an ordinary business. It is reasonable for that to be reflected in the arrangements between the parties and I am satisfied those words that I have just referred to in clause 4.3.2 make that clear.

[29] However, clause 4.3.2 also contains a second sentence which reads as follows:

> *As such, the hours set out above* [that is the hours contemplating an 8 hour day 5 days a week between 7am and 6pm Monday to Friday] *may be varied by the employer with agreement of the existing employee on either a temporary or permanent basis, provided an overall average of 40 hours per week is maintained.*

[30] Clearly, this is one of the qualifications which the Fire Service refers to in drawing the distinction between the earlier clauses and clause 4.3.4 which is the one creating difficulty in the present dispute. But this proviso in clause 4.3.2 allows for agreement between the parties, provided the overall average of 40 hours per week is maintained.

[31] The next clause, 4.3.3, again provides for a variation in the span of hours provided the average remains 40 hours per week for the employees affected.

[32] Then finally we come to clause 4.3.4 which is specifically concerned with a departure from the previous regime in that it is providing for employees who from time to time may have to work more than 40 hours a week because of the nature of their roles. It then goes on to refer specifically to the rostering provision that is giving difficulty in the present case.

[33] I am satisfied that, looking at the clause in its totality as I have just done, entitles me to conclude that the plain meaning of the clause is indeed to give the Fire Service the right to determine what rostering arrangements will apply in respect of Fire Safety Officers. I reach this conclusion principally because the structure of the clause, when looked at and analysed in the way that I have suggested, seems so deliberate. The first three provisions relate specifically to work within the usual 40 hour week span and the provisions that can be made within that time period. The final clause (the one we are principally concerned with) deals with the requirement that the

roles of some employees may require work beyond 40 hours. It simply cannot be the position that the operational integrity of the employer is compromised in a safety-sensitive industry because the employer is unable to secure agreement about the provision of fire investigations.

[34] As I noted earlier, it seems to me that the Union's principal objection to the suggestion that the Fire Service can determine the roster arrangements failing agreement is around the Union's objection to an exponential growth in on-call work without remuneration. If that impression of the Union's position is correct, it is plainly not supported by a correct analysis of the clause in the agreement which quite specifically states that it is part of Fire Safety Officers' jobs that they work more than 40 hours per week from time to time as a consequence of their role and that that is not optional but a requirement.

[35] In my considered opinion then, clause 4.3.4 of the collective employment agreement between the Fire Service and the Union covering the work of Messrs Cahill and Morris, requires Fire Safety Officers to work more than 40 hours per week as part of their roles and that in their capacity as fire safety officers, they may be rostered on-call on a roster determined ultimately by the Fire Service and that they may be called out from time to time in an emergency situation.

[36] A good and fair employer would consult extensively in respect of changes to a roster such as this even where that change was effectively returning a roster cycle to a previous status quo: Section 4 of the Act applied. However, I do not think that the words of the clause require that the extensive consultation must end with an agreement. Quite clearly, on the facts before the Authority, there has been extensive consultation by the Fire Service on this matter, but in the end that consultation has not resulted in any agreement. I am satisfied that a proper construction of the relevant clause does not require agreement, but if agreement were required and if the rosters were not able to be organised in as flexible a way as plainly they are, then the parties would have determined the issues in the agreement as they have for operational firefighters. The fact that those arrangements have not been made in the collective employment agreement is, I am satisfied, a basis on which it is safe for me to conclude on the balance of probabilities that the Fire Service can implement rosters and change them in accordance with operational requirements.

Determination

[37] It follows from the foregoing discussion that I am satisfied that the Fire Service has the right to place Fire Safety Officers on an on-call roster and that the Fire Service can alter such a roster from time to time in accordance with the operational requirements of the Fire Service. I am satisfied that it is not necessary for me to consider the other arguments advanced by the parties in this matter as it is possible to give effect to the contractual provision without considering the other arguments.

[38] For the avoidance of doubt, and although not strictly a matter on which the Authority is asked to advance a view, I am satisfied that the Fire Service has an obligation under s.4 of the Employment Relations Act 2000 to consult with its affected employees in relation to any changes it proposes to make in the roster arrangements. That statutory obligation, of course, overlays the contractual provisions, if any. In the particular circumstances of this case, it seems to me axiomatic that the Fire Service has done everything it reasonably could to actively engage with the Union and the two affected staff members, including but not limited to a mediation conducted by the Mediation Service of the Department of Labour.

Costs

[39] Costs are reserved.

James Crichton
Member of the Employment Relations Authority