IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 488/10
5324954

BETWEEN	CORRECTIONS ASSOCIATION OF NEW ZEALAND Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Rachel Larmer
Representatives:	Jim Roberts and Jodi Clark, Counsel for Applicant Karen Spackman and David Traylor, Counsel for Respondent
Investigation Meeting:	15 November 2010 at Auckland
Submissions:	Applicant's submissions 15 November 2010 Respondent's submissions 15 November 2010 Respondent's supplementary submissions 16 November 2010
Determination:	18 November 2010

DETERMINATION OF THE AUTHORITY

A **The Chief Executive of the Department of Corrections (the Chief Executive) has breached the consultation terms in clauses 1 and 9 the Auckland Central Remand Prison and Mt Eden Prison Combined CEA Employment Agreement CANZ 2010-2011 (the CEA).**

B **The Chief Executive has breached the good faith provisions in section 4(4)(c) of the Employment Relations Act 2000 (the Act).**

C **The Chief Executive has not breached the clause 8 representation term in the CEA.**

D **The Authority makes the compliance orders set out in paragraph [153].**

Urgency

[1] This matter was initially filed on 3 November 2010 as an urgent application for a compliance order to prevent the implementation of a new roster which was due to come into effect on 15 November 2010. The matter was accorded urgency and was set down for an investigation meeting on 15 November 2010, which was the earliest date the Authority could offer. The substantive matter was scheduled for 11 and 12 January 2010.

[2] Corrections Association New Zealand (CANZ) amended its Statement of Problem and applied on 8 November 2010 for the interim investigation meeting to be vacated and for a substantive investigation meeting to be held on 15 November 2010 instead. That application was granted, and new timetabling orders issued to enable the substantive matter to be heard on 15 November 2010.

[3] The parties were directed to urgent mediation. The possibly of undertakings from the Chief Executive pending the outcome of the Authority's investigation were explored, without success. In the absence of undertakings, this matter has been progressed with the utmost urgency and I am grateful to counsel for their assistance in that regard.

[4] I heard from Beven Hanlon, President of Corrections Association New Zealand (CANZ), and Bart Birch, National Executive Member of CANZ and representative for Auckland Central Remand Prison (ACRO) and Mt Eden Prison (MEP). I also heard from Grace Smit, Assistant Regional Manager/Prison Manager MEP and ACRP, Neville Mark, Operations Support Manager for MEP and ACRP, and Zane Paine Acting Security Manager for MEP and ACRP.

[5] On 16 November 2010 I received (via counsel) a letter from Graham Cuffley, New Zealand Public Service (PSA) National Organiser for Department of Corrections including Prison Service.

[6] During 16 and 17 November 2010 I received numerous communications from both counsel. That is certainly not a criticism of counsel, but it does reflect the issues that can arise when a when a substantive matter is investigated within such a short timeframe.

[7] On 17 November 2010 I received an excel spreadsheet recording the names of all staff on the roster at MEP and ACRP, which identified in red those staff who CANZ said had signed a waiver, see paragraph [147]. The Chief Executive takes issue with the accuracy of this information. He believes that some of the employees identified as having signed the waiver have not actually done so. The Chief Executive submitted an annotated

excel spreadsheet which also highlighted particular concerns involving 30 staff. I recognise the information in the spread sheet is untested, so I have treated it with caution.

[8] Mr Roberts filed a memorandum on 17 November 2010 which included an undertaking from CANZ which I refer to in paragraph 149.

[9] The parties filed written submissions on the day of the investigation meeting. At the conclusion of the evidence the parties were given an opportunity to file supplementary submissions by 3pm 16 November 2010. The Chief Executive did so.

[10] CANZ did not seek leave to change this timetable but filed its supplementary submissions on 17 November 2010, without any explanation of the delay. Ms Spackman objected to the Authority considering these out of time and said that they referred to new matters that the Chief Executive had not had an opportunity to respond to.

[11] I decided to disallow CANZ's supplementary submissions on the basis that the Chief Executive was potentially prejudiced by having had less time to prepare his supplementary submissions and by what he said was the raising of new matters he had not had an opportunity to respond to. I confirm that I have not read CANZ's supplementary submissions.

[12] Mr Roberts filed a memorandum on 17 November 2010 which, among other things, explained the delay and asked me to review my decision. After considering his memorandum, I decided the parties were best served by having this determination issued as soon as possible rather than delaying that by taking additional time to address the various matters he had raised.

Employment relationship problem

[13] This claim involves the Respondent's decision to introduce a new roster pattern and other arrangements for staff at Mt Eden Prison (MEP) and Auckland Central Remand Prison (ACRP).

[14] Since ACRP opened ten years ago, corrections staff at its custodial units have been rostered to work 12 hour shift patterns. Under the new roster pattern these staff are to be rostered to work 8 hour shifts (the new roster). The new roster came into effect on 15 November 2010.

[15] CANZ alleges that the Chief Executive has;

i. Breached the consultation, good faith, and representation provisions in the CEA agreement;

ii. Breached the good faith provisions in relation to consultation particularly section 4(4)(c) of the Employment Relations Act 2000 (the Act).

iii. By not breaching good faith, intended to undermine the employment relationship between the CANZ and its members.

[16] CANZ seeks:

i. A declaration that the Chief Executive has breached the consultation terms of the CEA (clause 9) by deciding on and implementing a change without consulting with CANZ prior to making such a decision.

ii. A declaration that the Chief Executive has breached the representation terms of the CEA (clause 8) by failing to consult with CANZ and by the way he communicated directly with the CANZ's members.

iii. A declaration that the Chief Executive has breached his good faith obligations.

iv. A compliance order, requiring the Chief Executive to:

    i. Reverse the new roster which commenced on 15 November 2010 until such time as he has properly consulted with the CANZ; and

    ii. Properly consult with CANZ (in accordance with the CEA and Protocol), if he wishes to introduce the new roster as a permanent measure.

v. Full indemnity for its reasonable costs.

[17] The Chief Executive says that clause 2.4 of the CEA gives him the contractual right to change the roster pattern from 12 hour shifts to 8 hour shifts, with reasonable notice (usually not less than two weeks).

[18] The Chief Executive says he was not required to consult over the proposed roster change. He says clause 9 of the CEA only applies to situations involving *an organisational review*, and that the implementation of a new roster does not meet that

requirement. Notwithstanding that, the Chief Executive says he did consult with his employees and with CANZ prior to deciding to implement the new roster and that he received a number of submissions from employees, including from CANZ delegates, which were considered before he decided to implement the new roster.

[19] The Chief Executive says that CANZ is not entitled to any remedies, because there has been no breach of the CEA or of any statutory good faith obligations.

Issues

[20] The Authority is required to determine the following issues:

a. Was the Chief Executive required to consult with CANZ before changing from a 12 hour shift to an 8 hour shift roster?

b. If so, did he consult with CANZ?

c. Did the Chief Executive breach clause 8 of the CEA by not recognising CANZ as the representative of its members?

d. Did the Chief Executive breach his contractual or statutory good faith obligations, and if so, was that intended to undermine CANZ's relationship with its members?

e. If breaches are established, should compliance orders be issued?

Relevant facts

[21] CANZ represents corrections officers working in the various prisons and correctional facilities in New Zealand. It covers 95% of the correction officers affected by the new roster.

[22] MEP and ACRP are situated on adjoining sites but have been operated separately. Until the recent round of CEA negotiations, separate collective agreements applied to employees working at ACRP and MEP. The latest round of bargaining brought MEP and ACRP together to operate as one prison in anticipation of a substantial construction programme. There is also a proposal to return ACRP to contract management (i.e. privatisation) in early 2011.

[23] The current CEA is the first single collective agreement which covers employees at both ACRP and MEP.

[24] ACRP has been operated by the Chief Executive since 2005. Prior to the new roster being implemented, ACRP mainly used 12 hour shift patterns, although some employees did work 8 hour shifts. It is the only one of the Chief Executive's prisons that uses 12 hour shifts, and 8 hour shift patterns operate for corrections officers in all other prisons, including MEP.

[25] On 14 September 2010, during a meeting between management and CANZ at ACRP to discuss the new CEA Grace Smit, Assistant Regional Manager and Prison Manager for ACRP and MEP, stated that the Chief Executive was considering a change to a single 8 hour roster regime. Bevan Hanlon, President of CANZ, says he told Ms Smit that would require consultation and that CANZ would need specific information (which he listed) as part of that. When giving evidence, Ms Smit and Zane Paine Acting Security Manager MEP and ACRP agreed that some specific information was requested, but they varied in their recall of the details of that.

[26] The Chief Executive commenced consultation on a proposed new single 8 hour roster for MEP and ACRP on 8 October 2010. The consultation period ran from 8-18 October 2010. The Chief Executive made his decision to move the two prisons to a single 8 hour roster on 25 October 2010 and the new roster was implemented on 15 November 2010.

[27] Under the new roster employees working at ACRP who were working on 12 hour shifts now work 8 hour shifts. This involves a reduction in total working hours from approximately 2184 to 2080 per year. The reduction in annual working hours in turn reduces the corrections officers' annual remuneration.

Was consultation with CANZ required?

CEA

[28] The CEA allows the Chief Executive to make decisions in relation to the operations of the prisons and services, so long as they are not inconsistent with the provisions of the CEA. Material clauses are as follows:

> ***1.1 Scope***
>
> *Management has the right to plan, manage, organise and finally decide on the operations and policies of the Prison Services (PS) of the Chief Executive of Corrections (the Chief Executive), subject to the provisions of this agreement. However, PS is committed to effective consultation with CANZ and its members and accepts its responsibility to deal with*

them in good faith in accordance with the Employment Relations Act 2000 and subsequent amendments.

1.4 Working Together

PS aims to have effective communication, so that discussions on matters relating to terms of employment can be initiated by staff or the appropriate manager. […]

2.4 Hours of Work

[…]

Corrections officers, including SCOs [Senior Corrections Officers] *and PCOs* [Principal Corrections Officers]*, may be employed on an 8 hour or 12 hour shift basis and with reasonable notice, usually not less than two weeks, may be required to change between one shift pattern and the other.*

Corrections officers, including SCOs and PCOs, may be employed on an 8 hour or 12 hour shift basis and, with reasonable notice, usually not less than two weeks, may be required to change between one shift pattern and the other.

Corrections officers, including SCOs and PCOs, employed on an 8 hour shift basis, shall work standard hours of 80 per fortnight (approximately 2,080 annual hours), 8 per day on any ten days of the fortnight in accordance with a roster published not less than ten days in advance. […]

Corrections officers, including SCOs and PCOs employed on a 12 hour shift basis, shall work standard hours of 84 per fortnight (approximately 2,184 annual hours), 12 per day on any seven days of the fortnight in accordance with a roster published not less than three weeks in advance. […]

In either case, the published roster may be varied by agreement between an individual staff member and their manager. […]

8.0 Representation

PS recognises CANZ as the representative of staff who have authorised CANZ to represent them. […]

9.0 Consultation

The process of change is continuous and should form part of the organisation's continuous improvement. Consultation is an essential part of that process.

PS will notify the secretary of CANZ once it has decided to undertake an organisational review, initiated by PS, which is likely to result in significant changes in the organisational structure, staffing or work practices affecting staff. Where a decision to make a change or undertake a review is beyond the control of the Chief Executive, this

notification will be made as soon as possible after the decision is announced.

PS will provide CANZ and staff with an opportunity to be involved and consulted during such reviews and take any views into account before decisions are finalised.

Protocol

[29] The parties have also entered into a Protocol for Consultation (Protocol) which was signed by the parties in May 2004. Material parts of the Protocol include:

Introduction

1 The process of change is continuous and should form part of the organisation's continuous improvement. Genuine consultation enables the exchange of information in ways that lead to better management decisions being made. CANZ has an important role to play in the continuous improvement of the PPS operation through the consultation process.

2 The consultation process ensures that reasons for change are understood and communicated effectively, and staff and their representatives are provided with the opportunity to contribute to the change process so that their views are taken into account before decisions are finalised. […]

Definition of Consultation

3 Consultation involves sustainment of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

Guiding Principles for Consultation

4 […]

- *Whilst the parties are entitled to have a working plan already in mind, they must keep their minds open and ready to change, or even start afresh.* […]

- *Serious consideration is given to all views expressed throughout the process.* […]

Consultation Process

4 (sic) *CANZ & PPS agree that:*

- *The party initiating the consultation will provide:*
  - *A clear outline of the proposed change[s];*
  - *The other party with sufficient time to give the proposal the consideration its size and scale requires.*

- *The parties will promptly advise whether they will be responding* [to a proposal] *or not;* […]

- *If a party is of the opinion that timelines provided for a specific phase of the consultation process are insufficient, they will advise the other party as soon as possible;* […]

- *For simple or small change proposal issues, all the consultation phases may be completed in a single meeting or exchange of views, while complex proposals may require a series of meetings;* […]

- *Should either party be of the opinion that a meeting would be required at any stage of the consultation process, the parties will endeavour to ensure that the requirement is met and the meeting occurs in a timely way;* […]

- *The party initiating consultation will advise the other of the final decision and its response to the issues raised by that party.*

[30] The Chief Executive says that the formal, national consultation as envisaged by clause 9 of the CEA is not necessary before he exercises his contractual ability to change shift patterns, as he is empowered to do under clause 2.4.

[31] He says clause 9 is restricted to situations when an *organisational review* is being undertaken which will result in *significant changes* to the *organisational structure, staffing or work practices affecting staff.* The Chief Executive says implementation of the new roster was not a significant change because 8 hour shifts have been used at all other 19 prisons around the country for many years, including at MEP, so it does not introduce a new untested shift.

[32] I do not accept that. I endorse the view of the Authority in *The Corrections Association of New Zealand v. Chief Executive of the Chief Executive of Corrections*, 20 June 2010, AA303/10 which held (when considering exactly the same consultation obligations in a previous collective agreement these parties were party to) that:

> *Given the emphasis the parties have placed on consultation in their CEA employment agreement a significant change is properly characterised as a change which is not minor. Changing longstanding roster patterns, notwithstanding the broadly drawn hours of work clause, in a working environment as complex as the prison service, meets a significant change standard.*

[33] Ms Smit's email to all staff entitled *Roster – Consultation* reflects the fact that the proposed changes effectively involved a review of operational matters. It stated:

> *... It is an opportune time for us to review how we operate our site and how we best make use of the staffing resource we have. To this end the*

> *management team have devised a new single roster to cover both sites which is now being sent to you all for consultation.* […]
>
> (emphasis added)

[34] I agree with Mr Hanlon that there is a fundamental distinction between changing staff between existing shift patterns and creating an entirely new shift pattern. The new roster involves a whole new working arrangement.

Statutory good faith consultation obligations

[35] In addition to the contractual obligation to consult, consultation is also required by the good faith provisions of the Act. Of relevance is s4(1A)(a) and (b) which provides that the duty of good faith is wider than the mutual obligations of trust and confidence and that parties to an employment relationship must be *active and constructive* in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, *responsive and communicative*.

[36] I consider these good faith obligations would require the Chief Executive to consult about changes that potentially affect employees' remuneration, as the new roster proposal did.

[37] Section 4(4) also clearly applies. It states:

> *The duty of good faith in subsection (1) applies to the following matters* […]
>
> *(b)* *Any matter arising under or in relation to a CEA agreement while the agreement is in force* […];
>
> *(a)* *Consultation (whether or not under a CEA agreement) between an employer and employees, including any union representing the employees, about the employees' CEA employment interests, including the effect on employees of changes to the employer's business;*
>
> *(b)* *A proposal by an employer that might impact on the employer's employees* […].

Chief Executive's recognition of consultation obligation

[38] The email that Ms Smit sent to all staff attaching the new roster specifically recognised the obligation to consult. It stated:

> *To this end the management team has devised a new single roster to cover both sites which has now been sent to you all for consultation.*

[39] She also sent a letter on 8 October 2010 to Barry Noakes, former National Secretary of CANZ, which stated that she was formally notifying him of a new roster which was being consulted on so that CANZ had an opportunity to give feedback on it. This letter is consistent with the obligation in clause 9 in the CEA to advise the CANZ Secretary of an organisational review which is likely to result in significant change to staffing or work practices.

Relevant case law on consultation obligations

[40] In *OCS v Service & Food Workers' Union* [2006] ERNZ 762, the Employment Court considered whether the employer was required to consult over the introduction of a finger scanning time recording system. Although there was no specific reference to consultation in the applicable collective agreement, it did recognise the desirability of consultation between the employer and union.

[41] The Court held:

> *I find that this provision, together with the statutory obligations to act in good faith, including the necessity for both sides to be responsive and communicative, creates an obligation on OCS to precede any changes of workplace practices with consultation.*

[42] If an employer has chosen to consult, even if it was not bound contractually to do so, then it must observe the good faith requirements which relate to consultation and the tabling of a proposal which may impact on the employer's employees: *Coutts Cars v Baguley* [2001] ERNZ 660. The Court of Appeal referred to a passage in the Employment Court decision on that case and stated:

> *In that passage the Court appears to be saying that Coutts, as employer was not bound to consult. But, having chosen to do so, it had to exercise good faith. I agree entirely that if a consultation process is embarked on, it must be carried out in good faith.*

[43] I consider that Ms Smit's communications on 8 October 2010 did embark on a consultation process, so the Chief Executive was then required to consult in good faith, whether he believed he was contractually required to or not.

Finding

[44] The starting point is the plain words used in the CEA, which expressly emphasises the need for *effective consultation*. The proposal of a new roster shift pattern did involve an organisational review which resulted in significant changes to staffing and work practices.

[45] Staff who had previously only worked at either MEP or ACRP were now required to work at both prisons. Under the new roster staff could find themselves working at an entirely new prison where they had never worked before, on new shift patterns they had never worked before, with the associated changes (including reduced remuneration) which flowed on from that.

[46] The duty of consultation is not inconsistent with the Chief Executive's right to organise and run the prison service but is a natural corollary of the statutory duty of the parties to deal with each other in good faith: *Coutts Cars* para 57.

[47] The Protocol also commits the parties to a consultation process prior to changes being made. It specifically recognised that genuine consultation involves an exchange of information that leads to better decisions being made.

[48] I find that the Chief Executive was required to consult with the CANZ over the new roster before he exercised his contractual right in clause 2.4 to change from a 12 hour shift to an 8 hour shift pattern.

Did the Chief Executive consult with CANZ?

[49] Clause 1.1 commits the Chief Executive to *effective consultation with CANZ and its members*. Clause 1.4 records that *PS aims to have effective communication*. The introduction to the Protocol states that the purpose of the consultation process is to *ensure the reasons for change are understood and communicated effectively*.

[50] I therefore need to determine whether there was consultation, and if so, whether it was effective.

[51] The Chief Executive says consultation consisted of:

i. Meeting with CANZ delegates on 8 October 2010 to discuss the proposed new roster before it was sent to staff;

ii. Emailing staff at MEP & ACRP the proposed new roster and a list of questions and answers about the changes which had been suggested by Mr Birch (Q&A) for their feedback;

iii. Emailing proposed new roster, Q&A, and letter to Mr Noakes to give CANZ an opportunity to make submissions on the proposed new roster change;

iv. Discussions with delegates at the regular Area 2 management meeting with CANZ on 15 October 2010;

v. Grace Smit walking around both prisons talking to employees about the proposed new roster;

vi. Grace Smit attending two morning briefs for MEP & ACRP;

vii. Receiving substantial *amount* of feedback between 8–18 October 2010 from employees, some of whom were self identified as being CANZ delegates;

viii. Discussions between Zane Paine and Mr Birch;

ix. Mr Paine's consideration of the feedback received from staff.

[52] The details of these nine instances of purported consultation, and the reasons for my finding that they were inadequate are as follows:

(i) 8 October 2010 meeting with delegates

[53] In response to my question, Ms Smit accepted that her *heads up* to CANZ delegates on 8 October 2010 immediately before she sent the proposed new roster out to staff was not consultation. That was an appropriate concession to make.

[54] Mr Birch was not invited to the meeting and he only found out about it because he had reported to work early that day. Ms Smit said she did not invite Mr Birch because she had set the meeting for 12.30pm and knew he did not start work until 1pm. She accepted there was no reason for her not to have started the meeting at 1pm to accommodate Mr Birch's attendance.

[55] Mr Hanlon and Mr Birch say the delegates did not know what the meeting was about. Mr Paine disputes that, however his evidence on this point was not reliable. He said he personally invited the delegates and told them what the meeting was about. Mr Zaine described seeing Uaea Leavasa Deputy Chair of ACRP at work that day, who he said had confirmed their attendance. Mr Leavasa did not attend the meeting. Mr Zaine was demonstratively mistaken about his interactions with Mr Leavasa because payroll records confirm that Mr Leavasa was on annual leave that day and the roster shows he was on annual leave for that week.

[56] This meeting was the commencement of the consultation process. I accept the delegates made some initial comments about the proposal, including Mr Birch suggesting the inclusion of Q&A. However, the delegates had not been given all relevant information or an opportunity to properly consider it, so their initial comments should not have been taken to be CANZ's formal feedback on the proposal.

(ii) Email to staff attaching proposed new roster and Q&A

[57] Ms Smit's email to staff attaching the proposed new rosters and Q&A started the consultation process, but was not consultation. Nor did this amount to consultation with CANZ, notwithstanding that some of the staff who received the email were CANZ delegates.

(iii) Email to CANZ National Secretary attaching proposed new roster and Q&A

[58] Ms Smit's email to Mr Noakes was consistent with the Chief Executive's obligation in clause 9 of the CEA to notify the Secretary of CANZ once it has decided to undertake an organisational review. It commenced the consultation process, but was notification only, which does not in itself amount to consultation: *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429; *Cammish v Parliamentary Service* [1997] ERNZ 641 (CA); *NZEPMU v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597; *Association of Salaried Medical Specialists v Otago DHB* [2006] ERNZ 492.

(iv) 15 October 2010 meeting with delegates

[59] This was one of the regular weekly management and joint union operational meetings. I accept Mr Hanlon's evidence that it was not a consultation meeting. The agenda did not include discussion of the proposed new roster, and Mr Birch was not present. No Branch Chairperson, Deputy Chairperson, Secretary or delegates from ACRP were present, despite ACRP being the prison where most of the affected staff work. Steve Bradley, CANZ National Organiser, was present but he was there to report on an entirely different matter, which is reflected in the minutes.

[60] No information was exchanged prior to this meeting. The agenda circulated before the meeting did not identify that the proposed new roster would be discussed or that it was going to be a consultation meeting. No attempt was made by the Chief Executive to ensure that the CANZ personnel who had authority to represent their members in respect of a proposed roster change were present or even aware that a consultation meeting was to occur.

[61] The portion of the minutes which deal with this issue are so brief that I set them out in their entirety.

> *Grace is very appreciative of the very good, positive feedback and sensible suggestions which have been received as part of the consultative process. Please encourage membership to make submissions. No information received from Bevan to date.*

[62] I find the proposed roster change was mentioned in passing and that this meeting did not amount to consultation. There was no exchange of ideas or information or genuine engagement on any of the issues that the proposed new roster had raised from CANZ's perspective.

(v) Grace Smit's prison walkabouts

[63] The communications Ms Smit had with staff during her walks around the prison does not amount to consultation with CANZ, notwithstanding that some of the staff she spoke to may have been CANZ members or delegates.

[64] Section 4(4)(c) of the Act requires consultation with any union about their members' collective employment interests, which by implication recognises that these collective interests may be different from employees' individual interests. Ms Smit's consultation with individuals does not discharge the Chief Executive's obligation to consult with CANZ; *OCS v SFWU* [2006] ERNZ 762, para 69.

[65] I accept the evidence of Mr Birch and Mr Hanlon about the importance of consultation occurring through CANZ because of a perception among some members that expressing views contrary to management's views might impact on their future employment prospects when the two prisons are put under contract management and staff have to reapply for their jobs.

[66] There was no record kept of the discussions Ms Smit had, and no feedback was provided to CANZ about the types of issues raised with Ms Smit. Accordingly, CANZ had no ability to influence or have any input into these informal and ad hoc discussions.

(vi) Grace Smit's attendance at a morning brief for MEP & ACRP

[67] Ms Smit attended one morning brief for MEP and one for ACRP. These meetings are the normal briefing meeting where any operational issues that staff need to be aware of are raised. No advance notification was given of Ms Smit's attendance, or the fact that she was intending to treat her presence as an opportunity for consultation.

[68] No information was provided before or after these meetings. Staff were not given the opportunity of having representation present. Although Ms Smit may have communicated some information to staff, she did not pass that on to CANZ. These meetings did not amount to consultation with CANZ.

(vii) Receipt of feedback

[69] I do not accept the Chief Executive's submission that because some of the feedback it received from employees during the period 8-18 October 2010 included feedback from staff who identified themselves as CANZ delegates, this amounted to consultation with CANZ. The fact an individual is a CANZ delegate does not automatically mean they are representing the memberships' collective interests when they responded to Ms Smit's email to all staff on 8 October 2010.

[70] Ms Smit accepted that usual practice in consultation situations was for CANZ National Office to decide who it would allocate to the issue and then it would advise who the Chief Executive should be communicating with. That did not occur because Mr Hanlon did not react to Ms Smit's email as quickly as he should have. There was nothing to stop Ms Smit moving the process forward by asking Mr Hanlon or Mr Birch to confirm who from CANZ she should be dealing with.

[71] Ms Smit was aware that Mr Noakes had resigned from his position as National Secretary with effect from 11 October 2010, and that he had forwarded her email of 8 October 2010 on to CANZ's four National Officers. Ms Smit was also aware that Mr Hanlon was President of CANZ and that he had responsibility for Northern Region, which included MEP & ACRP. She had recent dealings with him as they were both on their respective bargaining teams for the CEA. Ms Smit had also mentioned a possible roster change to Mr Hanlon on 14 September 2010 and he had told her consultation was required, and he had indicated the type of information CANZ would need if she wanted to pursue a roster change.

[72] It should have been obvious to Ms Smit that CANZ would want to consult over the proposed roster change and that Mr Hanlon would probably be the person responsible for that. She should not have automatically assumed that any CANZ delegate she spoke to or received feedback from was representing CANZ's members' collective feedback, particularly when she was actively engaging with individual staff about the proposed new roster.

(viii) Discussions between Zane Paine and Bart Birch

[73] Mr Paine is Mr Birch's manager. Whilst there were discussions between Mr Paine and Mr Birch, these were informal chats rather than consultation meetings with CANZ.

[74] Mr Birch had not been authorised by CANZ to deal with the matter and the Chief Executive had not been notified that he was the CANZ contact for the purposes of consultation. In any event, the discussions between Mr Paine and Mr Birch were very casual. They were not scheduled and occurred whilst Mr Birch was simultaneously working and as Mr Paine was passing through the Single Point of Entry post where Mr Birch was stationed. Such discussions did not occur within the content of a meeting which had been recognised by both parties as being for the purposes of consultation.

(ix) Consideration of the feedback received from staff

[75] Whilst Mr Zaine considered the feedback he had received, he accepts that he did not respond to the issues raised by staff who had identified themselves as CANZ delegates. Ms Smit also accepts that she did not respond to health and safety concerns that had been raised by Mr Birch via email on 11 October 2010 and by via email by Surjeet Singh on 10 October 2010. Allan Peters' email of 11 October 2010 to Ms Smit recorded that there were areas staff had reservations about, which he thought could be overcome with consultation. However, Ms Smit did not respond to that or embark on the consultation Mr Peters proposed was necessary to address staff reservations.

[76] I do not accept that the Chief Executive properly considered feedback that had been provided by staff who had identified themselves as delegates.

[77] No feedback was provided by CANZ within the period which had been unilaterally set by Ms Smit. The Chief Executive was therefore deprived of the *exchange of information* that the Protocol identifies *will lead to better management decisions being made*. Reviewing feedback from individual staff did not amount to consultation with CANZ.

Inadequacy of consultation

[78] The evidence established that any consultation which may have occurred with CANZ was clearly inadequate.

Key matters not addressed

[79] Mr Hanlon's evidence highlighted the following issues which he says should have been, but were not, consulted over. These are not irrelevant or trivial matters and all of the Chief Executive's witnesses agreed these were legitimate issues to have discussed during consultation;

i. Increase in workload – staff being required to fulfil the same duties and meet the same workload demands but in a shorter time period (8 hours instead of 12 hours);

ii. Change in prison operation – change in unlock hours and visiting hours;

iii. Increased risk to safety – increased lock-up hours creating heightened tension. Under the previous 12 hour rosters, prisoners were unlocked for up to 10 hours a day whilst now they are unlocked for a maximum of six hours;

iv. No induction or training – new roster staff are rostered onto roles they have not worked in before and for which they had not been trained. This was a concern because of the serious health and safety risks which are inherent in a highly dangerous and volatile working environment;

v. The AVL role was entirely new;

vi. The new roster allowed any MEP staff to work at ACRP and vice versa but there was no indication that appropriate induction or training had occurred;

vii. Personal consequences – staff will have fewer days off on an 8-5 roster than they would on a 12 hour roster. There was also a concern that staff would be required to travel to work on additional days and at different times, including during rush hour;

viii. Because staff were working less hours, their wages would decrease.

Other deficiencies

[80] The Chief Executive has also failed to comply with:

i. Recognised principles of consultation;

ii. The consultation requirements in the CEA agreement;

iii. Its contractual and statutory good faith obligations;

iv. Consultation requirements set out in the Protocol.

Breach of recognised principles of consultation

[81] The views of the Court of Appeal in *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671 (CA) on consultation were adopted by the *Employment Court in Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429 in a number of propositions relating to the duty of consultation:

> *(1) The word "consultation" does not require that there be agreement.*
>
> *(2) On the other hand it clearly requires more than mere prior notification.*
>
> *(3) If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views".*
>
> *(4) This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
>
> *(5) The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties.*
>
> *(6) Consultation must be allowed sufficient time.*
>
> *(7) Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade.*
>
> *(8) Consultation does not necessarily involve negotiation towards and agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus.*

> *(9) Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.*
>
> *(10) The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh.*
>
> *(11) There are no universal requirements as to form or as to duration of consultation.* (emphasis added)

[82] The underlined text indicates principles that I consider the Chief Executive has not complied with.

[83] Consultation involves imparting and receiving information when that can still realistically influence outcomes: *Auckland City Council v NZPSA Inc* [2003] 2 ERNZ 386 (CA). The Employment Court has recognised that effective consultation consists of more than mere notification, and includes the requirement for parties to know what is proposed before they are expected to give their views as well as the need for there to be a reasonable opportunity to respond: *Toll NZ Consolidated Ltd v Rail & Maritime Union Inc* [2004] 1 ERNZ 392.

[84] What is required by way of consultation depends on the circumstances, which include the context of the particular business operations. Consultation required the Chief Executive to properly advise CANZ of what he was proposing to do and why and to explain what effect the proposal was likely to have on staff. He should have provided CANZ with all relevant information and a reasonable opportunity to review that information, engage with its members, and then prepare a response. The Chief Executive should have engaged with CANZ which would have included responding to any concerns that had been raised.

Proposal unclear

[85] The Chief Executive's actions fell short of what was required. In particular;

i. He merely notified CANZ of the proposed roster change.

ii. He did not provide CANZ with any information apart from the proposed new roster and Q & A.

iii. He did not explain the rationale behind the proposed change.

iv. He did not provide the information that Mr Hanlon had told Ms Smit on 14 September 2010 CANZ would need to review before rosters were changed.

v. He did not provide any information on risk management or health and safety issues that could arise from the proposed changes.

vi. He did not advise the union that unlock hours would be reduced, which in turn would affect visiting hours.

vii. He did not explain what workload changes would be required.

viii. He did not identify how the proposal, if adopted, would impact on staff.

[86] Apart from stating that the roster involved 8 hour instead of 12 hour shifts, he did not identify what changes were proposed from the existing roster arrangements. This left the union to work through the proposed new roster line by line to try to identify what changes had been made. It also left CANZ without any information on the implications, impacts, risks or consequences of the proposed new roster. This was a significant failing which compromised CANZ's ability to meaningfully respond with the tight timeframe that had been set.

[87] The failure to identify what impact the proposed changes were likely to have on staff meant that CANZ was unable to provide members with any information. The Chief Executive should have provided information about new or additional training, induction processes, new duties, changes to reporting lines, changes to remuneration, annual leave, alternative holiday entitlements, work location issues, start and finish times, number of maximum continuous rostered days, and days off.

[88] Other changes that did not just involve a move from 12 to 8 hour shifts, and which should have been communicated to CANZ but were not, included:

i. The Special Needs Unit at ACRP & the At Risk Unit at MEP was consolidated into one unit;

ii. A new Audio Visual Link responsibility was introduced;

iii. A person was dropped from the Single Point of Entry (4 reduced to 3);

iv. The SCOs allocated to ACRP units was reduced from the current 4 to 3 SCOs across two units;

v. A new Security Unit was created.

[89] None of these changes were drawn to CANZ's attention. Ms Spackman said they should have been obvious to those familiar with the particular work environment. I do not accept that. It is up to the Chief Executive to properly explain his proposal in sufficient detail that CANZ understood what was proposed. It was evident, from the many unanswered questions Mr Hanlon raised in his evidence, that did not occur.

Failure to provide relevant information

[90] Ms Spackman suggested that because CANZ did not ask for additional information until after the consultation period had closed it had the information it needed to respond. She referred me to Mr Zaine's evidence that when the delegates were asked in the meeting on 8 October 2010 whether there was anything they might require, their response was "no".

[91] I do not agree that was reliable evidence from which to infer that CANZ had all the information it needed. The delegates had just been presented with the proposed new roster and had not had time to properly consider it or to turn their mind to what additional information may be required. It was unwise for the Chief Executive to rely on those comments to support a belief that all relevant information had been provided.

No reasonable opportunity to respond

[92] CANZ was not given a reasonable opportunity to consider the proposal. Ms Smit unilaterally set a consultation period for 8-18 October 2010 because that suited her diary. This ten day period included four weekend days, which left only six working days for CANZ to respond. Given the extent of the changes, this was an unrealistic and unfair timetable, notwithstanding the parties work in a 24/7 operating environment.

[93] The Chief Executive says that CANZ could have sought an extension of time during that period. It did so, one day late, and its request was declined.

Breach of CEA consultation terms

[94] The parties agreed to specific consultation obligations which were recorded in the CEA and Protocol. Although under clause 1.1 the Chief Executive has the right to plan,

manage, organise and finally decide on operations and policies, that right is subject to the provisions of the CEA.

[95] This means that whilst the Chief Executive was entitled to change the roster under clause 2.4 of the CEA that was subject to him engaging in a fair and reasonable consultation process, which was carried out in good faith.

[96] Clauses 1.1 and 1.4 of the CEA have been breached because there was no effective consultation with CANZ. Clause 9 was breached because CANZ was not given a fair or reasonable opportunity to be involved and consulted with about the proposed roster change.

Breach of contractual and statutory good faith obligations

[97] The good faith obligations in the Act apply to all dealings between the parties and in particular to consultation. Section 4 of the Act is one of the key provisions. Clause 1.1 of the CEA makes the statutory good faith obligations contractual, which means the parties wanted to emphasise these good faith requirements.

[98] On 11 October 2010 Mr Birch sent an email to Ms Smit asking for a meeting. His evidence was that was for a meeting with members so that CANZ could discuss what information it should request from the Chief Executive. This purpose was not clear from his email which merely stated *would it be possible to organise a meeting in the visits hall at the most earliest convenience?*

[99] Ms Smit incorrectly interpreted this as a request that she address CANZ's members and declined the request.

[100] If Ms Smit had been active and constructive and responsive and communicative in her dealings with CANZ then this sort of misunderstanding should not have occurred. A simple discussion would have identified the miscommunication. However, CANZ can also be subject to the same criticism. Mr Birch was concerned by the response, so forwarded it to Mr Hanlon to address. Mr Hanlon did not progress that issue until the day after the consultation period had closed. Had the parties been talking to each other, which would have been sensible with a proposal of this nature, this sort of confusion could have been avoided. Both parties are equally to blame for this misunderstanding.

[101] Ms Smit's response to Mr Hanlon's email of 19 October 2010 requesting information and an extension of the consultation period was unsatisfactory. Her deadline for consultation was 18 October 2010, whilst Mr Hanlon emailed his request for

information to her at 10.30am on 19 October 2010. He explained that he had been sick, hence the late response. Ms Smit did not respond until the evening of 25 October 2010 and when she did it was to advise him that the Chief Executive was proceeding with the new roster, which would be posted that week.

[102] If Ms Smit had investigated the delay, she would have established that Mr Hanlon was on certified sick leave from 11 to 25 October 2010. Despite this he had pre-existing commitments that he was still attending to over this period, which included a two day Employment Court hearing which occupied him on 11, 13 and 14 October 2010 and a criminal investigation which required attendance on his lawyer in Hawkes Bay on 18 October 2010. Added to his personal availability issues, Mr Noakes had resigned with effect from 11 October 2010, and had not yet been replaced.

[103] It would have been reasonable for Ms Smit to have shown some understanding of Mr Hanlon's situation, and to have extended the consultation period, although I note my view that Mr Hanlon's request for a further 8 weeks of consultation was unreasonable.

[104] I find Ms Smit's actions were a breach of s4(1A)(b). She effectively shut CANZ out of consultation and made a final decision without the benefit of its feedback. Her justification for not extending the consultation process was that she had allocated ten days for consultation because that suited her work commitments. This was not a constructive response. There was no good reason for not extending her arbitrary deadline.

[105] If Ms Smit was being responsive and communicative she should had spoken to Mr Hanlon during the week of 19 October 2010 with a view to agreeing a way forward which involved providing the requested information and giving CANZ a longer opportunity to provide its feedback.

[106] I also find that the Chief Executive has breached s4(4)(c) of the Act because he did not properly consult with CANZ as he was required to do, because the proposed roster change clearly impacted on employees' collective interests.

Breach of consultation requirements in the Protocol

[107] The Protocol was entered into by the parties in May 2004. The Protocol was negotiated on behalf of CANZ's members and agreed to. It was signed and dated by both parties.

[108] I do not accept Ms Spackman's submission that it is not contractual. I consider it forms part of each member's individual terms and it sets out the consultation obligations

that the parties agreed would apply. These obligations are in addition to the contractual and statutory consultation obligations.

[109] Ms Smit said she had not seen the Protocol before I started asking her questions about it during the investigation meeting.

[110] The material parts of the Protocol include:

> ***Introduction***
>
> 1. *The Process of change is continuous and should form part of the organisation's continuous improvement. Genuine consultation enables the exchange of information in ways that lead to better management decisions being made. CANZ has an important role to play in the continuous improvement of the PPS operation through the consultation process.*
>
> 2. *The consultation process ensures that reasons for change are understood and communicated effectively, and staff and their representatives are provided with the opportunity to contribute to the change process so that their views are taken into account before decisions are finalised.*
>
> (emphasis added)
>
> ***Definition of consultation***
>
> 3. *Consultation involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.*

[111] The guiding principles for consultation under the Protocol contain agreement between the parties that, among other things:

> - *Whilst the parties are entitled to have a working plan already in mind, they must keep their minds open and ready to change, or even start afresh;*
> - *A free and frank exchange of views is encouraged;*
> - *Serious consideration is given to all views expressed throughout the process.*

[112] The Protocol also records agreement that the party initiating the consultation will provide:

> - *A clear outline of the proposed change[s]; and*
> - *The other party with sufficient time to give the proposal the consideration its size and scale requires.*
>
> (emphasis added)

[113] The Chief Executive breached the Protocol.

[114] There was not an adequate exchange of information contrary to clause 1 of the Protocol. The reasons for the change were not communicated effectively; the lack of proper consultation meant the reasons for change were not properly understood; and CANZ did not have a proper opportunity to contribute its views which was contrary to clause 2 of the Protocol.

[115] The Chief Executive did not provide a clear outline of the proposed changes and he did not give CANZ sufficient time to consider his proposal, contrary to clause 4 of the Protocol.

Did the Chief Executive breach clause 8 of the CEA by failing to recognise CANZ's representation of its members?

[116] Clause 8.0 of the CEA requires the Chief Executive to recognise CANZ as the representative of its members.

[117] CANZ has taken issue with the Chief Executive approaching staff directly. The CEA did not prevent Ms Smit from speaking directly to staff. Consultation is defined in the CEA as the Chief Executive providing *CANZ and staff* with the opportunity to be involved and consulted.

[118] Ms Smit was entitled to have direct discussions with employees during the consultation process provided that did not undermine CANZ's relationship with its members.

[119] Mr Hanlon correctly stated the position in his email to Ms Smit on 19 October 2010 which said that individual engagement with staff should not be considered consultation with CANZ. He stated:

> *Our CANZ members, as your staff are free to give you feedback if you choose to engage with them in this way. But in the past there has been confusion that this constitutes consultation in regard to CANZ. For the record it does not.*

[120] The Chief Executive has not breached clause 8.0 of the CEA because he has not failed to recognise CANZ as the representative of its members.

[121] I accept that CANZ's ability to represent its members was curtailed by Ms Smit's refusal to extend the consultation period but I am not prepared to conclude that was a

breach of clause 8 of the CEA or, as Mr Roberts submitted I should, of s18(1) of the Act. I have already found that it was a breach of s4(4)(c) of the Act.

[122] Whilst Ms Smit's decision not to extend consultation was unreasonable, to some extent CANZ contributed to that. It did not respond during the specified consultation period. It did not seek an extension of time. It did not tell Ms Smit it was experiencing resourcing difficulties or that Mr Hanlon was on sick leave, or that these factors were compromising its ability to respond by the set deadline. It did not advise Ms Smit who at CANZ had responsibility for the consultation process. It also suggested that it needed a further 8 weeks for consultation to occur, which appears to have alarmed Ms Smit and caused her to view the request for an extension as merely a delaying tactic.

[123] The evidence established that the Chief Executive had every intention of recognising CANZ's authority to represent its members if CANZ had engaged with it during the specified consultation period. CANZ delegates were shown the proposed new roster before it was sent out for consultation. Ms Smit's email of 8 October 2010 stated staff were free to feedback their responses through CANZ. The minutes of the 15 October 2010 meeting records that no information had been received from Mr Hanlon, which implies Ms Smit was expecting to hear from him. She is also recorded as encouraging the CANZ delegates to get their members to make submissions.

Did the Chief Executive breach its good faith obligations and, if so, did it intend to undermine CANZ's employment relationship with its members?

[124] The Chief Executive breached section 4(4)(c) of the Act, see paragraph [106].

[125] Mr Roberts urged me to find that the Chief Executive's breach of good faith was intended to undermine the CEA agreement (s4A(b)(ii)) and/or the employment relationship between the CANZ and its members (s4A(b)(iii)).

[126] These sections set out the criteria that must be met before a penalty for breach of the good faith obligations contained in s4(1) of the Act may be imposed. CANZ is not seeking a penalty; rather Mr Roberts suggested that I have regard to the requirements of s4A when assessing the seriousness of the Chief Executive's breach of good faith.

[127] In *Waikato DHB v NZPSA* [2008] ERNZ 80, para 36 the Court referred to *the very high threshold of egregious bad faith required under s4A of the Act before a penalty can be imposed for a* breach *of good faith*. Applying this same high standard, there is not sufficient evidence to support a finding that the consultation deficiencies and breaches of

good faith requirements occurred because the Chief Executive intended to undermine CANZ's employment relationship with its members.

Should compliance orders be made?

[128] I have found that the Chief Executive has not complied with the CEA agreement and Part 1 of the Act, so I have jurisdiction under s137(a)(i) and s137(a)(ii) respectively to order compliance. I may also exercise my discretion under s137(2) to make orders for the purpose of preventing further non-observance or non compliance with the CEA or the key good faith provisions in Part 1 of the Act.

[129] The Chief Executive implemented the proposed new roster in breach of his statutory and contractual obligations. This makes the new roster unlawful. The Chief Executive has taken the position that, unless otherwise ordered by the Authority, it will continue to require staff to work in accordance with the new roster.

[130] The new roster is in place and will remain so. There is clearly a current breach, which is continuing. The purpose of making compliance orders is to prevent a continuing breach.

Relevant principles

[131] Compliance is a discretionary remedy. In determining whether to exercise that discretion, I am mindful of the observations made by the full bench of the Labour Court in the *United Food Workers v Talley* [1992] 1 ERNZ 756, 760, regarding the issuing of compliance orders. It stated:

> *Compliance order is a discretionary remedy. In exercising its discretion the Court acts according to principle and not according to whim. It weighs in the balance all factors put before it. One of those factors is the prejudice which the Applicant seeks to remedy in making the application. The prejudice alleged is frequently the very object of a compliance order application and the prejudice proved often determines the scope of the order that is made…*
>
> *… it is best to be remembered that what is required of judicial discretion is that the adjudicator seeks to do justice between the parties. It is a rule of statutory interpretation that where a discretion is conferred upon any judicial officer or public official it is to be regarded not as an absolute discretion but one that is conditioned by the required to do justice.*

[132] Any intervention by the Authority should be no more than is necessary to ensure compliance in the future: *NZ Seamens Union v Gearbulk Shipping (NZ) Ltd* [1989] 2 NZILR 270. I also have regard to the Chief Judge's comments in another decision involving these parties - *Corrections Association of New Zealand v Chief Executive of the*

Chief Executive of Corrections [2005] ERNZ 135 - that the discretion as to whether to order compliance must be exercised with care and restraint.

[133] Guidance on the exercise of the Authority's discretion can also be derived from the Chief Judge's decision in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Carter Holt* Harvey *Ltd* [2002] 1 ERNZ 597. That too was a case which involved findings that the employer had breached its contractual obligation to consult and its statutory good faith obligations. Although that case involved a restructuring and outsourcing situation, I consider that the principles behind the Court's exercise of its discretion to issue a compliance order are relevant to the present case.

[134] The Court, at [293], stated:

> *The remedy of compliance is discretionary. Other than the possibility of successful personal grievances for unjustified disadvantage in employment and/or unjustified dismissal by employees individually, it is common ground that the Act does not contemplate any sanction for breach of s4 other than an order for compliance… Unless, therefore, a compliance order is made, the defendant will be seen to have breached with impunity its statutory obligations affecting employees, many of who will lose their employments. That is not an attractive proposal for a court required to decide such cases in equity and good conscience: s189 Employment Relations Act 2000.*

CANZ's submissions

[135] CANZ seeks compliance orders because:

i. The Chief Executive has breached his contractual consultation obligations;

ii. Unless compliance orders are made, the Chief Executive will be seen to have breached with impunity not just his statutory obligations, but also his specific contractual obligations;

iii. If the Chief Executive is allowed to continue with the roster he implemented on 15 November 2010 (the day of the investigation meeting) CANZ is deprived of any real remedy.

[136] In terms of potential operational difficulties, Mr Roberts says that if the roster is reverted, then the desk files that existed up until 14 November 2010 can be used, as can that roster with the same allocation of employees. Any issues that may arise such as overtime, call-backs and associated costs, and payroll changes are all of the Chief Executive's own making.

[137] Mr Roberts submitted that the objections raised by the Chief Executive are largely of his own making and in any event are not significant impediments to the exercise of my discretion. I endorse that view.

The Chief Executive's submissions

[138] Ms Spackman submits that this is not an appropriate case for compliance orders. I have carefully reviewed paragraphs 40-51 of the Chief Executive's submissions and paragraphs 29-34 of his supplementary submissions. Due to space considerations I do not repeat all of these here, but I confirm all matters which were raised have been factored in to my decision making.

[139] Ms Spackman submits that the sensible and practical course of action in the event that the Authority finds the Chief Executive's consultation with the Applicant was lacking in some way, is to require that consultation occur in the next month as part of the mid December roster review, while the new roster remains in place and is tested in the meantime. She says the new roster should be allowed to operate at least for its initial term, i.e. until 5 December 2010. Ms Sparkman's position is that if a compliance order is issued, it should be limited to further consultation rather than roster changes.

[140] Ms Spackman further submitted that the factors that the Courts have had regard to in exercising the discretion in relation to judicial review remedies should be applied by the Authority to the exercise of its discretion in this case:

i. The gravity of the error;

ii. Whether, and to what extent, the applicant has been prejudiced by the error;

iii. The inevitability of the same outcome – where the same outcome regardless of the error would be reached, it is less likely that the decision will be set aside;

iv. The availability of other remedies; and

v. The futility of granting relief.

[141] Applying these factors to the present case, I consider that:

i. The Chief Executive's breaches of statutory and contractual obligations were not minor or technical breaches but went to the heart of the three

employment relationships involved. These breaches effectively prevented CANZ from representing its members' collective interests in a matter which was of high concern to the membership;

ii. CANZ and its members have been prejudiced by these breaches;

iii. The same outcome is not inevitable. Had there been proper consultation many of the issues of major concern to CANZ members could have been worked through in an orderly manner;

iv. No other remedies are available. Allowing CANZ to participate in the mid December roster review process is not an adequate remedy;

v. Ordering compliance will enable the CANZ membership to have their collective interests properly represented. The Chief Executive is required to keep an open mind whilst consulting, so the outcome of consultation with CANZ is not a foregone conclusion.

Factors against exercise of discretion

[142] The factors which weigh against the exercise of my discretion include;

i. CANZ's conduct. It did not communicate with the Chief Executive within the specified consultation period. It did not make it clear to the Chief Executive who it should be dealing with in terms of the consultation period. Mr Hanlon's request on 19 October 2010 for a further 8 weeks of consultation was unhelpful and lead to Ms Smit forming the view that it was trying to delay the process. It did not follow up Ms Smit's lack of response to its request for information and an extension of time. It did not attempt to constructively engage with Ms Smit over its desire for an extension to the consultation period.

ii. Only 79 out of 276 staff across both sites are potentially affected by the new roster. CANZ represents 82% of the total employees across both sites and it says that the membership as a whole, not just the 79 people potentially affected, want the rosters to revert. I questioned Mr Hanlon closely about that and he was very clear that members understood the personal disruption that may cause them but still wanted to the rosters to revert.

iii. Impact on third parties. PSA members and non represented employees will be inconvenienced and some may be adversely affected if the roster changes again. I had inquiries made with PSA and in a letter to me the PSA National Organiser for prisons advised that it does not in principle, oppose CANZ's application for a compliance order. Some individually represented staff also want the roster to revert. Prisoners and their visitors are also impacted, but that is likely to be seen as favourable because they would get longer unlock and visitor hours.

iv. Another roster change will be disruptive. Mr Hanlon said that his members recognise that but want that to occur anyway. He says members are very concerned about the risk, induction, training, and health and safety issues he referred to in his evidence and therefore feel it is safer to revert to the previous roster until these concerns have been satisfactorily addressed.

v. A compliance order will put the Chief Executive in breach of the notice obligations in clause 2.4 of the CEA. However, that is a situation of the Chief Executive's own making so should not weigh against the exercise of discretion. In any event the waiver in paragraph [147] would avoid potential liability in respect of a number of staff. The urgency to release this determination has meant that in the limited time available I have been unable to resolve the dispute between the parties over the exact number of staff who have signed the waiver. CANZ say 244 out of 276 staff have signed the waiver, whilst the Chief Executive disputes that. However, I can safely conclude that it is likely a large proportion of staff across both sites have waived the notice requirements in clause 2.4 of the CEA.

vi. Operational matters need to be attended to. However, Ms Smit's evidence was that these mainly involve notification issues and there is no reason that cannot be done expediently.

Factors in support of exercise of discretion

[143] The Chief Executive's conduct. He has clearly breached his obligations. He also decided to proceed with implementing the roster in the face of CANZ's advice on 25 October 2010 that it would seek compliance orders if he did so.

[144] I find that there was no real urgency for the Chief Executive to implement the new roster. He should have taken steps to resolve the dispute between the parties before implementing his decision. The Authority should not condone the Chief Executive's actions by allowing him to continue with a roster he has implemented unlawfully.

[145] The lack of other suitable remedies. If compliance is not ordered CANZ is effectively left without remedies. That does not sit well with the s3 key objects of the Act such as building productive employment relationships, promoting good faith behaviour, and recognising the inherent inequality of power in employment relationships: *NZEPMU v CHH.*

[146] Issues arising from the new roster clearly occurred on the morning of 15 November 2010. The Chief Executive has described these as *teething issues*, whilst CANZ say these problems are proof that issues raised by its members (including concerns about risk, training, induction, health and safety matters) have merit. It has not been possible in the time available and on the evidence before me to resolve that definitively. However, this uncertainty suggests that it would be prudent for the pre 15 November 2010 status quo to be preserved whilst such issues are being worked through by the parties.

[147] Mr Hanlon's evidence that his members are so concerned about health and safety issues that they all want to revert to the pre 15 November 2010 roster is supported by the fact a waiver of contractual notice has been signed by 244 out of the 276 staff employed at both prisons. Only 211 of those who have signed are CANZ members. The waiver confirms that the named employees will not seek to enforce the two weeks' notice which is usually required for roster changes under clause 2.4 of the CEA.

[148] CANZ has also provided an undertaking to the effect that it will not support any of its members, whether financially or via representation or in any other way, who may decided to pursue a claim against the Chief Executive for breach of the notice requirement in clause 2.4 of the CEA, in the event a compliance order is made.

[149] An ongoing breach will continue if no compliance order is made. The Chief Executive will not voluntarily revert to the pre roster 15 November 2010.

[150] I consider it appropriate to exercise my discretion to make compliance orders to ensure that the current ongoing breach does not continue.

Orders

[151] Mr Roberts submitted a list of orders sought and Ms Spackman has responded to each of those. It is clear from that, each parties' view of whether or not they have already complied with their consultation obligations differs. I am also concerned about what appears to be tendency for the parties to talk past each other.

[152] Although I want to intervene as little as possible, after hearing the evidence and observing the way in which the parties are relating to each other, including in relation to post investigation meeting developments, I have concluded that this is a situation where prescriptive compliance orders are necessary to ensure compliance with the consultation requirements in the CEA, Protocol, and Act.

[153] Accordingly, pursuant to s137(1) and (2) I make the following orders that:

i. **The Chief Executive cease the roster commenced on 15 November 2010 by no later than 11.59pm on Sunday 21 November 2010;**

ii. **From 12.00am on Monday 22 November 2010 the Chief Executive must reinstate and continue the roster that existed on 14 November 2010, along with the pre 15 November 2010 positions and desk files;**

iii. **If the Chief Executive wants to propose a roster similar to, or the same as, the roster implemented on 15 November 2010, he must properly consult with CANZ in accordance with his contractual, statutory, and good faith consultation obligations.**

iv. **Consultation will require the Chief Executive to provide a clear outline of the proposed changes. At a minimum, the outline must include an explanation of the differences between the two rosters and how the proposed changes will affect staff. Matters to be addressed include (but are not limited to) the impact of the proposed changes on training, risk assessments, unlock hours, health and safety issues, induction, leave entitlements, remuneration, reporting lines, duties, the number of consecutive roster days on, days off, and all other matters that impact on staff;**

v. **Both parties are to allocate priority and sufficient resources to a new consultation process. This shall include allocating time to**

enable the parties to meet each other, if requested, to discuss and resolve issues that arise during the consultation process;

vi. **The Chief Executive is entitled to set an end date for the consultation period, provided that is not less than 21 days from the date on which CANZ received his written outline of the proposed changes.**

[154] The parties have leave to revert to the Authority on an urgent basis should issues arise out of these orders. Further mediation is also available and I strongly encourage the parties to take advantage of that if further difficulties arise.

Costs

[155] CANZ has sought indemnity costs. The Chief Executive has suggested costs be reserved. Given the urgency with which this matter has been presented and determined, costs should be reserved. Both parties have 28 days from the date of this determination within which to file any further submissions on costs.

[156] No change to this timeframe will be permitted without prior leave.

Rachel Larmer
Member of the Employment Relations Authority