

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 303/10  
5162721

BETWEEN                      CORRECTIONS  
   ASSOCIATION OF NEW  
   ZEALAND  
   Applicant

AND                              CHIEF EXECUTIVE OF THE  
   DEPARTMENT OF  
   CORRECTIONS  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Jim Roberts , Counsel for Applicant  
   Karen Spackman, Counsel for Respondent  
  
Investigation Meeting:        19, 20 and 21 October 2009  
  
Submissions Received:        21 October 2009  
  
Determination:                28 June 2010

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**DETERMINATION OF THE AUTHORITY**

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[1]     The Department of Corrections has implemented an 8am to 5pm shift for Corrections officers employed in high security prisons. The stated purpose is to align working hours with the same span of hours in which prisoners are released from their cells. This span of hours is call unlock. The alignment of the unlock hours with the 8am to 5pm shift will be referred to as the 8-5 regime.

[2]     The Corrections Association (“CANZ”) says Corrections has breached the terms of the parties collective employment agreement<sup>1</sup> in that the 8-5 regime is contrary to the stated purpose and scope of the CEA and/or that Corrections has failed to meet its obligation to consult with CANZ over what is a significant change in organisational structure, staffing and/or work practises.

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<sup>1</sup> Prison Services Collective Employment Agreement 2008 - 2009

[3] Corrections say the 8-5 regime is not a new issue, that it has operated in some units in various prisons around the country for many years and in other units to facilitate annual leave taken around Christmas. It says the policy decision taken in mid-2008 to implement the 8-5 unlock in all high security units in prisons and the promulgation of that policy from January 2009 is an operational change which it is free to make. Corrections say further that sufficient and proper consultation occurred prior to the implementation of the operational decision.

[4] For those corrections officers affected by the change<sup>2</sup> the implementation of the 8-5 regime means a collapsing of the two overlapping shifts they used to work into one shift.

### **Relevant contractual provisions**

[5] The following provisions of the CEA are relevant to the issues before the Authority:

#### ***Scope***

*Management has the right to plan, manage, organise and finally decide on the operations and policies of the Prison Service (PS) of the Department of Corrections (the Department), subject to the provisions of the 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.*

...

#### ***Working Together***

*PS aims to have effective communication, so that discussions on matters relating to terms of employment can be initiated by CANZ, its members or the appropriate manager.*

*Accordingly, if CANZ or its members have positive suggestions or wish to raise issues of concern they may be discussed with the appropriate manager.*

#### ***Duties***

##### ***Professional Service***

*A primary goal is a professional service committed to reducing re-offending through “needs-based” prisoner management, both with regard to security needs and programmes and treatments to assist prisoners to change their offending behaviour.*

*This requires a new way of working and staff will be developed and supported in the process. This includes the opportunity to achieve recognised qualifications on the NZQA framework so that PPS can acknowledge stall skills and offer clear career paths.*

##### ***Efficiency & Flexibility***

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<sup>2</sup> Putting to one side the disagreement as to the temporary use of the 8-5 shift.

*Hand in hand with professional service is a commitment to increasing efficiency and flexibility such that all stakeholders have confidence in what Prison Services does.*

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### **Hours of Work**

*Non Rostered staff are employed to work standard hours of 40 per week, 8 hours per day, Monday to Friday inclusive between the hours of 7am and 6pm. By agreement between the staff member and their manager the daily hours may be worked outside the above hours.*

*Rostered staff are employed to work standard hours of 40 per week, 8 per day to be worked on any five days of the week Monday to Sunday inclusive between the hours of 7am and 6pm. By agreement between the staff member and their manager the daily hours may be worked outside the above hours.*

*Shift staff are employed to work standard hours of 80 per fortnight, 8 per day on any ten days of the fortnight in accordance with a cyclic roster published not less than ten days in advance. The published roster may be varied by agreement between the individual staff member and their manager. Wherever practicable the days off shall be two consecutive days per week, provided that in any fortnight a period of one day off may be given in one week if the other three days are consecutive.*

*All staff employed on shift work have a responsibility to ensure an effective handover, both with the person they replace and with the person who replaces them.*

*Staff who intend to be absent from any day must, where practicable, advise their manager at least thirty minutes before their normal start time.*

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### **Annual Leave**

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*On the completion of one year's employment on shift work staff will be granted one additional week of annual leave.*

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### **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 to 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.*

## **Does the 8-5 regime amount to a breach of the CEA?**

[6] In relation to this issue CANZ's central argument is that the change to a permanent 8-5 regime renders it impossible for corrections officers to satisfy the

purpose of their duties as stated under the cea as well as the wider statutory aims of the prison service<sup>3</sup>.

[7] Under the cea a professional prison service is committed to reducing re-offending through managing prisoners' security, rehabilitation and reintegration in a way which changes offending behaviour. The cea goes on to provide that staff will be supported to develop what is described as *a new way of working*.

[8] The evidence before the Authority was that Corrections officers contribute towards this goal by actively managing prisoners needs through supervision and facilitation of sentence management along with prisoner attendance at programmes, education and work.

[9] I received extensive evidence that the 8-5 regime had had or was likely to have a negative impact on the ability of corrections officers to deliver the cea goal of needs based prisoner management. That evidence was essentially that corrections officers have fewer hours in which to perform their duties and hold serious concerns about the health and safety impact of the new regime. There was no evidence of corrections officers being directed to perform duties which they were unable to because of the 8-5 regime. Evidence for Corrections acknowledged that there had been some increase in workload as a result of the 8-5 but that this was manageable and that some programmes had had to be reorganised or cancelled (for example evening classes) but that it was satisfied that prisoner management targets were being meet.

[10] The terms of the cea CANZ seeks to rely on to support this argument are so broadly drawn that it is not possible for the Authority make any link between the principles they articulate and the 8-5 regime. For example, despite the extensive evidence received it remained unclear what exactly *a new way of working* meant or what the development and support for staff in moving towards that *new way of working*. I have taken from this that *a new way of working* is an ongoing goal for Corrections and CANZ.

[11] It is not desirable that provisions in employment agreements should be unenforceable for want of concrete application. However, it is not unusual for ceas to

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<sup>3</sup> Corrections Act 2004 and Corrections Regulations 2005

contain expressions of intention for the purpose of guiding parties in the development of their employment relationships. This is part of what is articulated in this cease professional service provision; it is, in part, an expression of intent as to what this service will look like.

[12] The other element expressed in the professional service provision is the obligation of Corrections to provide prison services and in turn to direct staff to perform duties in fulfilment of that obligation. How that obligation is fulfilled lies with Corrections to determine within agreed boundaries. As I have stated above the goal of that duty is too broadly defined to act as the limit CANZ seeks.

### **Was Corrections obliged to consult with CANZ over the 8-5 regime?**

[13] There is no dispute between the parties that the right to manage the operation and policies of the prison service is that of Corrections. There is also no dispute that that right is not unfettered and must be exercised in accordance with the obligations under the cea and in good faith including the statutory good faith obligations which require employers to consult with employees about any matter which may impact their collective interests<sup>4</sup>.

[14] The dispute concerns the extent of the duty to consult and in particular what amounts to an organisation review.

[15] The starting point is the cea. The relevant provisions (set out above) variously provide that:

- (i) Corrections has the ability to make decisions and implement changes regarding the operation of prisons (ref: Scope);
- (ii) prison services is committed to effective consultation in good faith with CANZ and its members (ref: Scope);
- (iii) consultation is an essential part of Correction's continuous process of change and improvement (ref: Consultation);

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<sup>4</sup> Section 4(4) Employment Relations Act 2000

- (iv) the prison service will notify the Secretary of CANZ if an organisation review is to be undertaken likely to result in significant changes in organisational structure, staffing or work practises affecting staff; and
- (v) the consultation process will involve an opportunity for CANZ and staff to be involved and consulted during reviews and take those views into account before any decision is finalised.

[16] Corrections say no organisational review is triggered by the implementation of the 8-5 regime because no organisational review has taken place or significant changes made to the organisational structure.

[17] CANZ say the increase in staff workload and health and safety concerns mean the change to the 8-5 regime has had a significant impact on staffing practices.

[18] Given the emphasis the parties have placed on consultation in their cea a significant change is properly characterised as a change which is not minor. Changing long standing roster patterns, notwithstanding the broadly drawn hours of works clause, in a working environment as complex as a prison service, meets the significant change standard.

[19] I am unwilling to make findings that extend the consultation obligation to the unlock hours decision. This is a policy decision beyond the operational scope of the cea.

**If so, has Corrections discharged its obligation to consult?**

[20] The policy decision to roll out 8-5 unlocks was made in June 2008. In January 2009 a directive was issued to implement the 8-5 rosters nation wide. For the reasons set out above this ought to have triggered the consultation process as set out the cea which commences with notification to the secretary of CANZ. Instead Corrections commenced site based discussions around implementation. This was not the correct procedure. Later discussions between the parties at a national level do not cure this failure to follow the agreed procedure.

[21] Accordingly, Corrections has not discharged its obligation to consult with CANZ and its members about the nation wide roll out of the 8-5 shift.

### **Remedies**

[22] CANZ seeks compliance orders pursuant to section 137 of the Act. It is appropriate that one is granted despite the passing of time – the parties agreed what their consultation procedure was to be and the implementation of the 8-5 roster was a situation where that procedure ought to have been followed. The parties have an ongoing relationship and given the passing of time will be in a position to assess the success or otherwise of the 8-5 shift.

**[23] Corrections is ordered to consult with CANZ and its members about the implementation of the 8 – 5 shift in compliance with its obligations under the parties' collective employment agreement: pursuant to section 137 of the Employment Relations Act 2000.**

### **Penalty**

[24] A penalty is not appropriate. A genuine dispute existed between the parties.

### **Costs**

[25] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then leave is granted to request a timetable be set for the filing of such within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority