

Attention is drawn to the
order prohibiting publication
of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 87/10
5289994

BETWEEN	NATIONAL UNION OF PUBLIC EMPLOYEES INCORPORATED First Applicant
A N D	JUDY JACKSON Second Respondent
A N D	RICHMOND FELLOWSHIP NEW ZEALAND INCORPORATED Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicants
Penny Shaw, Advocate for Respondent

Investigation Meeting: 1 April 2010 at Christchurch

Determination: 9 April 2010

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication the name and any details that may identify the client of Richmond Fellowship New Zealand Incorporated who was cared for in the service division referred to in this determination and the address at which the client is cared for under clause 10.1 of the Second Schedule to the Employment Relations Act 2000.

Employment relationship problem

[2] Judy Jackson has been employed by Richmond Fellowship New Zealand Incorporated (Richmond Fellowship) for 11 years from 1999. The description of her

role, which changed from the time her employment commenced, is community service professional. Ms Jackson has, from the commencement of her employment, provided care for one client in the service division of Richmond Fellowship currently known as the CTIPS service. This service has a staffing level of 2.8 full time equivalent staff (FTE). Ms Jackson is the .8 FTE. The CTIPS service provides 24 hour care seven days a week for the client.

[3] Ms Jackson is a member of the National Union of Public Employees (NUPE) and is covered by a collective agreement between that union, the Service and Food Workers' Union, Nga Ringa Kota (Service and Food Workers Union) and Richmond Fellowship. Mr McKenzie has advised the Service and Food Workers Union about this matter.

[4] Ms Jackson has been asked by Richmond Fellowship to work according to a rotating roster since 29 December 2009 including shifts between Monday to Friday 7am to 3pm. Prior to that Ms Jackson had not been rostered to work between Monday and Friday 7am to 3pm. She works at another job during that time. Since 29 December 2009, when the roster indicates a shift for her during that period, she does not attend and her work has been covered by casual staff.

[5] Richmond Fellowship has suspended any potential disciplinary action in terms of Ms Jackson not attending shifts during that time on the basis that NUPE and Ms Jackson would seek urgency in terms of this application.

[6] When the application was lodged with the Authority, it was granted urgency in the circumstances and with the co-operation of Mr McKenzie and Ms Shaw, the matter proceeded to an investigation meeting on the first opportunity that the Authority and representatives could meet.

The issues

[7] In setting out the issues, I record Mr McKenzie's concession in final submissions that the instruction to Ms Jackson to work in accordance with the rotating roster from 29 December 2009 was a lawful one.

[8] The issues that the Authority is required to determine are as follows:

- Was the instruction to Ms Jackson to work the new roster a reasonable instruction? This involves consideration of the provisions in the current collective agreement, terms and conditions of Ms Jackson's employment, the reason why Ms Jackson is not able to agree to work the roster between Monday and Friday 7am to 3pm and the process involved.
- Does the introduction of the new roster constitute a change to the requirements of Ms Jackson's position to entitle her to redundancy in terms of clause 22 of the collective agreement?

Was the instruction to Ms Jackson to work in accordance with the new roster a reasonable instruction?

Background to the dispute

[9] Martin Cole, who is employed by Richmond Fellowship as Regional Manager, Southern, has been in that position since December 2006. For the purposes of the Authority's investigation meeting, he reviewed Ms Jackson's personal file to ascertain the history of her employment with Richmond Fellowship. Mr Cole described in his evidence the employment agreements that Ms Jackson was party to from the time she commenced her employment in 1999. Ms Jackson did not take issue with his evidence about her employment agreements.

[10] Ms Jackson was party to three fixed term agreements from 1999 until 2004 when as a member of NUPE her work was covered by the first of the two collective agreements between NUPE and Richmond Fellowship.

[11] The first fixed term agreement was expressed to commence on 21 August 1999 and provided that it was to expire on 30 June 1999. I accept that that was a mistake. That agreement provided, in clause 7(b):

- (i) *The days of the week on which work is to be performed shall be as required by the employer as set out in rosters.*
- (ii) *Rosters shall be published and the employee given 14 days notice before each new roster becomes effective. Less notice may be given in exceptional circumstances.*

[12] There was a further fixed term agreement signed by Ms Jackson commencing 1 July 2001 which contained the same wording in the first agreement about days of the week on which the work is to be performed shall be as required by the employer as set out in rosters. There was no reference however in that agreement to the matters in clause 7(b) (ii).

[13] The final fixed term agreement commenced on 7 October 2002 and was expressed to expire when professional services within CTIPS were no longer required. This agreement also contained the same wording as in clause 7(b) (i) in the first fixed term agreement.

[14] Ms Jackson's work was then covered by a collective agreement between Richmond Fellowship and NUPE which took effect from 5 November 2004 and provided, at clause 5.2:

As the employer operates a 24- hour day, seven- day week business the employees may be required to work at any time. The actual days and hours to be worked in any week will be notified to the employee, by way of roster.

[15] The collective agreement expired on 4 May 2005 and a subsequent collective agreement did not take effect until 2 October 2008. That collective contained the same clause as in clause 5.2 but in clause 7.2. Mr Cole could not find any other agreement that may have covered Ms Jackson between the two collectives and it seems common ground that she continued on the same terms and conditions of employment during that period as in the collective agreement.

Rostering staff policy

[16] Prue Sullivan is employed by Richmond Fellowship as the General Manager, People and Capabilities. Ms Sullivan said in her evidence that in January 2008 the Richmond Fellowship rostering of staff policy became due for review and she was advised by another manager about concerns in respect of rostering practices at Richmond which included:

- The number of hours within a 24 hour period that staff were working because of the potential risk to health and wellbeing of staff and consequential risk of fatigue and wellbeing of clients;

- That some staff held the view that the rostering practices were unfair or inequitable as some staff were self-selecting shifts leaving other staff to work the less popular remaining shifts.

[17] Once Ms Sullivan had prepared draft changes to the policy in order to deal with some of these concerns, she consulted with the Union and staff. As part of the evidence I was provided with the considerable staff feedback to Richmond Fellowship about these changes, including a written submission from the staff at CTIPS. Staff feedback covered a range of issues but I accept some staff wanted to ensure there would still be flexibility in this rostering and other staff wanted to work longer in a 24 hour period if it suited their personal situation. Ms Sullivan said in her evidence that the submissions of staff about the proposed changes were taken into account, but it was felt that the health and safety issues with respect to extended periods of work took precedence over the staff's personal views about rosters. The changes were duly implemented and the policy document was issued in August 2008.

[18] Although other services within Richmond Fellowship rosters were compliant with the policy, the policy was not implemented in CTIPS until one year later for a number of reasons.

[19] Stephanie Smith, who is employed by Richmond Fellowship as the Operations Manager, Regional Intellectual Disability Support Accommodation Service, Southern Region (RIDSAS) gave evidence about this matter. Ms Smith took over the management of CTIPS service in approximately July 2009. An onsite manager was recruited by Ms Smith into the service and this person identified that CTIPS was not compliant with Richmond Fellowship's rostering policy. All other RIDSAS services had been compliant for some time.

[20] On 31 August 2009, Ms Smith wrote to Ms Jackson and advised in the letter that she wanted to arrange a meeting with Ms Jackson regarding the implementation of the Richmond Fellowship rostering policy and the effect that that would have on Ms Jackson's hours of work. Ms Smith referred in her letter to the policy not being actioned effectively into the CTIPS programme which she said was creating difficulties in implementing a fair and appropriate roster for the service.

[21] Ms Smith suggested a meeting on 9 September 2009 and advised Ms Jackson that as the implementation of the policy would result in changes to the terms and

conditions of her employment, she was advised to bring a representative or support person with her to the meeting. Ms Smith enclosed a copy of the rostering policy so that Ms Jackson could review it prior to the meeting. NUPE placed some emphasis on the wording of that letter in relation to the second issue as to whether in terms of clause 22 in the collective agreement Ms Jackson was redundant.

[22] Ms Smith said that this wording was in fact a mistake and she should have used the word *implementation*. This is an issue that I shall return to when I consider the second issue.

[23] On 9 September 2009, a meeting took place. Ms Jackson attended the meeting with Martin Cooney who is the secretary of NUPE and Ms Smith attended with another person from the service. Ms Smith took minutes of that meeting which I was provided with. Ms Smith discussed the rationale for the policy change and Ms Jackson indicated that she was not able to comply with the rotating roster policy as she had a long and established pattern of employment that she was not rostered between Monday to Friday 7am to 3pm. This was because Ms Jackson had another job that she undertook during that period.

[24] Ms Jackson was not prepared to talk to her other employer about the requirements of Richmond Fellowship and she explained in her evidence that she did not believe that there was any real flexibility in terms of someone else covering her in that role and further that she had worked for a longer period in that employment than she had for Richmond Fellowship. Ms Jackson said that she was in fact recruited to Richmond Fellowship from that position and so it was through that employment that she started working at Richmond Fellowship.

[25] It was agreed at that meeting that Ms Jackson would prepare a draft roster that was compliant with the roster policy and with her own requirements. I accept that Ms Smith was unaware, prior to that meeting and the discussion, of the details with respect to Ms Jackson's other employment.

[26] The next meeting took place on 9 October 2009 during which meeting Ms Jackson confirmed that she would not be able to comply with any roster that rostered her for shifts between 7am and 3pm Monday to Friday. Ms Jackson presented an alternative roster which Ms Smith agreed to consider.

[27] There was then a discussion about whether there should be a 10 week grace and/or transition period to the new roster if Ms Jackson's roster was not compliant. Mr Cooney requested that this 10 week period be a grace period rather than a transition period and Ms Smith agreed to the 10 weeks being a grace period in an email sent a day after the meeting.

[28] Ms Smith gave evidence that she considered Ms Jackson's roster but it was obvious to her that it was not compliant with the policy. On 20 October 2009 she wrote to Ms Jackson advising her of this view and that the roster on that basis was not accepted. In her letter, Ms Smith set out that the roster did not meet the requirements for three reasons as follows:

1. A regular rotating roster is the preferred option and all staff should have at least one weekend off every six weeks unless agreed by the employee to the contrary;
2. Established roster patterns will allow all employees to have a minimum of two consecutive days (48 hours) off per fortnight, including sleepovers;
3. Staffing schedules will be considered in sequential order of the following:
 - (a) Roster patterns are focused on the client needs by allocating staff competencies to meet the needs of the client base;
 - (b) Roster patterns are based around permanent full-time positions;
 - (c) Part time staff rosters are planned to fit around (a) and (b);
 - (d) Casual staff are only used in exceptional rostering situations.

[29] In terms of each of these matters, Ms Smith emphasised in her letter that the roster was not about individual people but about roles and functions. She set out for example in terms of the third reason the roster was deemed to be non compliant with policy that the proposed roster by Ms Jackson was not set to meet the needs of the service around permanent full time positions but to meet the needs of Ms Jackson and her alternate work arrangements.

[30] The parties then participated in mediation on 23 December 2009 but the matter was not resolved and although Ms Jackson was rostered from 29 December 2009 four shifts between 7am and 3pm Monday to Friday, she does not undertake those shifts and they are filled by casual or agency staff.

[31] One of the other full time employees at CTIPS service, Kathleen O'Shea, gave evidence that she believed prior to the rostering policy being implemented the workload was split unfairly. Ms O'Shea gave her evidence in a refreshingly straightforward manner that she had found it awkward when Ms Jackson was not working the morning shift. She explained that the workload tended to be greater in the mornings than in the afternoons and weekends and she explained that she had become fatigued when she was not working a fully rotating roster. Ms O'Shea said that she had noticed since the introduction of the full rotating roster that she was not as fatigued. I accept that such a discussion in all probability had never been undertaken directly with Ms Jackson and that is understandable.

Conclusion

[32] Mr McKenzie, in his submissions, says that the instruction to work was unreasonable due to Ms Jackson's work history because she had never been required since the commencement of her employment in 1999 to work shifts between 7am and 3pm Monday to Friday. He submits that being required to do so cuts across an established pattern of work and that clause 7.2 of the current collective agreement does not give an unfettered right for Richmond Fellowship to roster her for those shifts and/or does not provide a complete answer.

[33] It is accepted that from the time of the commencement of Ms Jackson's employment she has not been rostered to work 7am to 3pm Monday to Friday. There is no evidence of any express term or condition of employment that applies to Ms Jackson in addition to those in the applicable collective agreement that she would not be rostered between the hours of 7am and 3pm Monday to Friday. Given clause 7.2, I accept Ms Shaw's submission that if there had been such an express term, arguably it would have been inconsistent with the clear terms and conditions of the collective agreement in clause 7.2.

[34] Mr McKenzie placed some emphasis on clause 7.1 that provides:

The employee's normal hours of work per week shall be as set out in the additional individual terms provided to each employee. Additional hours shall be worked from time to time as required by the employer in order to meet the demands of the position.

[35] I asked Mr Cole to ascertain whether there had been any such individual terms provided to Ms Jackson. He did not find any and Ms Jackson could not recall any either.

[36] I did not hear any argument focused on the meaning of clause 7.1. I find, and this is reinforced when I consider all the employment agreements either covering Ms Jackson's work or that she was a party to, that this is a clause dealing with normal hours of work which, in Ms Jackson's case, are .8 FTE. When those normal hours of work are to be worked is then covered by clause 7.2.

[37] I turn now to Mr McKenzie's submission that a term that Ms Jackson not be rostered between 7am and 3pm Monday to Friday be implied on the basis of the historical custom and practice since the time she commenced employment. I find that the answer to that submission is that if such a term was implied then it would override the express and clear provisions in clause 7.2 of the collective agreement.

[38] I then turn to the wider consideration of reasonableness in terms of the requirement to work the rotating roster. I find that a fair and reasonable employer would recognise the fact that Ms Jackson had not been rostered for those hours and want to discuss and consult with her about implementing the policy in CTIPS. Ms Jackson is now in the difficult position, because of her other role, that if required to undertake the rostered hours she will have to choose between the jobs. Richmond Fellowship has consulted about its policy in terms of rostering and says that it developed a policy designed to meet the needs of the service and the health and safety of its employees and clients. There is an exception provision, clause 20, in the rostering policy that NUPE say should have been used in this case for Ms Jackson. Richmond Fellowship says that an exception would only be made to meet the needs of the wider service not an individual. I am not satisfied that the decision not to grant an exception in this matter was unreasonable.

[39] I find that Richmond Fellowship undertook a very fair process with Ms Jackson. It included a 10 week grace period before Ms Jackson was required to undertake work in accordance with the rotating roster. Richmond Fellowship asked

Ms Jackson to provide a roster but concluded, having heard the evidence it cannot be said unreasonably, that it was not compliant with the policy.

[40] There were other factors too that I accept Richmond Fellowship had to take into account. It is clear that one of the other workers who would be directly affected was not happy with a roster whereby Ms Jackson was rostered off for the morning shifts during the week.

[41] It would have suited Ms Jackson, who is clearly a committed and caring employee, to have a roster whereby she is not rostered on Monday to Friday for morning shifts. I have sympathy with the difficulties that she now faces. The Authority is required to ascertain however what the parties agreed to as Ms Jackson's terms and conditions of her employment.

[42] I find that Richmond Fellowship's requirement that Ms Jackson be rostered on the basis of the rotating roster introduced on 29 December 2009 is lawful and reasonable. In term of the rostering policy clause 6.1 of the collective agreement provides that employees will comply with all of the employer's policies, rules and procedures.

[43] I do not find there is any basis to imply a term that Ms Jackson not be rostered on between 7am and 3pm Monday to Friday and Richmond Fellowship is entitled to require Ms Jackson to work according to the rotating roster under clause 7.2 of the collective agreement.

Does the introduction of the new roster constitute a change to Ms Jackson's position or the requirements of the position so as to entitle her to redundancy?

[44] Clause 22 of the collective agreement deals with redundancy. Clause 22.1 refers to a situation where either:

22.1.1 An employee's position is no longer required, or

22.1.2 An employee's position or its requirements permanently change to such an extent that an employee is unable to fill the position in a manner satisfactory to us...

[45] NUPE relies on clause 22.1.2 and says Ms Jackson's position or its requirements permanently changed with the introduction of the rotating roster and the

requirement that she work between 7am to 3pm Monday to Friday so that her position is redundant.

[46] For completeness, I note that in the event of termination for reasons of redundancy, the collective agreement does provide for compensation not exceeding 10 weeks' salary.

[47] I find that Richmond Fellowship's contractual arrangements with Ms Jackson from the time that she commenced employment were such that Richmond Fellowship was entitled to require her to work her normal hours between the hours of 7am and 3pm Monday to Friday. Whilst that entitlement existed, Ms Jackson was never rostered to undertake those shifts until recent times.

[48] I am not satisfied that the requirements of Ms Jackson's position at CTIPS permanently changed by the implementation of the policy roster. The requirements that need to be permanently changed under clause 22.1.2 are in relation to the position. The requirements in relation to the position were always that there be 24 hour care seven days a week for the client. The hours to be performed to maintain that care were set by way of roster. That requirement has not changed.

[49] I accept Ms Shaw's submission that there has been no change to the requirements under clause 22.1.2 that would mean Ms Jackson's position was redundant and she would be eligible therefore to redundancy compensation.

Determination

[50] Both questions are answered in favour of the Richmond Fellowship.

Costs

[51] I reserve the issue of costs but note that this was a genuine dispute between the parties and in those circumstances it may be that no issue of costs arises.

Helen Doyle
Member of the Employment Relations Authority