

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 177
5404922

BETWEEN AMALGAMATED WORKERS’
 UNION OF NEW ZEALAND
 INC
 Applicant

A N D COUNTIES MANUKAU
 DISTRICT HEALTH BOARD
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Helen White, Counsel for Applicant
 Anthony Russell, Counsel for Respondent

Investigation Meeting: 26 March 2013 at Auckland

Submissions Received: 26 March with supplementary submissions on 12 April
 from Respondent
 5 April from Applicant.

Date of Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY

A. Employees of Counties Manukau District Health Board (“Counties Manukau”) who are members of the applicant, the Amalgamated Workers’ Union of New Zealand have unreasonably withheld their agreement to the inclusion of the 11.30 am shift in the roster.

B. Costs are reserved.

Employment relationship problem

[1] The applicant, the Amalgamated Workers’ Union of New Zealand (“AWUNZ”) is a registered Union. AWUNZ has a number of members employed by the respondent, Counties

Manukau in its surgical services units (SSU) at Middlemore Hospital (Middlemore) and the Manukau Super Clinic (the Super Clinic). The Public Services Association (PSA) also has members employed in the SSU at Middlemore and the Super Clinic.

[2] The relevant collective agreements applying to staff in the SSU are the Counties Manukau District Health Board and Amalgamated Workers' Union of New Zealand, Sterile Supply Services Technicians' Collective Agreement 1 October 2011-1 June 2014 ("the AWUNZ Collective") and the Auckland Region District Health Boards/PSA Allied, Public Health and Technical multi employer collective agreement 28 October 2011-30 April 2014 ("PSA Collective").

[3] Counties Manukau is a District Health Board established under the New Zealand Public Health and Disability Act 2000 providing health and education services to people in the Counties Manukau region. Counties Manukau is a Crown Entity, responsible to the Minister of Health.

[4] Middlemore operates 24 hours a day seven days a week and provides a wide range of health care services including acute surgery services. The Super Clinic provides specialist outpatient appointments and elective procedures. There are no emergency or primary care services available on site.

[5] The SSU within which members of AWUNZ and the PSA are employed, is responsible for ensuring the sterilisation of equipment for surgery at both Middlemore and the Super Clinic. Staff in the SSU work to a roster. The roster for those in the SSU at Middlemore are as follows:

A = early shift- 0700 to 1530 hours

C = day shift- 0900 to 1730 hours

P = pm shift-1430 to 2300 hours

N = night shift-2030 to 0700 hours

[6] The Super Clinic has the same shifts but does not operate a night shift.

[7] As a result of an external review of SSU in 2007, Counties Manukau has been investigating its operations including staffing levels and rosters¹.

[8] Ms Gillian Cossey, General Manager, Surgical and Ambulatory Care for Counties Manukau made the following comment on a recommendation in the external review:

A key area of focus was the rostering practices with the recommendation to 'Analyse the timing of the occurrence of peak workload demand to ensure rostering patterns reflect the allocation of resources to coincide with maximum workload'.

[9] Counties Manukau took steps to address the recommendations in the report including rostering patterns. To manage the current workload and the increased work load expected when Counties Manukau opens 3 more operating theatres and moves operations in February 2014, a nine month rotating roster was devised which included a new 1130 to 2000 shift (11.30am shift).

[10] Counties Manukau undertook two trials of a new roster including the 11.30am shift. The first trial in 2010, was with employees at Middlemore Hospital who volunteered to participate. In August 2011, AWUNZ, the PSA and Counties Manukau agreed to a further trial period for the 11.30am shift for all SSU staff at Middlemore Hospital. The trial was for a nine month period.

[11] On 5 June 2012 the PSA members at Middlemore Hospital agreed to the implementation of the 11.30am shift provided AWUNZ members also worked the 11.30am shift.

[12] On 6 June 2012 AWUNZ members at Middlemore Hospital voted not to accept the 11.30am shift. On 18 June 2012 AWUNZ informed Counties Manukau that its members had rejected the 11.30am shift. From 20 August 2012 the 11.30am shift has not been worked at Middlemore Hospital.

[13] Following rejection of the 11.30am shift, Counties Manukau informed AWUNZ that it was considering, as a last resort, restructuring the SSU pursuant to clause 10.8.2 of the

¹ Review of the Sterilising Services Units for Counties Manukau District Health Board, Terry McAuley 26 January 2007

AWUNZ Collective because it was of the view that the 11.30am shift was essential to its efficient operation.

[14] The AWUNZ Collective includes a provision which allows Counties Manukau to seek changes to its employees' hours of work to meet *service needs*. At least 8 weeks notice must be given by Counties Manukau to affected employees of the new work hour requirement. This notice is for the purpose of enabling written agreement to be reached with affected employees, who cannot *unreasonably withhold* their agreement.

[15] Counties Manukau has requested its employees in the SSU who are members of AWUNZ to change their regular hours of work to include an 11.30am shift. AWUNZ, on behalf of its members, has refused this request. Counties Manukau is of the view that AWUNZ on behalf of its members is unreasonably withholding its agreement. AWUNZ disagrees.

[16] Counties Manukau is of the view that its only option to meet its service needs is to commence a restructuring process. AWUNZ says such action by Counties Manukau would have the effect of overriding a covenant in the AWUNZ Collective requiring agreement to a change in hours of work.

[17] The parties have attempted to resolve the issues by way of mediation but this has been unsuccessful.

Issues

[18] The Authority must determine the following issues:

- (a) Have the employees/AWUNZ unreasonably withheld their agreement to work the 11.30am shift? If the answer is yes, then the provisions of clause 4.4.1 of the AWUNZ collective apply and are enforceable by Counties Manukau.
- (b) If the employees/AWUNZ have not unreasonably withheld their agreement, can Counties Manukau restructure its operations under clause 10.8.2 of the AWUNZ Collective and introduce a new roster pattern including the 11.30am shift?

First issue

Have the employees/AWUNZ unreasonably withheld their agreement to work the 11.30am shift?

[19] This question raises a dispute under s129 of the Act in my view. Section 129 states:

129. Person bound by, or party to, employment agreement may pursue dispute under this Act.

(1) Where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement or any party to the agreement may pursue that dispute ...

[20] As Mr Russell contends, correctly in my view Counties Manukau has not yet taken any action in relation to the employment of any employee which could be challenged by AWUNZ under s103A of the Act. The dispute is about the interpretation of Clause 4.4.1 of the AWUNZ Collective which deals with hours of work and the ability of Counties Manukau to require changes “*to meet service needs.*”

[21] Clause 4.4.1 of the AWUNZ collective states:

Where the Employer requires an Employee or group of Employees to change their regular hours of work requirements to meet service needs, prior notice of at least eight weeks of the new hours of work requirement shall be given (unless a shorter period is agreed) for the purpose of reaching written agreement between the Employer and the Employees directly affected. Such agreement shall not be unreasonably withheld. Note however, that in an emergency the Employer may direct temporary variation to hours of work requirements.

[22] Clause 4.4.1 provides a mechanism by which Counties Manukau can require employees to change their regular hours of work. The change to work hours must be because Counties Manukau has service needs and employees cannot unreasonably withhold agreement to the new hours of work requirement. Following the trials of the 11.30am shift, feedback was sought from affected employees, AWUNZ and the PSA about its effectiveness. Ms Cossey, stated:

The feedback generally we obtained on the rotating roster was that it was a better utilisation of staff to ensure patient needs were met. It resulted in better quality and quantity of work for the eleven operating theatres.

The 11.30am Shift allowed best use of human resources at the most demanding period of the day. This meant that there was less delay in the sterilisation, allowing more instruments to be available throughout the day for the surgeons.

[23] Ms Cossey stated that concerns raised by employees and by AWUNZ about the roster with the new 11.30 am shift included:

- Insufficient carparks,
- Back to back 10 hour shifts,
- Health and safety impacts.

[24] Each of these concerns and others raised were investigated and addressed by Counties Manukau. For example extra car parks were offered to address the concern over whether there were sufficient carparks available for those rostered on the new shift and back to back 10 hour shifts were removed from the roster.

[25] In summary, Ms Cossey stated:

Counties Manukau considers that the new nine month rotating roster system that has been developed is a far superior model, not only for staff wellbeing and fairness, but also to meet the operational requirements of the business. Central to the effective operation of this rotating roster system is the inclusion of the 11.30am Shift. This is to provide cover during the busiest time of the day for the sterilising of surgical instruments.

[26] Mr David Farmer, Sterile Services Unit Manager, who was responsible for devising a workable roster for Counties Manukau stated:

... the 11.30am shift is fundamental to the operation of the SSU as an efficient and time effective operation. It would streamline a busy department and would favourably position [Counties Manukau's] surgical services to cope with the increase expected in surgery over the forthcoming years.

[27] Mr Timothy Junior Leotuki is a Sterile Service Technician at the Middlemore Hospital where he has been working for approximately 11 years. Mr Leotuki participated in the trial of the 11.30am shift but disliked it and said he:

did not like doing another shift. We already had so many. Every time you add another shift it is more exhausting..

[28] Mr Leotuki said he found it hard *to wind down at night* and, it interfered with his sleep. At the investigation meeting, Mr Leotuki said that he has his life organised around his existing shift work and by agreeing to the 11.30am shift he would have to move things around including attending to his personal business and going to the gym.

[29] Ms Angela Piggot also a Sterile Service Technician at Middlemore Hospital gave evidence on behalf of AWUNZ about the reasons for her opposition to the inclusion of the 11.30am shift in the roster she works. Like Mr Leotuki, Ms Piggot found working the 11.30am shift exhausting. At the investigation meeting Ms Piggott said she also had her lifestyle organised around her current shifts which allow her to attend to her personal business in the morning such as paying bills and running errands. This personal work would be disrupted by the inclusion of the 11.30am shift.

[30] Further, both Mr Leotuki and Ms Piggot said the inclusion of the 11.30am shift was not effective in terms of addressing the work flow issue. They each felt that the 11.30am shift started too late *to help much on the earlier workload and [that they] wait around underutilized until 1.30-2.30pm, then we work our socks off until we go home.* Mr Leotuki and Ms Piggott said at the end of the shift they had to hand over to other staff halfway or partway through jobs which they found stressful and inefficient. They felt that they were finishing their shift at a time at which the workload had become increasingly busy. They did not like being in a position of not being able to help their colleagues.

[31] On 5 June 2012, members of the PSA who worked in the SSU unanimously agreed to adopt the new roster with the 11.30am shift, on the condition that AWUNZ members did also.

[32] One of the frustrations for Counties Manukau following the trials of the new 11.30am shift was the absence of reasoning for the rejection by AWUNZ of the new 11.30am shift. Counties Manukau HR Manager, Ms Paula Renwick wrote to AWUNZ on 7 June 2012 following notice by it that members had rejected the new 11.30 am shift as follows:

To help us to understand can you please tell me what the rationale is on why the employees of SSU do not want to work this shift? That way I can understand more clearly and see what we can do.

[33] This request was repeated on 18 June 2012 and met with a response by Mr Ray Bianci of AWUNZ on 18 June 2012 as follows:

They have made it very clear that although agreed to trial the roster for 9 months, they still do not like the 11.30am shift and prefer a 7.30am start on day shifts. They therefore prefer to revert to the old shift rosters as agreed.

[34] Mr Bianci gave no reasons why AWUNZ members did “*not like the 11.30am shift*”.

[35] A mediation was subsequently held between the parties in an attempt to reach agreement about the roster and in particular the 11.30am shift. Following the mediation, Ms Cossey wrote to Mr Bianci providing further information about the 11.30 am shift. Ms Cossey stated:

The key difference in the trial over previous rosters shift times were:

- *Establishing a shift that starts at 11.30am to cover the peak demand for sterilising services as equipment comes out of the theatres as the operations are completed, and*
- *Commencing the morning shift at 6.30am instead of 7am to ensure that there is a handover between night and morning shifts.*

The manager has also generated a roster template which provides regular repeating patterns-so staff can predict 9 months out what their duties will be and when their days off will be- so most of them has seen that as a benefit...

[36] Ms Cossey provided further information and sought agreement to the shift by AWUNZ members. No agreement was reached and on 17 July 2012 Mr Bianci responded to Ms Cossey:

1. *We do not accept that your proposed Roster is the only workable Roster available.*
2. *It appears from your proposal you require two extra people at 11.30am. Our members believe that two extra people on day shift would meet that requirement.*
3. *We do not accept that the use of the Management of Organisation Development provisions supersedes clause 4.4 (Variation to Hours of Work Requirements).*

4. *Finally, we do not see the need for a 6.30am start to accommodate a very small handover period. We propose that the supervisors could handle that.*

Finally, our members have been through the trial in good faith and have not made this decision not to agree to this proposed roster change, lightly.

[37] There was further correspondence between the parties. On 19 September Ms Cossey provided further information to AWUNZ and the PSA and concluded her letter as follows:

The conclusion is that no party is disadvantaged by doing these shifts. I also confirm that we have now been able to get two permanent car park spaces for staff to use for the 11.30 am roster. This will now ensure that staff are able to get a carpark.

I believe we have now covered off the employees concerns and I ask that you go back to your members again and alleviate their concerns so that we may proceed with the roster changes as discussed.

[38] Ms Cossey asked for Mr Bianci's response as soon as possible. On 19 October Mr Bianci provided a short reply:

...I can confirm that our members in SSU are unconvinced of the need for the D Shift and do not want to work the D shift [11.30am shift]. We will therefore not agree to any changes to the agreed Shift Roster...

[39] Counties Manukau had identified the inclusion of the 11.30am shift was necessary to meet *service needs*. *Not wanting* to work the 11.30am shift without supporting reasons was unreasonable. Counties Manukau was entitled to be told and to know the reasons for AWUNZ and its members withholding agreement to the 11.30 am shift, so that the *parties may discuss the reasons and the circumstances and attempt to reach agreement*²

[40] At the investigation meeting, reasons advanced by Mr Leotuki and Ms Piggott for not wanting to work 11.30am shift were:

- Interference with personal life- disruption of personal jobs, activities,
- Exhausting- feeling tired on days off and tired doing another shift,

² *Department of Courts v Crofts*, AC 82/01 per Colgan J

- Car park issues
- Disagreement that inclusion of the 11.30am shift would address work flow.

[41] These issues had been investigated and addressed by Counties Manukau as part of the trial process. In all these circumstances Mr Russell, for Counties Manukau, submitted the continued refusal by AWUNZ to agree to the inclusion of the 11.30am shift was unreasonable. This is the dispute. Have AWUNZ member employees *unreasonably withheld* agreement to the request by Counties Manukau for a change in work hours.

[42] The New Zealand Oxford Dictionary³, defines “*unreasonable*” as follows:

1. *Going beyond the limits of what is reasonable or equitable (unreasonable demands).*
2. *Not guided by or listening to reason.*

Almost exactly the same definition of “*unreasonable*” is contained in The Concise Oxford Dictionary⁴

[43] In *ANZ National Bank Limited v Svensson*⁵ Judge Shaw considered a clause in Mrs Svensson’s employment agreement which was similar in some respects to clause 4.4.1 in this case. The clause recognised there may be times when a *business need* requires a change to work hours. In such a case, following a process of notice and discussion the parties may agree on a change of hours and *neither party may unreasonably withhold agreement to such changes.*

[44] At para 70 Judge Shaw states:

While Mrs Svensson undoubtedly had health issues at the time of the proposed changes she was successfully working 30 hours a week. However, apart from her health, her reasons for resisting the proposed changes were not compelling. She did not want to alter what had become convenient to her personal situation.

³ Oxford University Press 2005

⁴ 6th Ed.

⁵ CC13/08, 19 December 2008

[45] Judge Shaw observed that Mrs Svensson's concerns could have been dealt with by following the procedures regarding discussion and notification in clause 2 of the employment contract, which I have referred to above. Judge Shaw found Mrs Svensson did not do so and that she had *maintained an inflexible stance [and in such circumstances] I would have found that she had unreasonably withheld her agreement.*

[46] Concerns about the 11.30 am shift raised by employees and AWUNZ on behalf of its members during the two trials were investigated and addressed by Counties Manukau. When Counties Manukau then requested reasons why AWUNZ was withholding agreement to the proposed change in work hours, it did not receive reasons. Mediation was attempted but was unsuccessful. Further information was provided by Counties Manukau to AWUNZ in an attempt to secure agreement. Agreement to the new work schedule was refused without proper reasons and in my view this was unreasonable.

[47] At the investigation meeting Mr Leotuki and Ms Piggott advanced what were primarily personal reasons for withholding agreement to the new roster including the 11.30am shift, namely disruption of their personal lives. Those reasons, in my view while understandable were not compelling. It is my view AWUNZ and its members have held an inflexible stance regarding the 11.30 am shift.

[48] The employer's ability to manage its business and the employee's right to have terms and conditions of employment honoured must be balanced fairly in a case such as this one.

[49] I find that Counties Manukau employees who are members of AWUNZ have unreasonably withheld agreement to the inclusion of the 11.30 am shift in the roster.

[50] I am therefore not required to make a finding as to whether or not Counties Manukau can restructure its operations pursuant to clause 10.8.2 of the AWUNZ Collective to bring in the new roster including the 11.30am shift.

Costs

[51] Costs are reserved. The respondent has 14 days from the date of this determination within which to file a memorandum as to costs and the applicant has a further 14 days to file its memorandum as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority