IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 141
5425486

	BETWEEN	PUBLIC SERVICE ASSOCIATION INC First Applicant
	AND	STEPHEN QUIRK and LANA FERRIGE Second Applicants
	AND	PATHWAYS HEALTH LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Fleur Fitzsimons for the Applicants Simon Menzies for the Respondent
Investigation Meeting:	22 October 2013 at Wellington
Submissions Received:	22 October 2013
Determination:	7 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is effectively a dispute about whether or not the respondent (Pathways) is entitled to vary rosters under the collective agreement it has with the first applicant (the PSA) and affecting the second applicants (Mr Quirk and Ms Ferrige) and others, or whether the PSA and its members' agreement is required.

Factual discussion

[2] Pathways is part of the Wise Group, which encompasses a number of charitable enterprises. It is the largest provider of mental health and wellness services

in New Zealand. However, it relies for its funding on a group of contracts with the Ministry of Health, various District Health Boards (DHBs) and ACC. Staff are engaged in supporting and caring for individuals with mental health issues, ordinarily in their homes.

[3] The PSA has negotiated a number of collective agreements with Pathways, the first of which came into force in July 2002. The current collective employment agreement has been in force since 1 July 2012 and expires on 30 June 2014. The issues in dispute relate to hours of work, which are dealt with in clauses 15 and 16,which state:

> *15. HOURS OF WORK*
>
> *1. Non Rostered Employees:*
>
> *(a) Forty hours constitute a working week which may be worked on five 8 hour days, Monday to Sunday between the hours of 8am and 6pm.*
>
> *(b) Start and finish times will be agreed between employees and the Regional Manager.*
>
> *(c) Additional hours will be mutually agreed and paid at the appropriate hourly rate.*
>
> *(d) To accommodate the needs of the service and employees, hours may be varied by mutual agreement. Such variations may include flexitime arrangements that will operate on an hour for hour basis, or occasions where day employees agree to work rostered shifts.*
>
> *2. Rostered Employees:*
>
> *(e) The ordinary hours of work shall be worked in accordance with a rolling roster based on a normal pattern of up to 40 hours per week.*
>
> *(f) Rosters will be designed to recognise the fact that Pathways provides a range of flexible and responsive services, up to 24 hour, seven day services. Rosters may include sleepover and on-call requirements.*
>
> *(g) Rosters will be developed in consultation with employees that:*
>
> *a. Meet the needs of people using services and the service.*
>
> *b. Comply with acceptable Health and Safety practice.*
>
> *c. Have regard for the individual needs of employees where practicable.*

> *(h) Employees should not be rostered on for more than 5 consecutive shifts without their agreement and in accordance with health and safety requirements.*
>
> *(i) A break of at least nine hours should be provided whenever possible between any two consecutive shifts. Except that if a ten hour duty has been worked then a break of 12 consecutive hours should be provided wherever possible.*
>
> *(j) Additional hours are by mutual agreement and paid at the appropriate hourly rate.*
>
> *(k) Individual employee's hours of work or rosters will be detailed in Schedule 2.*
>
> *16. ROSTER CHANGES*
>
> *Pathways will give employees 4 weeks notice of significant roster changes, e.g. roster change requiring a variation to employment.*

[4] Also potentially relevant are clause 4, which states that any of the provisions of the agreement may be varied by written agreement between Pathways and the PSA after due ratification and Schedule 2, the heading of which is: *Individual employees' detailed hours of work or roster*.

[5] In Ms Ferrige's case the hours of work schedule states, amongst other things, that:

> *The employer may alter, and/or amend the hours of work, shift hours and/or roster cycle to suit operational needs.*

[6] While Mr Quirk had originally signed a schedule to similar effect, his most recent employment document entitled *Variation to employment agreement* sets out a variation to hours which *replaces any previous variation* with all other terms and conditions of employment remaining unchanged. It took effect from 24 March 2008 and provides for set hours of work over a 16 day cycle.

[7] Because of significant changes in its contractual requirements, Pathways has been forced to reconsider the four days on, two days off roster that applied to Mr Quirk and Ms Ferrige and many others of its employees. Consequently, for operational reasons, including a desire to save money, Pathways has moved to a five on/two off roster so that employees' days of work remain the same each week. As a result some employees such as Mr Quirk and Ms Ferrige are denied a full weekend off, which they did get every six weeks or so under their four on/two off arrangement.

[8] This new arrangement was only entered into after full consultation with the PSA and the applicants, but agreement could not be reached. This was because on the one hand Pathways is facing financial constraints and on the other many of the PSA members found the change to a five on/two off roster to be extremely inconvenient for their personal lives. Responsibly, Mr Quirk and Ms Ferrige, together with other PSA members, have subsequently agreed to work their new rosters without prejudice to this claim in the Authority.

[9] The matter remained unresolved after mediation and it therefore falls to the Authority to make a determination.

The Law

[10] The method for interpreting collective agreements has been recently set out in *Electrical Union 2001 Incorporated & Cowell v. Mighty River Power Ltd* [2013] NZEmpC 197 at para.[25]ff:

> *[25] The correct approach to interpreting collective agreements has been addressed most authoritatively and recently by the Court of Appeal in* Silver Fern Farms Ltd v. New Zealand Meatworkers & Related Trades Union Inc *[2010] ERNZ 317 (CA). The Court followed the judgments of the Supreme Court in* Vector Gas Ltd v. Bay of Plenty Energy Ltd *[2010] NZSC 5 and what it described as a series of important decisions of the House of Lords (now the Supreme Court) of the United Kingdom and of the New Zealand Court of Appeal over a lengthy period. These judgments were set out at fn20 of the Court of Appeal's judgment in* Silver Fern Farms Ltd. *The Court accepted (and it was not argued otherwise before it) that it was proper to consider prior instruments between the parties to a collective agreement or their predecessors, and found help from the summary of McGrath J in* Vector Gas *of Lord Hoffman's five principles of interpretation in his judgment on behalf of the majority in* Investors Compensation Scheme Ltd v. West Bromwich Building Society *[1998] 1 WLR 896 (HL) at 61:*
>
> > "… interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.
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> *[26] The Court of Appeal in* Silver Fern Farms *also approved the analysis of Tipping J in* Vector Gas *as follows:*
>
> … generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can

> represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification. But a clear drafting or linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear. A special meaning as this when the words used, even after the contractual context is brought into account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evident from the objective context that the parties, by custom usage or agreement, meant their words to bear a meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage."

[11] As was held in *Amalgamated Engineers Printing & Manufacturing Union Inc* v *Energex Limited* [2006] ERNZ 749 at 30, the following principles remain largely applicable to the issue of consistency between individual and collective terms and conditions of employment:

- *The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.*

- *The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.*

- *The definition of inconsistent is that in the Oxford English Dictionary (second ed) Oxford, Clarendon Press 1989.*

  Not agreeing in substance, spirit or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.

- *If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.*

- *Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.*

Discussion

[12] The PSA first claimed that Pathways is in breach of the collective agreement because the hours it seeks to have people such as Mr Quirk and Ms Ferrige work are not rolling rosters, which is required under 15.2(e). It is true that they are not rolling rosters in the normal sense of the word *rolling*, because the days and hours of work appear to be, at least for those workers about whom evidence was given, the same days and the same hours each week. However, the employees can not be said to meet

the definition of non-rostered employees either, because they do not work between the hours of 8:00am and 6:00pm.

[13] The collective agreement is in such a form that employees may not be re-categorised from being a rostered to becoming a non-rostered employee, without the employee's agreement, as the parties appeared to accept. Similarly, there is no provision for a third category under the collective, namely for rostered employees who work on a fixed roster. I conclude that it would be unrealistic to interpret the collective agreement (one not developed by professional legal drafters) to not allow roster changes to be developed and implemented simply on the basis that a new roster was not a rolling one, particularly as at the time the collectives were negotiated there was no suggestion that any non-rolling rostered staff were being required to work outside of the hours of 8:00am to 6:00pm and thus qualifying as non-rostered staff. No doubt the phrase *rolling roster* was used to explain the actuality of the roster systems to date, but not that this was the only form of roster that could ever be applied. The phrase should therefore be interpreted on the basis that the rosters that Pathways wishes the PSA members to work are a different form of rolling roster within the meaning of the collective, even although they do not *roll* as such from day to day.

[14] It is clear that rosters are to be (and have been) designed following consultation in terms of 15.2(g), subject to the issue of whether agreement is required to a change of roster. The questions for determination are first, whether the collective agreement has been complied with by Pathways when setting the new rosters, and second, where employees have signed agreements over rostered hours, whether they are inconsistent with the collective. Both issues involve analysing what the effect of clause 16 is, if the hours set out in the schedule of rosters are enforceable terms and conditions of employment by each employee and the PSA.

[15] While under clause 15.1 Pathways has significant flexibility in the days and hours of work of non-rostered employees – other matters such as start and finish times, additional hours and variation of hours must be by agreement. The contrast is made with rostered staff under 15.2, where Pathways is claiming that rostered employees have no such protections. I note that clause 15 is explicit in areas where agreement is required, see subclauses 1(b), 1(c), 1(d), 2(h) and 2(j). It follows that, by contrast, agreement may not be required where there is no reference to the necessity

for agreement in the wording of the collective. In addition, subclause 2(g) provides for criteria on how rosters should be developed (as well as for consultation), presumably to help protect employees from unfair rosters, which would not necessarily be required if their agreement to any change was required.

[16] The PSA notes that there would be little purpose in containing individual employee's hours of work or rosters in the schedule if that schedule could be varied without agreement. However it does provide a record of the rosters in case of disputes over rostered hours and for the application of cl 15.2(j) for example.

[17] Clause 16 relates, as one example, to roster changes *requiring variations to employment.* It was submitted that such changes must invariably involve variations to employment agreements and it is trite law that employment agreements can only be varied by consent. However this wording is set out in clause 16 as only one example. That implies that there must be other forms of significant roster change that do not involve variations to employment, and hence that would be consistent with Pathways possessing a right to unilaterally vary employees' rosters. The fact that Pathways has to give notice under clause 16 could thus give Pathways the right to vary rosters unilaterally, providing there is consultation, the criteria in clause 15.2(g) are met and it has given four weeks notice.

[18] The tenor of the collective agreement is that it is for the employer to develop rosters in accordance with the principles set out in the collective, which it did when compiling 5 on/2 off rosters, given the service imperatives. No doubt in order to implement the changes to the rosters smoothly it makes sense that a roster change can not be implemented, at least on a long term basis, without some notice and that four weeks has been agreed by the parties as that appropriate period. Thus clause 16 is also consistent with Pathway's position.

[19] As a result it need not be considered whether the agreements such as that entered into by Ms Ferrige (which give Pathways the clear power to vary roster patterns unilaterally) are consistent with the collective agreement. This is because of my conclusion that the tenor of the collective agreement is such that rostered employees can have their rosters changed without agreement, and thus any wide ranging clauses in the schedule clearly can stand with the terms of the collective agreement.

[20] On the other hand, Mr Quirk has signed a variation to his employment agreement providing for set hours of work over a 16 day rolling roster, without any reservation being made by Pathways that it was still able to unilaterally vary this roster. It can not be said that this variation, which should form part of schedule 2, is inconsistent with the rest of the collective, because it sets out his roster. However, simply because this roster change was agreed in 2008 and described as a variation to his employment, does not mean that his agreement was required for future variations to his roster. There is therefore no inconsistency with the collective agreement simply because the 2008 variation between Pathways and Mr Quirk was agreed rather than imposed. Similarly, that document can not be applied to override the provisions of clause 15 allowing for roster changes.

Determination

[21] I therefore determine that rosters of employees covered by the collective employment agreement may be altered without agreement by the employees concerned.

Costs

[22] Costs are reserved.

G J Wood
Member of the Employment Relations Authority