

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 70
5574884

BETWEEN CORRECTIONS ASSOCIATION OF
NEW ZEALAND INCORPORATED
Applicant

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Respondent

Member of Authority: M B Loftus

Representatives: Jim Roberts and Nina Thomson, Counsel for Applicant
Karen Radich and Steve Wragg, Counsel for Respondent

Investigation Meeting: 20 November 2015 at Wellington

Submissions Received: At the investigation meeting, along with further
correspondence up till 11 December 2015

Determination: 22 June 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] This is a dispute with the applicant, the Corrections Association of New Zealand Incorporated (CANZ), claiming the respondent, Department of Corrections (Corrections) intends introducing a Physical Readiness Assessment (PRA) in circumstances which preclude it from doing so.

[2] In particular CANZ claims the PRA is a condition of employment which *can only be introduced by a change to the Collective Agreement*.¹ CANZ also claims

¹ Statement of Problem at 1.3

Corrections has breached its duty to bargain in good faith by refusing to address CANZ's claim it include the PRA in the Collective Agreement via a variation.

[3] Finally CANZ says Corrections has again breached the duty of good faith by *not being active, constructive, responsive and communicative ... by failing to advise what terms and conditions it relies on to introduce the PRA.*²

[4] Corrections is of the view it may implement policies and programmes outside of the Collective Agreement provided it does not breach the collective in doing so. It follows the PRA, which it portrays as *a compelling health and safety initiative*,³ is such a policy and there is nothing in the collective which precludes its introduction.

Background

[5] CANZ is a union representing corrections officers at various prisons throughout New Zealand. It and Corrections are party to a collective agreement with the current version being in force for the period 20 March 2015 to 1 March 2017. CANZ says the following provisions are relevant to this dispute:

- a. Clauses 1.4.1 and 2.2.5 which requires any variation be negotiated, agreed and reduced to writing;
- b. Clause 2.2.4 which gives Corrections *the right to plan, manage, organise and finally decide on the operations and policies of the Department* provided it does so in accordance with the provisions of the collective agreement;
- c. Clause 3.3.1 which provides Corrections will provide appropriate training to enable employees to perform their roles safely and efficiently;
- d. Clause 3.3.2 which requires employees participate when training opportunities are offered;
- e. Clause 6.1.1 which provides *It is essential that staff present themselves for work fit to carry out their assigned duties*;

² Statement of Problem at 1.6

³ Statement in Reply at 2

- f. Clause 6.4.1 which allows the Department to require an employee undergo medical examinations to assess *whether they continue to meet the requirements of the role.*

[6] The PRA has its genesis in the recommendations of an expert advisory panel on staff safety who saw a need to ensure employees were fit enough to do their jobs which can include physically demanding tasks. It would also mean other employees would have confidence their colleagues were capable of providing assistance if required.

[7] The recommendation saw the establishment of a PRA project charged with developing an occupational assessment that simulated the physical requirements of custodial officers. Both staff and CANZ had input and this extended to meetings at which implantation was discussed. PRA was also discussed at regular monthly health and safety meetings. Some employees also participated in voluntary trials.

[8] In 10 June 2015 the process was extended to include a wider staff group and a consultation document was promulgated. CANZ received a copy two days earlier.

[9] On 3 August 2015 a decision document was issued. It advised Corrections intended introducing the PRA once an implementation plan and detailed policy guidelines have been completed. This is yet to be completed due to CANZ's attempts to halt the process via this application though the PRA is being used as part of a pre-employment testing process.

[10] The PRA involves an assessment of an employees' fitness via a physical test comprising six activities. Corrections denies CANZ's claim staff are also required to submit to a medical examination/assessment prior to doing the PRA. It says they will be asked to provide an exercise risk assessment which is part of their regular free health check provided they had done one in the last 12 months. If not staff would be asked to complete a pre-exercise screening test on the day of the PRA or provide clearance from their GP.

[11] Following the PRA employees are graded green, amber or red. Amber employees have an opportunity to repeat the test in a fortnight and if still graded amber they will be provided with support and retested in a year's time.

[12] Those graded red will be required to submit to medical and safety assessments with the result determining whether or not they are capable of remaining in their roles or have their duties amended. It may also result in a requirement to take sick leave either paid or unpaid. They will also be required to improve their fitness levels.

[13] CAZN is concerned it has various questions which remain unanswered. They include whether or not employees will be required to address their fitness in their own time and uncertainty about the level of support Corrections may offer.

[14] CANZ is also of the view, consistently expressed, the PRA constitutes a change to employees conditions of work which can only be implemented by a variation to the collective agreement. In this regard CANZ notes bargaining for the present collective occurred between December 2014 and 7 April 2015. It also notes Corrections acknowledged it expected CANZ would raise claims regarding the PRA but says Corrections then refused to bargain on the issue.

[15] Corrections denies it refused to discuss the matter during bargaining. Corrections says CANZ initially sought a payment for staff to complete the PRA of \$1,000 per employee per year, an additional 3 days wellness leave and a higher duties allowance for PRA assessors. The claims were rejected.

[16] CANZ also sought to include the PRA process as a schedule to the collective agreement so it could not be altered without agreement. Again Corrections did not accept this claim. It did, however, advise it was committed to continuing consultation over the proposed assessment. That is recorded in a letter that accompanied the draft terms of settlement when these were forwarded by Corrections to CANZ on 23 February 2015.

[17] Corrections says its response does not constitute a refusal to bargain but a refusal to accede to CANZ's demands which is, it says, a right it has when bargaining. Corrections adds CANZ can be said to have accepted its position by concluding the collective agreement.

Determination

[18] The first and key issue is whether or not the PRA constitutes a condition of employment which must be incorporated in the collective agreement.

[19] CANZ says the answer is yes and the PRA constitutes a change to an employee's terms in that it requires an employee to:

- a. *Submit to a medical examination/assessment;*
- b. *Carry out a set of physical tasks and be assessed on their performance;*
- c. *Undertake additional activities/work (likely outside of work time) in order to improve their fitness;*
- d. *Potentially suffer detriment (in the form of leave (paid or unpaid), unilateral changes to duties, or dismissal) if they are unable to improve their performance.*⁴

[20] CANZ says the PRA constitutes *a significantly different condition of work, and a departure from what was ever intended within the [collective agreement] or any previous application of the [collective agreement]* which was never bargained for.

[21] It then argues the placement of clause 2.2.5 acts as a fetter on Corrections right to manage in clause 2.2.4 in the same way contractual fetters were found to exist in *Electrical Union 2001 Inc v Mighty River Power Limited*.⁵

[22] I conclude the *Mighty River Power* scenario to be distinguishable. In that case the employer's ability to ascertain whether or not an employee was fit to work was already restrained by a provision of the applicable collective which said there had to be just cause to request an employee confirm their fitness and that cause be recorded in writing. To then try and change that to random testing is clearly an alteration of an express provision of the collective.

[23] Similarly another case referred to by CANZ has the same distinguishing feature. In *Hooper v Coca Cola Amatil (NZ) Ltd*,⁶ another case involving drug and alcohol testing, there was again a clause specifying how and when testing might occur. That is not the situation here. There is simply a requirement staff are fit enough to perform their duties. There is no detail about how, or constraint on, the way that will be ascertained. The PRA endeavours to address that deficiency.

⁴ Statement of Problem at 2.16

⁵ [2013] NZEmpC 197

⁶ [2012] NZEmpC 11

[24] As Corrections says the PRA is *an assessment [it] can reasonably expect staff to undertake under the current provisions of the [collective agreement] and that there is nothing to exclude the PRA as a reasonable assessment and measure in relation to their roles.*⁷ Its introduction does not therefore require any changes to the collective agreement⁸ as there is no contractual restraint on how to measure the present requirement staff are fit to carry out their duties.

[25] There is then CANZ's argument clause 6.6.1 was never intended to be used in the way now being proposed via the PRA. It is claimed that when it came into being Corrections rejected a CANZ proposal there be a fitness assessment, instead taking the approach fitness to work should be measured by a doctor to a medical standard. It is argued Corrections is therefore estopped from now introducing such an assessment. This claim faces one crucial impediment. The clause does not say what CANZ claims is implied. It is silent on the issue.

[26] For the above reasons I conclude, as argued by Corrections, this constitutes an operational decision clause 2.2.4 of the collective agreement gives the department the ability to make, especially given the level of consultation undertaken.

[27] The argument staff will be required to undergo medical examinations also fails. It already has that ability under clause 6.4.1 but in any event the evidence does not suggest this is medical examination per-se but a confirmation the employee has no issues that may impede their participation in the PRA. That seems a sensible precaution.

[28] The argument employees may potentially suffer detriment may be true but each case will ultimately depend on its individual circumstances and, in some cases, a detrimental outcome may be justifiable as the employee is no longer capable of complying with the requirement s/he present fit to perform his or her duties and/or the employee does pose a safety risk to both him or herself and/or others.

[29] I also note CANZ, via questions answered by its president Alan Whitley, accepts the activities tested in the PRA are ones which a corrections officer could be expected to perform. Mr Whitley also accepted CANZ was not opposed to the PRA as it would improve the safety of its members but it demanded the introduction be

⁷ E-mail dated 17 November 2014

⁸ Letter dated 4 June 2015

bargained so that it could procure payment for completing the PRA and time to prepare. If there proves to be issues regarding the appropriateness of training then these may, if they truly exist, be addressed via claims clause 3.3.1 has been breached.

[30] Finally, and again, I refer to the claim CANZ advocated for a higher fitness requirement for some years but Corrections rejected the idea. It seems ironic CANZ is now trying to stop delivery of that which it says it saw as desirable. Finally I note Mr Whitley's acceptance the PRA will enhance an employee's safety. I must express concern at the fact the union now wishes to block a safety initiative because Corrections will not pay its members to introduce it. That seems an abrogation of the member's duty to *take reasonable care for his or her own health and safety and take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.*⁹

[31] The conclusion Corrections may proceed with the introduction of the PRA without amending the collective agreement mean CANZ's claim Corrections has breached the duty of good faith by failing to negotiate a variation will fail as no variation is required.

[32] Similarly it means the claim Corrections has failed to be active, constructive, responsive and communicative by specifically failing to advise what terms and conditions it relies on to introduce the PRA fails. There are no applicable terms in the collective that require identification and, in any event, the evidence shows a comprehensive consultation process has occurred.

[33] Similarly the claim Corrections breached the duty of good faith by not negotiating CANZ's claims during the most recent bargaining round will also fail. Firstly the evidence does not support the allegation but shows Corrections rejected the claims as unreasonable. That is a right it has and is simply part of bargaining. Not all claims will be accepted while others may be amended during the negotiating process. Finally I note it is, in my view, difficult for CANZ to now argue otherwise given its members, by ratifying the present collective agreement, accepted their claims regarding the PRA would not form part of the finalised agreement.

⁹ Sections 45(a) and (b) of the Health and Safety at Work Act 2015

Conclusion and costs

[34] For the above reasons CANZ's claims and its attempt to prevent Corrections from introducing the PRA fails on the grounds presently pleaded fails. Costs are reserved.

M B Loftus
Member of the Employment Relations Authority