IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 125
3023094

	BETWEEN	Regional Facilities Auckland Applicant
	AND	Northern Amalgamated Workers Union Incorporated Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Simon Greening, Counsel for the Applicant Helen White, Counsel for the Respondent
Investigation Meeting:	On the papers
Additional documents received:	21 March 2018 from Applicant 16 March 2018 from Respondent
Determination:	24 April 2018

DETERMINATION OF THE AUTHORITY

A. Where RFA proposes to make a permanent and significant change to an employee's work pattern, the Collective Agreement requires that it must first negotiate with the affected employee and obtain the employee's consent to the change.

B. Work pattern in the context of this case means the regular pattern of hours and days worked by an employee, whether recorded in a roster or otherwise.

C. The changes to the work patterns proposed by RFA, as they relate to Letitia Haddon and the Grounds and Maintenance employees, are significant and permanent changes to their work patterns and therefore require their consent.

Employment Relationship Problem

[1] The Applicant is Regional Facilities Auckland (RFA). RFA manages Auckland Zoological Park (the Zoo).

[2] RFA and the Respondent Union, Northern Amalgamated Workers Union Incorporated (the Union), are parties to a Collective Agreement (CA). The CA applies to members of the union who are employees at the Zoo and who are carrying out duties in the areas of zoo keeping, veterinary nursing, trades persons, store person, cashiering, retail, function work, visitors' services, gardening, general grounds maintenance, construction and driving.

[3] A review of health and safety practices at the Zoo in 2017 highlighted risks associated with the current work practices within the grounds and maintenance team. Particularly in regard to lone workers working on the weekend with tools. In response RFA proposed changes to the ground and maintenance teams' roster to ensure a minimum staffing level of two staff per day.

[4] RFA has also proposed changes to the hours of work and roster of Letitia Haddon, a Zoo keeper.

[5] RFA's proposals have met with opposition from the affected staff and their Union who say changes cannot be made to their work patterns without their consent.

[6] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The questions at issue

[7] The question identified by the pleadings, and during the initial telephone conference with the parties is whether RFA, pursuant to the terms of the CA, is able to vary employees' work patterns where it has consulted with the affected employees but has not obtained their consent to the change.

[8] In the course of my investigation the parties raised an additional question as to the meaning of the words "work pattern" and whether the proposed changes to the

employees' work pattern are permanent and significant. It is appropriate that I deal with this question first.

[9] With the consent of the parties this matter has been determined on the papers following the filing of affidavits and submissions by both parties and a reply affidavit and submissions from RFA.

The legal position

[10] The principles that apply when interpreting an employment agreement are well established. They were recently addressed by the Supreme Court in *Affco NZ Limited v NZ Meat Workers and Related Trades Union Incorp & Anor*.[1]

[11] In *Affco* the Supreme Court affirmed the approach described in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, namely: [2]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having 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". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs the meaning.

The terms of the CA

[12] The relevant clauses in the CA are:

> 6.1 The employees' ordinary hours of work shall be expressed within the employees' offer letter for the role in which they are employed. Hours are expressed on a fortnightly basis, in line with the employer's pay run and the operational nature of the Zoo.
>
> 6.5 Any permanent significant change to an employees' work pattern will be negotiated by the parties, in accordance with Clause 37 of this agreement.
>
> 6.6 Work patterns will be made available to the employee at least two weeks prior to it coming into effect. Any changes to the notified roster can only be made by mutual agreement.

[1] [2017] NZSC 135.
[2] [2014] NZSC 147.

Background to the current CA

The previous CA

[13] I have viewed the four CAs which precede the current CA. These were signed on the first day of July every two years from 1 July 2007. The relevant terms remained unchanged during this period, save for the clause reference.

[14] The relevant terms were these:

> 6.1 The employees' ordinary hours of work shall be:
>
> (a) Monday to Friday employees
>
> Forty hours per week of which not more than eight hours may be worked between the hours of 6 am and 6 pm from Monday to Friday inclusive
>
> (b) Rostered employees
>
> Eighty hours per fortnight, no more than eight hours per day between 6 am and 6 pm, and no more than seven consecutive days.
>
> 6.2 The ordinary hours of work for employees covered by this clause may be varied by mutual agreement between the employer and the employee, or at the employee's request, the union.
>
> 7.1 Any permanent significant change to the rostering patterns will be negotiated by the parties, in accordance with clause 37 of this agreement.
>
> 7.2 Rosters will be made available to the employee at least two weeks prior to it coming into effect. Any changes to the notified roster can only be made by mutual agreement.

[15] Consistent with these agreed terms, where RFA proposed a change to an employee's ordinary hours of work or rostering pattern, it first obtained the consent of its employees. For example, Letitia Haddon gave uncontested evidence that when her rostering pattern was changed the parties negotiated and agreed to a change to her roster before it occurred.

[16] These changes first occurred in October 2012 when Ms Haddon's roster changed to a 6/4 split roster. The "split" referred to how her 10 working days within a fortnight were split i.e. 6 days on, two days off, 4 days on, two days off. Further changes occurred in June 2013 when her roster changed to a 7/3 roster i.e. 7 days on, two days off, 3 days on, two days off. Then again in February 2015 when the roster

changed to a 5/2 split. On each of these occasions a "Change to working hours form" was executed by Ms Haddon and her Manager before the new roster issued.

The changes to the current CA

[17] The current CA replaced Clause 6.1 with wording which covered both "Monday to Friday employees" and "Rostered employees". In addition it deleted Clause 6.2 and changed clause 7.1 (now clause 6.5) by changing the word "rostering patterns" to working patterns. Clause 7.2 (now clause 6.6) remained unchanged save for the word "rosters" being changed to "work pattern".

[18] The reasons for these changes were explained by Jonathan Wilcken, a Director of the Zoo, and Ms Haddon, in their affidavits. Mr Wilcken deposed that the aim was to remove unnecessary specificity in the CA around hours of work and to consolidate wording of relevance to all staff rather than separate references for "Monday to Friday employees" and "Rostered employees". Ms Haddon, who was a party to the negotiations for the new CA as the Union's delegate, deposed the intention was to use the words "work patterns" to cover both rostering pattern changes and hours of work changes for all employees.

[19] Mr Wilcken and Ms Haddon's evidence is supported by the email correspondence exchanged prior to the execution of the CA. The email correspondence, dated mid-June 2017, was between Letitia Haddon and Emily Clayton, from the Zoo. The correspondence provided:

> Haddon — I believe that "hours of work" and rostering patterns" are a different thing. Rostering patterns to me talks about being on a 7 on 3 off, Or 5 on 5 off, the pattern defines more which days (eg: Sunday off, alternative Sundays off) and the pattern that occurs and is definitely something our members need a say in being changed as it has a significant impact of work/life balance. Therefore we need to retain the ability to negotiate and mutually agree to a change of roster pattern.
>
> Clayton — Oh right – so basically, I mean the same thing but we're lost in translation here.
>
> The pattern of work should fix that then? 'pattern of work' rather than 'hours of work'?

Later that day Ms Clayton sent a further email:

> Clayton — Here you go – simply changed to 'pattern of work' – same thing as a roster. The intention is to tidy up terminology so it

> actually covers everyone. The old 'rosters' has been removed in definitions, so if I randomly place it there it isn't worded well.

[20] The email correspondence also confirmed that the parties did not intend the change in wording to take away the existing rights of employees. In response to a query from the Union about the reason for the change, Ms Clayton replied:

> ….Already explained this – rosters was removed from the definition list. This new terminology covers everyone, not just rostered staff. Surely that's a better win for employees?
>
> I don't understand what the issue is - no-one is taking away any rights, we're adding to them to cover all employees?"

Question One: What is the meaning of work pattern?

[21] RFA submits that "work pattern" means the ordinary hours of work set out in Clause 6.1 of the current CA and an employee's letter of offer. In support of this submission it produced a number of letters of offer which each contain similar wording with regard to hours of work. One example is a letter of offer to a Grounds and Maintenance employee dated 13 January 2017. This provides:

> Your ordinary hours of work will be 40 hours per week. You will work shifts in accordance with the roster set by Regional Facilities Auckland and in accordance with the provisions of your employment agreement. Please note that this means that you may be rostered to work for 8 hours per day over any 7 days including weekends and public holidays. The roster may require you to work hours falling outside usual business hours, or overnight.

[22] I am not persuaded by RFA's submission. I agree with the Union that an employee's "ordinary hours of work" provides the parameters within which the pattern of days and hours fit. The "work pattern" is the regular pattern of hours and days worked by an employee, whether recorded in a roster or otherwise.

[23] I am satisfied the meaning I have reached is what a reasonable person would conclude having regard to the relevant background. It accords with:

a. The natural and ordinary meaning of "work pattern",

b. The CA's recognition of an employee's need for certainty around hours to be worked and when.

c. Other clauses in the CA, particularly Clause 6.6 that interchanges the word "work pattern" with notified roster.

d. The email correspondence exchanged between the parties in mid-June 2017. This shows a common intention that the words work pattern means the "same thing as roster" and there was no intention to remove any existing rights. Under the previous CA, RFA was required to negotiate and gain the consent of employees before making permanent and significant changes to their rostering patterns. It also had to obtain the consent of employees to changes to their roster, a requirement which was carried over into Clause 6.6 of the current CA.

e. The parties' post-contractual conduct. Following the execution of the CA the parties conducted themselves in a manner consistent with their shared understanding that the words "work pattern" meant the regular pattern of hours and days normally worked by an employee, whether by roster or otherwise. In correspondence exchanged between RFA and Ms Haddon from August 2017 onwards RFA refers to a change in Ms Haddon's work pattern when talking about a change to her hours of work and rostered days.

[24] On the foregoing basis, and in answer to the first question posed by RFA, I am satisfied "work pattern" is the regular pattern of hours and days worked by an employee, whether recorded in a roster or otherwise.

Question Two: Is consent required to vary an employee's work pattern where consultation has occurred but the consent of the affected employees has not been obtained to the change?

[25] The answer to RFA's question is answered by Clause 6.5 of the CA.

[26] This clause applies to situations where RFA proposes to vary an employee's work pattern and that change is permanent and significant. In those circumstances the change must be "negotiated" by the parties, in accordance with the variation provision contained in the CA. The parties agree the reference to Clause 37 should be to Clause 34.

[27] Consultation with affected employees is insufficient. The word "negotiated" in Clause 6.5 implies a process that has its object arriving at an agreement.[3]

[3] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at p 30.

[28] I am satisfied the meaning I have reached is what a reasonable person would conclude having regard to the relevant background. It accords with:

a. The previous CAs. These required an employee's consent to changes to their ordinary hours of work, consent to permanent and substantial changes to their rostering patterns (following negotiation), and their consent to changes to the notified roster.

b. The conduct of the parties under the previous CAs in requiring an employee's consent to changes to their rostering patterns before they occurred.

c. The mid-June email correspondence exchanged by the parties prior to the execution of the current CA. This showed the intention of the parties was not to remove any existing rights.

d. Clause 6.6 of the current CA which requires an employee's consent to any changes to the "notified roster". The words "notified roster" being used interchangeably with the words "work pattern".

[29] On the foregoing basis, and in answer to the second question posed by RFA, where RFA proposes to make a permanent and significant change to an employee's work pattern, the CA requires that it must first negotiate with the affected employee and obtain the employee's consent to the change.

Issue Three: Is the proposed change permanent and significant?

[30] RFA submits the proposed changes are neither permanent nor significant. It submits "permanent and significant" means a situation where the Zoo is proposing to amend an employee's ordinary hours of work as opposed to a roster which is temporary in nature. I do not accept this argument.

[31] Clause 6.5 expressly provides that the permanent and significant change is to the "work pattern" not the "ordinary hours of work". I have already found "ordinary hours of work" provides the parameters within which the pattern of days and hours fit. The "work pattern" is the regular pattern of hours and days worked by an employee, whether recorded in a roster or otherwise.

[32] Whether a change is permanent and significant will depend on the circumstances.

Significant?

[33] The meaning of "significant" in the Oxford New Zealand Dictionary is "noteworthy; important". In the present case I am satisfied, on balance, that the proposed changes to the grounds and maintenance staff's work pattern, and that of Ms Haddon, are significant changes.

[34] The proposed changes will result in Ms Haddon working later hours and her roster changing. At present Ms Haddon works a 5/2 split roster working Tuesday to Saturday each week. The proposed change is to a 7/3 day roster i.e. over a fortnight period Ms Haddon will be required to work 7 days on, followed by a 2 day break, followed by 3 days on and then another 2 day break. This will mean she will be working alternate weekends with two weekdays off a fortnight. Ms Haddon says that working seven days in a row will have a negative impact on her wellbeing. A copy of a medical certificate supporting her evidence was provided.

[35] No details have been provided as to the nature of the proposed changes in regard to the grounds and maintenance staff. However, from the staff feedback I have viewed, I can see that the change proposed includes staff working at least one day of every weekend whereas they currently only work one in every 3-4 weekends. This is more likely than not to be a significant change. The feedback I have viewed is that the proposed changes will have a negative impact on the employee's personal/work life balance and on the teams' morale.

Permanent?

[36] In the present circumstances, I understand there is no proposal to limit the length of time that the rosters are intended to last either in terms of the grounds and maintenance staff or in relation to the changes proposed for Ms Haddon. I am satisfied, on balance, that the proposed changes to their work pattern are permanent.

[37] Ms Haddon's evidence is that she understands the changes proposed to her roster are permanent. Her evidence is consistent with correspondence from RFA to Ms Haddon. This states that the change to Ms Haddon's hours is significant for RFA's operations. The change will bring Ms Haddon's hours and rostered days into

line with the other members of her team. This will result in a cost saving to the Zoo. It is more likely than not that the change is permanent.

[38] In regards to the maintenance and grounds staff, I understand no limit has been placed on the length of time the roster will be in place. It is more likely than not that the change is likely to be permanent. This is supported by the Statement of Problem that pleads:

> 1 (b) The applicant deems a change to a roster for some employees to be an operational necessity…"
>
> (o) RFA maintains two essential reasons for the proposed variation to the roster. Firstly, the statutory requirement to ensure employees working in the Grounds and Maintenance teams are working in a healthy and safe environment. The issue with the current roster is employees working by themselves in the weekends. Secondly, the increase in visitors to the Zoo during the weekends requires the Zoo, for operational reasons, to increase the number of employees in the Grounds team working during the weekends.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[40] If they are not able to do so and an Authority determination on costs is needed the Union may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum RFA will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[4]

Jenni-Maree Trotman
Member of the Employment Relations Authority

[4] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].