IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 102
3039371

	BETWEEN	RUTH FRENCH First Applicant
		JACKSON WALKER Second Applicant
		JAKE WREN Third Applicant
	AND	HOYTS CINEMAS (N.Z.) LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Duncan Allan, for the Applicants Tim McGinn, for the Respondent
Investigation Meeting:	24 January 2019 & 8 February 2019
Submissions [and further Information] Received:	11 February 2019 from the Applicants 11 & 13 February 2019 from the Respondent
Date of Determination:	26 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent is a company that runs a number of cinemas throughout New Zealand. The Applicants were each employed by Hoyts as cinema attendants at the Hoyts Berkeley cinema in Takapuna. The first and third Applicants remain employed by Hoyts.

[2] The Applicants each allege that in or about March 2017 and April 2017 they suffered disadvantages to their employment. Firstly, when Hoyts failed to offer them

an increase to their minimum contracted hours before employing new staff. Secondly, when Hoyts promoted another cinema attendant to the role of shift assistant rather than one of the Applicants. The first of these disadvantages, they claim, also gives rise to a breach of the collective agreement. A claim for breach of good faith arising from an allegation that Hoyts failed to investigate their personal grievances is also made. Hoyts denies the Applicants' claims.

[3] 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 issues

[4] The issues requiring investigation and determination were:

a. Did Hoyts breach Clause 14.15.4 of the Collective Agreement by hiring new staff in March and April 2017 without first offering the available hours to the Applicants?

b. Did the Applicants raise their personal grievance relating to the hiring of new staff in March 2017 within the 90 day statutory time limit?

c. If not, did Hoyts consent to the raising of the Applicants' personal grievances out of time or are there exceptional circumstances warranting the granting of leave to the Applicants to raise these grievances out of time?

d. Did the Applicants suffer an unjustified disadvantage to their employment as a result of:

    i. Hoyts hiring new employees in March and April 2017 without first offering the available hours to the Applicants?

    ii. Not being promoted to the role of Shift Assistant?

e. If the Applicants were unjustifiably disadvantaged what remedies should be awarded?

f. Did Hoyts breach its duty of good faith by failing to be active and constructive in investigating the Applicants' personal grievances? If so should a penalty be awarded under s 4 of the Act?

g. If any remedies are awarded, should they be reduced for blameworthy conduct by the Applicants that contributed to the situation giving rise to the grievance?

h. Should either party contribute to the costs of representation of the other party?

Background

[5] Each of the Applicants were employed by Hoyts in April 2016. Ms French and Mr Walker were initially employed under individual employment agreements. Mr Walker became covered by the Collective Agreement (CA) from 22 March 2017 and Ms French from 5 April 2017. Mr Wren was covered by the CA from the commencement of his employment on 29 April 2016.

[6] Upon obtaining cover under the CA each of the Applicants secured guaranteed hours of work of 8 hours. These hours were the lowest minimum guaranteed hours offered in the CA, the CA providing at Clause 14.10 that Hoyts would offer hours to each employee in a banded group of hours of either 8 hours, 16 hours, 24 hours or 30 hours per week.

The appointment of new staff

[7] Between December 2016 and February 2017 three cinema attendants resigned from their employment with Hoyts. During this period the Applicants and other cinema attendants were notified by weekly emails that additional shifts were available and to contact Bernard Voice, the location manager, if they had availability to take on these extra hours. At some points during this period each of the Applicants expressed availability to cover additional temporary shifts.

[8] On or about 27 February 2017 Hoyts employed three new cinema attendants and on 20 March 2017 it employed a fourth. Each of these cinema attendants had guaranteed minimum hours of eight each week.

The promotion opportunity

[9] On 19 March 2017 Mr Voice sent an email to all cinema attendants at Berkeley Takapuna regarding a promotion opportunity for the role of Shift Assistant. The email stated that the qualities Hoyts was looking for included team leadership, time management, exceptional customer relations and excellence in achieving targets.

[10] The following day Mr Voice provided further details on the Shift Assistant role:

> As clarification of what a Shift Assistant Role is at Taka:
>
> The S.A. is an outstanding C.A. that others should turn to as an example of top customer service.
>
> They have a code for the tills and have authority to assign tasks, for the purpose of improving time management, to C.A.s.
>
> The Manager is still the leader of the shift, but a S.A. is next on the pecking order when it comes to shift authority.
>
> The role will become more active throughout school holidays and busy periods where a Manager can't be everywhere they are required and a S.A. can take charge of the Candy Bar. A S.A. will not contradict the decisions of a Duty or Location Manager, but help to further the goals we should all share.
>
> The Shift Assistant will report directly to myself, such as the Duty Managers, and will act as an additional set of eyes and ears on the floor.

[11] Each of the Applicants, and a fourth cinema attendant applied for the role. This cinema attendant did not provide evidence and therefore I shall refer to him as Mr X.

[12] Mr Voice conducted interviews with each of the Applicants and Mr X. As well as asking questions to do with the criteria mentioned in his email of 19 March 2017, Mr Voice also went through a questionnaire.

[13] By email dated 28 March 2017 Mr Voice announced that Mr X was the successful candidate. He explained:

> I have worked with [Mr X] at both Mission Bay and Takapuna where he has consistently shown superb customer service and sales skills.
>
> I have literally watched him sell more rewards in a day than the four Christchurch and Hamilton sites combined.

> My personal take on the Shift Assistant role is that it is a reward for being an outstanding Cinema Attendant.
>
> If you make more money for the company, you should make more money for yourself.
>
> As such, [Mr X] more than fits the requirements.

[14] Mr Voice also spoke individually with each of the cinema attendants to convey the outcome of the promotion process and his reasons for not selecting them.

Concerns about shift allocation arise

[15] In March 2017 Hannah Shelton Agar, the Union Organiser, visited the cinema to talk to staff. This meeting lead to Ms French and Mr Walker raising concerns about shift allocation. This prompted discussions between Ms Shelton Agar, and Mr Voice during which Ms Shelton Agar raised the issue of new employees being hired without the shifts first being offered to existing employees.

[16] At 11.52 am on 2 April 2017 Mr Voice sent an email to staff:

> With holidays approaching we will be hiring at the very least 1 if not 2 additional staff member.
>
> Following the departure of [name redacted] and [name redacted] we lost 32 contracted hours.
>
> With the inclusion of [name redacted], [name redacted], [name redacted], and [name redacted], this brings us back to where we started.
>
> If this was something that could be resolved by upping your contracted hours, that would be my first point of call.
>
> Unfortunately it's about the number of people we require in the building at once, not the amount of hours that need filling.
>
> As an example an additional 78hrs were circulated throughout the team, that were above what was contracted for, in the last week.
>
> Despite this, there are already days where we don't have enough people available to fill the amount of shifts required.
>
> A concern as this is without taking school holiday traffic into consideration.
>
> The additional hours will still be available each week upon request and as of yet each and every request has been approved.
>
> Contact me each roster to let me know if you have extra requirements for the following week.

[17] Later that day Mr Voice sent an email to Ms Shelton Agar that advised:

> I need to hire some additional staff for the holidays but I don't want to step on anybodies (sic) toes.
>
> Are you free for a chat tomorrow morning?
>
> Phone or otherwise.
>
> Hope you had a good weekend!
>
> I think we're currently in one of our busiest of all time.

[18] Ms Shelton Agar responded and a telephone discussion took place at 11.30 am on 3 April 2017. Following this conversation Ms Shelton Agar sent an email to the Union's members that advised:

> In response to your site being super busy, more hours of work have become available to you all as existing staff. Bernie and I have discussed this and decided the best way to handle this is for him to meet with each of you to discuss if you would like more hours of work.
>
> If you do, then have a think about the following for when you meet:
>
> 1. Your current work availability and how much it reflects where these extra hours of work are (most likely but not limited to Fridays and Saturdays). If your availability currently doesn't include times like these expanding it to do so should give you access to more hours (clauses 14.7; 14.15.2).
>
> 2. Think about whether the change would be a permanent one or a fixed term one. Some of you might want a tonne of extra hours for the upcoming month but then not so much after that – with mutual agreement with Bernie you can sign off on a higher minimum hours for any time period ranging from at least two weeks to permanent (clause 14.12).
>
> 3. Decide if there is an increase, by how much. Even though you have your bands of minimum hours (8, 16, 24, 30 hours); through mutual agreement you can sign off on any number of hours. 24 hours might be too much for some of you on the 16 hour minimum, but 20 might be just right.
>
> Some of you may want extra hours of work but only occasionally on a week by week basis. When extra hours unpredictably become available, Bernie will continue to reach out to the staff each roster to advertise staff who would like more work that week (clause 14.15.3).
>
> I invite you to have a further read of your contracts at the clauses above. Please get in touch if you any questions and have an awesome week.

[19] Later that afternoon Mr Voice emailed each of the cinema attendants advising:

> Roster
>
> Please see attached this week's Roster.
>
> Have had some productive chats this week with both Union and Head Office in regards to holiday rostering. As you can see from both this coming and our current roster the hours are absolutely available for those that desire extra. I continue to take requests each week from those that require additional hours and that will certainly be actioned accordingly.
>
> For anyone, union or otherwise, that would like to review their contracted hours/availability with me, please feel free to do so. The hours are there for the taking as we're dealing with anywhere between 40 – 100 hrs extra available each week. I'm open to making arrangements to suit your needs.
>
> Hoping to talk to each of you over the next few weeks regardless so that we can get a sense of holiday availability.
>
> On that note, [redacted] and [redacted] have requested additional hours this week, however everybody has a boost in hours due to the high amount of leave. Big thanks to Jake, Ruth, [redacted], [redacted] and [redacted] who are taking on the extra hours over the weekend due to missing team members. If anyone would like to request additional hours or leave for next roster, please contact me by Friday.

[20] Mr Voice then met with the cinema attendants.

a. Ms French said she told Mr Voice she wanted to increase her minimum guaranteed hours to 20 per week but he told her this was not possible. Mr Voice cannot recall Ms French asking for her minimum hours to be increased to 20 hours but said if she had he would have told her this was not possible as these hours did not fall within one of the banded groups of hours in the collective agreement. Ms French acknowledged she was unavailable to work in the next band above that which she was currently employed, namely 24 hours.

b. Mr Wren said he asked Mr Voice to increase his minimum guaranteed hours to 24 per week. He said he recalls Mr Voice telling him that this was not possible but could not recall the explanation provided as to why. Mr Voice said he had checked the Applicants' availability and they were not available to work the shifts required.

c. Mr Walker said he didn't meet with Mr Voice about increasing his minimum guaranteed hours. He said he thought Mr Voice would contact him but he didn't. Mr Voice disputes this. He says he did meet with Mr Walker although he couldn't recall what Mr Walker told him about his availability. I find it more likely than not that Mr Voice did meet with Mr Walker. This is what he agreed to do and is supported by the Union's letter of 28 July 2017 where Mr Walker is confirmed as having approached Mr Voice in response to the offer for more hours.

The employment of two additional cinema attendants

[21] On 10 April 2017 Hoyts employed a fifth new cinema attendant and on 14 April 2017 it employed a sixth. Each of these cinema attendants were guaranteed a minimum of eight hours.

The raising of personal grievances and the events that followed

[22] On 20 June 2017 Ms French and Mr Walker raised personal grievances. On 21 June 2017 Mr Wren raised a personal grievance. These grievances were similar.

[23] In terms of the matters raised in the present investigation meeting the letters advised:

> **Unjustified disadvantage in promotional opportunity**
>
> Mr Walker was unfairly disadvantaged in a Shift Assistant promotion on March 28, 2017 that he applied for. Mr Voice predetermined the candidate to award the promotion to – Mr X. Mr Voice altered the position description to suit Mr X's candidacy. The reason Mr Walker missed out is because Mr Voice and Mr X are close friends outside of work.
>
> **Unjustified disadvantage through breach of contract clause 14.15.4**
>
> Mr Voice failed to comply with the above clause in March and April 2017. He hired three staff members due to an increase in business and a reduction in staff. Mr Voice failed to offer Mr Walker these additional shifts prior to hiring in March and did not discuss making an adjustment to his minimum guaranteed hours of 10 hours.

[24] On 30 June 2017 Hoyts responded to the personal grievances advising, in relation to the matters raised in the present investigation:

Unjustified disadvantage in promotional opportunity

A fair and equitable process was followed in the recruitment of the Shift Assistant role. On 19 March 2017, an email communication was sent from the Location Manager, Bernard Voice, to all employees outlining the opportunity to apply for Shift Assistant and the process that would follow to find the suitable candidate (Attachment 1).

The job description was not altered in the recruitment process and although not shared in full, a summary of the key activities was shared via an email on 20 March 2017 by the Location Manager (Attachment 2). This summary is reflective of the key job responsibilities outlined in the Job Description.

Four candidates were interviewed for the role, including Ruth. Ruth was provided with feedback following her interview.

After consideration, the successful candidate was selected based on their strength demonstrated against the selection criteria. The successful candidate had recently transferred from another HOYTS location, and although they had worked together previously, the Takapuna Location Manager did not employ him in his original employment with HOYTS.

All unsuccessful candidates were offered feedback after their interview, including development activities to undertake in preparation for future roles should they wish to apply. In addition, the Location Manager sent an email on 28 March 2017 offering employees the opportunity for assistance in their development should they wish to apply for future promotional roles (Attachment 3).

Unjustified disadvantage through breach of contract clause 14.15.4

On 13 March 2017, the Location Manager sent an email with the weekly roster and sought employee requests for additional hours should they wish (Attachment 4). This was one week prior to hiring one new employee. Five employees had requested additional hours, but the Location Manager deemed the situation to be unworkable as he did not have the ability to fulfil the minimum shift requirements of the operation.

Again due to limited resources, on 3 April 2017, the Location Manager sent an email to all employees outlining the opportunity to volunteer for extra shifts available (Attachment 5). This was one week prior to conducting the hiring process in which two new employees were hired. In this communication, he also offered employees to seek him out to review their contracted hours and availability should they wish. This communication implies that Ruth was given additional hours in that week at her request.

The Location Manager received a request for additional hours which was accepted and actioned over the course of peak holiday trade. The Location Manager did not receive a request to adjust minimum contracted hours despite invitation.

There was one employee who did make this request and their hours were adjusted accordingly.

[25] The Applicants responded by letter dated 28 July 2017:

Unjustified disadvantage in promotional opportunity

We do not agree that a fair and equitable process was involved in the recruitment for the Shift Assistant role at Hoyts (Berkeley) Takapuna.

We do not claim that the job description was formally altered as a document; we claim that through a number of emails Mr Voice indicated that the decision of who to hire would be based on criteria to the disadvantage of Jake, Jackson and Ruth and was akin to altering the position to fit the preferred candidate before any fair selection process could take place. We do not agree that the successful candidate was selected based on their strength demonstrated against the selection criteria.

We are aware that it is not possible for all three of the workers that we represent to have been successful in gaining the promotion, however all three were disadvantaged by the unfair process.

Breach of c 14.15.4

We do not agree that the Location Manager complied with c 14.15.4. Despite the emails referred to in your response, Jake, Jackson and Ruth all approached the Location Manager in response to the offer of more hours. While the Location Manager may have offered extra shifts, he did not offer to increase Jake, Jackson and Ruth's minimum hours on an ongoing basis as required by 14.15.4 before employing new employees. He took an "all or nothing" approach to the discussion of new minimum hours which was incorrect and did not offer all the available extra shifts to Jake, Jackson and Ruth before hiring new employees.

[26] On 22 September 2017 the parties attended mediation.

[27] A second mediation was held on 13 April 2018.

Issue One: Did Hoyts breach Clause 14.15.4 of the Collective Agreement?

The Claim

[28] The Applicants allege Hoyts breached Clause 14.15.4 of the CA by hiring new employees without first offering the available hours to the Applicants. This clause provides:

> [14.15.4] Where additional regular shifts become available due to an increase in business or a reduction in current staff these shifts shall be offered to existing workers, wherever practical before new staff are employed with requisite adjustment to minimum guaranteed hours in accordance with clause 14.12. Where the employer proposes to hire additional temporary or casual staff to assist in a peak school holiday period the employer shall not employ more than the equivalent to 10% of the workforce performing work covered by this agreement.

What are regular shifts?

[29] The term "regular shifts" is not defined in the CA.

[30] The approach to be taken when interpreting an employment agreement was addressed by the Supreme Court in *Affco NZ Limited v NZ Meat Workers and Related Trades Union Incorp & Anor*.[1]

[31] 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.

[32] For the reasons that follow I am satisfied that the term "regular shifts", in the context of Clause 14.15.4, means the rostered periods of time worked by an employee each week based on their minimum guaranteed hours and their stated availability. Using the example provided by the Union, if an employee that had 8 minimum guaranteed hours of work left the workplace, and they had been available to work Monday to Friday between 5 pm and 11 pm, then the additional regular shifts that became available were 8 hours per week between 5 pm and 11 pm Monday to Friday.

Natural and ordinary meaning of the words

[33] The meaning I have applied to the words "regular shifts" accords with the natural and ordinary meaning of the words.

[34] The Cambridge English Dictionary defines "shift" as:[3]

> **B2**. a group of workers who do a job for a period of time during the day or night, or the period of time itself.

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[1] [2017] NZSC 135.
[2] [2014] NZSC 147.
[3] Cambridge English Dictionary, Cambridge University Press 2019.

[35] It defines "regular" as

> **B2.** existing or happening repeatedly in a fixed pattern, with equal or similar amounts of space or time between one and the next; even.

Contractual context

[36] Secondly, the meaning is consistent with the terms of the CA. Nothing in the CA suggests that Clause 14.15.4 should be read in any way other than its natural or ordinary meaning. The surrounding clauses confirm:

a. An employee is engaged to work in a banded group of hours of 8, 16, 24 or 30 hours per week. These hours are known as the employee's minimum guaranteed hours (Clause 14.10).

b. At commencement of their employment, new employees must state their availability for hours that Hoyts then relies upon to roster minimum guaranteed hours (Clause 14.4).

c. Due to the fluctuating nature of the business, employees work pursuant to a weekly roster that is consistent with the employee's agreed minimum guaranteed hours and the employee's stated availability (Clause 14.1).

d. Fixed shifts are able to be agreed pursuant to clause 14.16 of the CA. The evidence was that unless a fixed shift was agreed under this clause, there were no recurring or regular shift patterns in the sense of fixed times and days of the week to be worked by an employee every week.

Were additional regular shifts available?

Employees employed in February & March 2017

[37] Four employees were employed in February and March 2017. These employees did not provide evidence and therefore I shall refer to them as Mr E, Ms H, Ms B and Ms S. Each of these employees were employed to replace the employees leaving Hoyts between 24 December 2016 and 30 January 2017. Some of the resigning employees' hours were taken over by an existing Hoyts staff member but,

according to Mr Voice's email of 2 April 2017, 32 guaranteed minimum hours remained.

[38] I find additional regular shifts of 32 hours, based on the hours of availability of the three resigning employees, were available. Subject to practicality Hoyts was required to offer the 32 additional hours to Mr Wren, being the only Applicant covered by the CA at the time the new staff were employed.

Employees employed in April 2017

[39] Two employees were employed in April 2017 on minimum guaranteed hours of 8 hours each per week. Again, these employees did not provide evidence and therefore I shall refer to them as Mr B and Mr M. These employees were engaged on a permanent basis. There is no evidence that their employment was to replace existing staff. However, based on Mr Voice's emails of 2 April 2017, I find they were engaged due to an increase in business.

[40] I find additional regular shifts of 16 hours, based on the hours of availability required by Hoyts, were available. Subject to practicality these 16 additional hours had to be offered to the Applicants.

Was practicality a precursor to offering the additional regular shifts to the Applicants under Clause 14.15.4?

[41] In short, the answer to this question is yes. Clause 14.15.4 requires Hoyts to offer additional regular hours to existing employees *wherever practical*. This implies an assessment of practicality occurs prior to any offer being made. This can be contrasted with the situation in *Williams v Wendco (NZ) Limited*.[4] In that case practicality was not a precursor to an offer of additional hours to staff such that the Authority found that the employer was required to offer the additional hours before engaging new staff.

[4] [2017] NZERA Auckland 342.

Was it practical to offer the regular shifts to the Applicants?

The Respondent's evidence

[42] Hoyts maintains that it was not practical to offer the regular shifts to the Applicants.

[43] Mr Voice's evidence was that at material times Hoyts was understaffed. It needed at least 2 cinema attendants for a day shift and two for an evening shift. In addition, it needed reserves to cover for illness and leave. He explained that when he employed the additional 6 staff members this was not just to make up the hours for those that had left, but also to take on additional staff to ensure Hoyts had sufficient staff to cover shifts. Mr Voice's evidence was consistent with the email correspondence he sent to Hoyts staff on 2 April 2017.

[44] Mr Voice said that before making his decision he undertook a review of the Applicants' availability to cover the required shifts. This established that the Applicants were either unavailable on the days Hoyts required cover, were already working, or they could not undertake the number of minimum guaranteed hours Hoyts required. For example, Ms French said she told Mr Voice that she was willing to increase her minimum guaranteed hours by 4 hours i.e. from 16 hours to 20 hours. She was unwilling to increase her hours by 8 hours to 24 hours which was the next minimum guaranteed band. The two new employees Hoyts engaged were each required to undertake a minimum of 8 hours each week.

The Applicants' evidence

[45] During the investigation I explored with the Applicants their availability at material times so as to assess Mr Voice's evidence that it was not practical to offer them the additional regular shifts.

[46] Mr Wren could not recall his availability during term time and the only documentary evidence of his availability was dated several months after the new employees were employed. On this basis I accept Mr Voice's evidence that Mr Wren was unavailable to take on the additional regular shifts.

[47] Ms French's recollection of her availability during term time conflicted with the availability forms I viewed. For example, she said that during term time she could work any number of shifts on any day except a Monday or a Wednesday. However, the documentary evidence suggested that her availability fluctuated. Unfortunately all but one of the regular availability forms she completed was undated.

a. A form dated 21 July 2017 shows Ms French was unavailable prior to 6 pm on a Monday, prior to midday on a Tuesday and Friday and between 2.50 pm and 6 pm on a Wednesday.

b. Three undated forms, which form part of a temporary availability/leave request form, show unavailability between 2.50 pm and 6 pm on a Monday and Wednesday.

c. A fourth undated form, also forming part of a temporary availability/leave request form, shows unavailability on a Thursday from 9 am to 5 pm and on a Saturday from 11 am.

[48] A review of the shifts undertaken by Mr B and Mr M, and those undertaken by Ms French, show that for the majority of shifts Ms French was either working at the same time as Mr B or Mr M or was working the same day but on a different shift.

[49] Mr Walker's oral evidence of availability during term time was consistent with the availability form he completed in April 2017. However, this showed that he could only work a maximum of 3 shifts each week. Namely from 5 pm on a Monday to Saturday and all day on a Sunday. A review of the shifts undertaken by Mr B and Mr M showed that they primarily worked day shifts.

[50] For completeness I record that I did consider the excel spreadsheets that Ms Shelton Agar, who gave evidence for the Applicants, provided to the Authority. These showed the shifts the Applicants worked at material times based on the records provided by Hoyts. They also purported to show the shifts worked by the 6 new employees that the Applicants could have allegedly worked. Had these schedules been accurate that would have been very useful to my investigation. However my review of these spreadsheets against the time records supplied by Hoyts, and the Applicants' availability, revealed that the shifts recorded as being able to be worked

by the Applicants were incorrect in a number of material ways. For the most part the time records showed the Applicants were not available to undertake the additional regular shifts undertaken by Mr B and Mr M because they were already working, or were rostered to work another shift the same day, or the ability to work the shift conflicted with the availability they advised the Authority.

Finding on Issue One

[51] In the absence of evidence from Mr Wren as to his availability to work the additional regular shifts offered to the new staff in February to April 2017, and taking into account Hoyts' business needs as outlined by Mr Voice, I find, on balance, that it was not practical for Hoyts to offer these additional shifts to Mr Wren.

[52] I am also satisfied that it was not practical for Hoyts to offer the additional regular shifts arising in April 2017 to Ms French or Mr Walker. It is more likely than not that they were unavailable to undertake the additional regular shifts.

[53] I find Hoyts did not breach Clause 14.15.4. The Applicants' claim is dismissed.

Issue Two: Are the Applicant's out of time for raising their personal grievances relating to not being offered additional regular shifts prior to the appointment of new staff in February and March 2017?

[54] Section 114 (1) of the Act states:

> Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[55] Section 114(2) of the Act provides that a personal grievance is raised with an employer as soon as:

> … the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[56] In *Creedy v Commissioner of Police* Chief Judge Colgan held:[5]

> [36] … it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment …
>
> [37] … an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[57] The Chief Judge noted that the personal grievance procedures in the Act are:[6]

> …aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee …

Analysis

[58] The Applicants' statement of problem pleads that they were unjustifiably disadvantaged by Hoyts employing new employees without first offering the additional regular shifts to the Applicants.[7] This, they claim lead to them not receiving additional regular shifts and not having their guaranteed hours increased above the minimum of 8 hours per week.

[59] The personal grievance letters sent to Hoyts by the Applicants on 20 and 21 June 2017 each provided:

> **Unjustified disadvantage through breach of contract clause 14.15.4**
>
> Mr Voice failed to comply with the above clause in March and April 2017. He hired three staff members due to an increase in business and a reduction in staff. Mr Voice failed to offer [the Applicants] these additional shifts prior to hiring in March and did not discuss making an adjustment to [their] minimum guaranteed hours.

Mr E, Ms H, Ms B and Ms S

[60] The employees who were employed by Hoyts in February and March 2017 did not provide evidence. I shall therefore refer to them as Mr E, Ms H, Ms B and Ms S.

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[5] *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC).
[6] At para [39].
[7] Statement of Problem at paragraph 24.

[61] For the reasons that follow I am satisfied that a personal grievance relating to the appointment of these employees was raised outside of time:

a. Mr E was employed by Hoyts on 14 February 2017. Email correspondence I have viewed shows the Applicants became aware of his appointment by 23 February 2017 at the latest. The time for raising a personal grievance expired on 23 May 2017.

b. Ms H and Ms B were employed by Hoyts on 2 March 2017. Email correspondence I have viewed shows the Applicants became aware of Ms H and Ms B's appointment by way of an email sent to them by Mr Voice on 27 February 2017. The latest the action that is alleged to have amounted to a personal grievance occurred or came to the notice of the Applicants, was 2 March 2017. The time for raising a personal grievance expired on 30 May 2017.

c. Ms S was employed by Hoyts on 20 March 2018. Email correspondence I have viewed shows the Applicants became aware of this appointment that same day. The time for raising a personal grievance expired on 17 June 2017.

Mr B and Mr M

[62] The employees who were employed by Hoyts in April 2017 did not provide evidence. I shall therefore refer to them as Mr B and Mr M.

[63] Mr B was employed by Hoyts on 10 April 2017 and Mr M on 14 April 2017. I do not accept Hoyts submission that the Applicants are out of time for pursuing a personal grievance relating to the appointment of these staff members.

[64] The personal grievance correspondence sent by the Applicants to Hoyts expressly refers to a failure to comply with clause 14.15.4 in April 2017. The only staff employed by Hoyts during this period was Mr B and Mr M. I am satisfied Hoyts had sufficient information to address the Applicant's grievance relating to the appointment of these staff members and to "respond to it on its merits with a view to

resolving it soon and informally".[8] Indeed, that is what it did when it responded on 30 June 2017.

> … on 3 April 2017, the Location Manager sent an email to all employees outlining the opportunity to volunteer for extra shifts available (Attachment 5). This was one week prior to conducting the hiring process in which two new employees were hired. In this communication, he also offered employees to seek him out to review their contracted hours and availability should they wish. This communication implies that Ruth was given additional hours in that week at her request.
>
> The Location Manager received a request for additional hours which was accepted and actioned over the course of peak holiday trade. The Location Manager did not receive a request to adjust minimum contracted hours despite invitation.
>
> There was one employee who did make this request and their hours were adjusted accordingly.

Finding on Issue 2

[65] In the foregoing circumstances I find the Applicants did not raise a personal grievance within 90 days in relation to their grievances arising from the appointment of Mr E, Ms H, Ms B and Ms S. I find the Applicants did raise a personal grievance within time in regard to their personal grievances arising from the appointment of Mr B and Mr M.

Issue Three: Did Hoyts consent to the Personal Grievance being raised out of time?

[66] Section 114(1) of the Act requires a personal grievance to be raised within 90 days unless the employer consents to the personal grievance being raised after the expiration of that period.

[67] It is well established that consent requires a positive affirmative act such as written or oral acceptance. However, it may also be impliedly accepted by conduct. Whether a defendant has consented is a matter of fact judged against that test.[9]

[68] While Hoyts did raise an objection in its Statement in Reply as to the late filing of the Applicants' personal grievance, I find that Hoyts had previously impliedly consented to the Applicants raising their personal grievance after the expiry

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[8] *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at[35].
[9] *Hawkins v Commission of Police* [2007] ERNZ 762 at [17]-[18].

of the 90 day period. Hoyts did this by responding to the personal grievance letter and then attending the two mediations without raising the 90-day issue.

Issue Four: Were the Applicants disadvantaged by Hoyts employing new staff without first offering the additional regular shifts to the Applicants?

[69] The principles and requirements to be applied in the Authority's inquiry pursuant to s 103A of the Act were recently summarised by the Court in *Hayashi v Skycity Management Limited*.[10] These are:

a. There may be more than one fair and reasonable response applied by a fair and reasonable employer in all the circumstances at the time; if the employer's response is one of these, the dismissal (or disadvantage) must be found to be justified.

b. The Authority or the Court should assess, objectively and carefully, the conduct of both employee and employer, and the employer's response to the conduct.

c. Relevant circumstances which the Court may look into are those of the employer, the employee, the nature of the employer's enterprise and any other relevant circumstances.

d. The focus of the Court's inquiry must be on the actions of the employer and how the employer acted. The Court must be satisfied that the employer adopted a logical chain of reasoning which was transparent and reasonable from the facts at the time of the inquiry.

e. The inquiry includes considering the factual rationale for the employer's belief; and whether the employer had clear evidence it could safely rely on, whether it conducted reasonable enquiries, and whether the consequences for the employee were reasonable.

[70] For the same reasons as I have found earlier, I am satisfied that a term or condition of the Applicants' employment was not disadvantaged by the appointment

[10] [2018] NZEmpC 14 at paragraph 27.

of Mr B and Mr M. There was no requirement for Hoyts to offer the additional regular hours to the Applicants as it was not practical to do so.

[71] Even if I am wrong, the decision that Hoyts made was one that a fair and reasonable employer could have made in the circumstances known at the time taking into account the Applicants' known availability based on reasonable enquiries and its business needs.

Finding on Issue Four

[72] I find the Applicants were not disadvantaged by Hoyts employing new staff without first offering the additional regular shifts to the Applicants.

Issue Five – Were the Applicants disadvantaged by not being promoted to the position of Shift Assistant?

[73] For the reasons that follow I am satisfied the actions of Hoyts and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time it decided to promote Mr X.

a. Prior to conducting interviews for the role of Shift Assistant Mr Voice provided each applicant with the criteria that he would be using to decide who would be promoted. This included a component of "excellence in achieving targets".

b. During the interview Mr Voice spoke to each applicant about their experience and ability to meet the criteria required to fulfil the role. This included asking them questions including those contained in a questionnaire.

c. Following the interviews Mr Voice considered each applicant's suitability for the role. I have viewed his notes where he addresses each of the Applicants' positive and negative attributes.

d. Mr Voice reached the view that Mr X was most suited to the role and decided to promote him to the position. This was based on the criteria outlined in the initial email sent to staff.

[74] For completeness, I did consider whether there was any evidence to support the position advanced by the Applicants in their statements that Mr X was promoted due to his friendship with Mr Voice, or the criteria for the role was changed to ensure Mr X secured the role, or due to Mr X and Mr Voice colluding to inflate Mr X's reward sales so as to justify his promotion. I am satisfied there is not.

[75] There is no evidence that the criteria for the role changed or that Mr Voice made the criterion of sales figures the primary focus in his selection of the preferred candidate. Nor is there evidence that Mr Voice falsified documents to increase Mr X's sales figures or that he was aware that Mr X was falsifying reward sales. The Applicants' beliefs about the manipulation of reward sales are based on second hand information and "gossip". The documents relied upon to support an allegation of falsification of sales rewards relate to a period after Mr X was promoted. There is no evidence of favouritism.

Finding on Issue Five

[76] I find a fair and reasonable employer could have concluded in all of the circumstances known at the time that Mr X was more qualified for the role than the Applicants. I find they did not suffer an unjustified disadvantage to their employment.

Issue Six – Breach of Good Faith

The claim

[77] The Statement of Problem pleads that Hoyts failed to act in good faith by failing to be active and constructive in investigating the Applicants' personal grievance.[11] It alleges that Hoyts agreed as an outcome to mediation that it would conduct an investigation into the matters raised by the Applicants at mediation. It alleges that Hoyts did not conduct that investigation in a timely manner, misled the Applicants as to the progress of the investigation and did not provide the Applicants with a formal outcome of the investigation.

[11] Statement of Problem at paragraphs [42]-[56].

[78] Hoyts disputes any breach of good faith. It points to s148 of the Act and maintains the matters relied upon by the Applicants to establish a breach of good faith were matters discussed at mediation and are therefore subject to confidentiality.[12]

The law

[79] The Act requires parties to an employment relationship to act in good faith. This includes a requirement that parties to an employment relationship must be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.[13]

[80] Section 148 of the Act provides that, except with the consent of the parties, a person to whom mediation services are provided:

> must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

[81] The scope of confidentiality under s148 of the Act was considered by the Court of Appeal in *Just Hotel Ltd v Jesudhass.*[14] The Court noted:

> [32] In accordance with the ordinary meaning of the word 'purpose', that of the intended object of an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation.
>
> [33] Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1). So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.
>
> [34] There is nothing surprising in this conclusion. To the contrary, it reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.
>
> [35] As this Court said in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at 349, 'the very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to 'lay bare their souls' for the purpose of facilitating a conciliation and resolution of the dispute'.

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[12] Statement in Reply at paragraphs [2.23]-[2.24].
[13] Section 4 of the Employment Relations Act 2000.
[14] [2008] NZLR 210 at [32]-[35].

Analysis

[82] I find any discussions held between the parties took place during the course of the mediation and were therefore confidential pursuant to s 148. The evidence from the parties who attended the mediation was to the effect that new matters were raised during the course of the mediation. The mediation was adjourned to allow Hoyts to investigate the new matters. A second mediation was then reconvened on 13 April 2018 following the completion of an investigation by Hoyts into the new matters raised. Information was shared between the parties relating to the new issue at the reconvened mediation. I find the matters communicated through that process are confidential and cannot be considered by the Authority.

[83] To the extent that the issue of failure to investigate relates to the original issues raised in the personal grievance letters, I record my finding that there is no evidence to establish any breach of good faith by Hoyts. Within ten days of receipt of the Applicants' personal grievance Hoyts responded. It then attended mediation on 22 September 2017. This mediation was adjourned by consent and reconvened on 13 April 2018. During the intervening period the union wrote to Hoyts several times for an update but did not place any urgency on a response. If the Applicants considered the delay in responding was unreasonable they could have raised this with Hoyts. The obligation to be open and communicative is a two-way street.

Finding on Issue Six

[84] The Applicants' claim for breach of good faith is dismissed.

Issue Seven: Costs

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

[86] If they are not able to do so and an Authority determination on costs is needed Hoyts 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 the Applicants 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.

[87] 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.[15]

Outcome

[88] The overall outcome is:

a. Hoyts did not breach Clause 14.15.2 of the Collective Agreement.

b. The Applicants' personal grievances relating to the appointment by Hoyts of employees in February and March 2017 were not raised within the statutory 90 day time period however Hoyts impliedly consented to the raising of this grievance outside the statutory 90 day time period.

c. The Applicants did not suffer an unjustified disadvantage to their employment arising from the appointment of new employees from February to April 2017 or their non-promotion to the role of Shift Assistant.

d. Hoyts did not breach its duty of good faith.

e. Costs are reserved pending receipt of memoranda from the parties.

Jenni-Maree Trotman
Member of the Employment Relations Authority

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