Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2019] NZERA 505
3025912

	BETWEEN	NEW ZEALAND POLICE ASSOCIATION INCORPORATED Applicant
	AND	COMMISSIONER OF NEW ZEALAND POLICE Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Susan Hornsby-Geluk, counsel for the applicant Hamish Kynaston and Bridget Sinclair, counsel for the Respondent
Investigation Meeting:	29 May 2019
Submissions Received:	29 May 2019 orally and in writing from both parties
Date of Determination:	29 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The New Zealand Police Association Incorporated (NZPA or the Association) brings a dispute to the Authority for determination. The dispute concerns the interpretation, application and operation of clause 4.9.1(ii) of the New Zealand Police Constabulary Collective Employment Agreement (the CEA).

[2] Clause 4.9 of the CEA concerns "Work Related Motor Vehicle Reimbursement" (MVR) and provides at 4.9.1(ii) that employees of Police will be reimbursed at rates that are specified provided they meet the following criteria:

> They are required to travel to an alternative place of work that requires them to travel a greater distance than they would normally travel to their normal place of work. Reimbursement to be for the excess distance travelled only. Provided, however, where employees are unable to get to an alternative place of work they should discuss options with their supervisor. The employee can choose to report to their normal place of work and will be provided to travel by Police to the alternative place of work: or…

[3] The Association considers the clause is intended to apply to any situation where an employee is required to travel to an alternative place of work, regardless of how this has come about or been initiated. This would cover situations where the requirement to travel to an alternative place of work results from an "expression of interest" (EOI) process. It would also apply to situations where the employee is rotated. The Association accepts the clause does not apply where an employee's place of work changes permanently as a result of a merit-based appointment process pursuant to ss 59,60 and 62 of the Policing Act 2008 (the Act).

[4] The Commissioner of Police (Police or the Commissioner) considers MVR does not apply to permanent movements, or rotations within Police to a new place of work. The reason is that such a move changes the normal place of work and the travel is not to an "alternative place of work". Nor, in Police's view, does MVR apply to movements that are initiated or requested by an employee, because the travel is not "required" in that instance.

[5] The Commissioner says it has at times paid MVR to employees in the situations noted above. It has done so for a range of reasons and the practice has varied. This has been a matter of discretion and the Commissioner asserts this does not give rise to a contractual obligation and nor does it assist in the interpretation of clause 4.9.1(ii).

Issues

[6] The Association asks the Authority to determine the following questions:

(a) In what circumstances would an employee be regarded as being "required to travel to an alternative place of work"?

(i) Is this limited to situations where "a movement or change is required by Police due to operational or resourcing requirements" and that are "ad hoc, temporary and out of the ordinary"?

(ii) Does this apply where the movement occurs as a result of an expression of interest process?

(b) What constitutes an employee's "normal place of work"?

(c) Where an employee is "rotated" pursuant to s 65 Policing Act, what is their "normal" place of work?

(d) Does clause 4.9.1 apply where a rotated employee is required to work from a station or workplace other than the station or workplace to which their substantive position relates?

(e) Does a "district" constitute a "place of work" in terms of clause 4.9.1(ii), or does this refer to the station or workplace that the employee has been appointed to work at?

(f) Is the respondent able to impose time constraints on the applicability of the motor vehicle reimbursement allowance?

Relevant Background

[7] Clause 4.9.1(ii) has been in the CEA since 1 July 2006. On 9 January 2018 the Commissioner issued a Memorandum setting out "the National Position" regarding the application of the MVR policy. The Memorandum noted that there had been ongoing consideration as to when the reimbursement should be applied and stated:

> Although this clause has been in our agreements for many years, Police is continuously evolving with regards to the flexibility and mobility with which it operates. As the structures and demands of the organisation changes it can become challenging to apply some of the older provisions that were implemented when the organisation operated differently. At present, movements of employees is increasingly common to meet both the personal and professional needs of employees and the organisations operational and resourcing requirements.

[8] The Memorandum went on to refer to the application of the clause:

> In summary the provision applies in the event that a movement or change is required by Police due to operational or resourcing requirements that are ad hoc, temporary and out of the ordinary. The key consideration is whether Police is requiring or directing an employee to work from another location while those tasks are carried out.
>
> The provision does not apply where the movement is initiated or requested by the employee. This includes mechanisms such as a recruitment or an expression of interest process where the employee has an option to participate.

> The provision does not apply for movement that is part of an employee's agreed terms and conditions of employment such as a rotation. When employees are on a genuine rotation it is Police's assessment that that role and location has become their "normal" place of work. This means the employees normal place of work will update each time they are rotated to a new location. A rotation does not align with the view that the provision applied for ad hoc and temporary moves where the employee is required to help out in a position or place that is out of the ordinary.
>
> It should be clarified that this should not prevent particular situations being looked at on a case by case basis in terms of what is reasonable for Police to expect when it requires an employee to rotate to a new location.

[9] The memorandum then went on to posit a number of situations relating to whether an employee had or did not have an entitlement to travel assistance.

[10] It is the Association's stance that this memorandum issued by the Commissioner in January 2018 was contrary to the express term of clause 4.9.1(ii) of the CEA; contrary to custom and practice; and contrary to the purpose for, and intent of, rotation within s 65 of the Policing Act 2008 (the Act).

[11] The Commissioner's view is that practices have evolved over time in the Police and the Association's concern is that the CEA has not evolved with them. The Commissioner sees this as a matter that should be addressed in bargaining rather than through an interpretation exercise in the Authority.

The Authority's Investigation

[12] Evidence was heard from three witnesses for the Association and one witness for the Commissioner. In accordance with s 174E of the Employment Relations Act 2000 I have not set out a record of all the evidence heard or received or to all the submissions made by the parties. I have stated relevant findings of fact and my reasons for making those findings. I have expressed my conclusion on the matters or issues I consider require determination in order to dispose of the matter and have specified the orders I am making.

[13] In the course of the investigation meeting the personal situations or correspondence of several members of the Association were referred to in oral and documentary evidence. The Association sought an order for non-publication of the names and any identifying details of those members. I have granted the order without opposition from the Commissioner in the interests of maintaining the privacy of persons who were not in attendance at the

investigation meeting and who were potentially unaware their situations were a subject of discussion in a public forum.

[14] I have not referred to those persons in this determination. However, this order also prohibits any dissemination of any written reference to those details in documents prepared for, and presented as evidence in, the Authority's investigation.

Contractual Interpretation

[15] There is no dispute between the parties on the principles of contractual interpretation. Both parties referred me to the well-known cases where those principles may be found. Amongst other cases, counsel cited the Supreme Court in *Firm Pi 1 Limited* v *Zurich Australian Insurance Limited t/a Zurich New Zealand.*[1] In that case the Court stated:

> [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 meaning. [footnotes omitted].

Submissions of the parties and discussion

[16] As noted above, it is the Association's position that clause 4.9(ii) of the CEA is intended to apply to any situation where an employee is required to travel to an alternative place of work, including where the employee has participated in an expression of interest process.

[17] The Association also submits employees on rotation are not excluded from the clause and says the Commissioner is trying to redefine "the normal place of work" for rotated employees. In its view this position is inconsistent with how Police has previously applied clause 4.9.1(ii) and with the temporary nature of rotation as reflected in Police policies and s 65 of the Act.

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1 [2014] NZSC 147.

[18] In drawing a distinction between roles that are subject to "ongoing rotation" and rotations of a temporary nature, the Commissioner is going beyond what is permitted by clause 1.7 of the CEA and s 65 of the Act, in the Association's submission.

[19] Clause 1.7 provides:

> **Rotation**
>
> Subject to this Agreement, the Policing Act 2008 and any applicable Police rotation policy, the Commissioner can rotate, relocate, second, assign and temporarily assign employees and other persons within Police.
>
> Both Police and the Association recognise the need to provide effective policing services as efficiently as possible while providing a work environment that encourages the growth of employee's (sic) skills and experience.

[20] The Policing Act provides:

> **65 Power to temporarily assign, second, and locate employees and other persons within Police**
>
> (1) The Commissioner may, subject to any applicable employment agreement, but without complying with sections 59(1) and 60(1)—
>
> (a) assign a Police employee to a temporary position in the Police:
>
> (b) assign a person to a position in the Police:
>
> (c) second a Police employee to a position with another employer:
>
> (d) relocate a Police employee—
>
> (i) on the graduation of that person from initial recruit training; or
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> (ii) within the district in which the employee is stationed, and at the employee's existing level of position, to meet Police requirements, after considering the employee's circumstances and the merit of all employees who have indicated an interest in the position; or
>
> (iii) on the return of that person to duty from an overseas assignment, leave without pay, parental leave, or other special leave; or
>
> (iv) to fill a vacancy in a temporary international assignment, after considering all employees who have indicated an interest in the position; or
>
> (v) in order to rotate an employee within the district in which he or she is stationed; or

(vi) for substantial welfare or personal reasons:

(e) locate a person who is rejoining the Police as an employee.

(2) Subsection (3) applies if—

(a) the Commissioner assigns a person to a temporary position under subsection (1)(a) or assigns a person to a position under subsection (1)(b) without complying with sections 59(1) and 60(1); and

(b) the person has occupied that position or been on that secondment for a period of at least 14 months.

(3) The position occupied, or the secondment, must be considered to have been vacated by that person and, subject to any applicable employment agreement, any further assignment to or secondment of that position must be dealt with in compliance with sections 59(1) and 60(1).

[21] The Association's view was clearly expressed in evidence given by Leann Peden, a Senior Industrial Officer who works out of the Association's National Office in Wellington. Ms Peden observed the increased use of rotation and Expressions of Interest (EIOs) to fill vacancies since 2010 and/or 2011. She described the practice and the effect in the following terms:

> The now routine use of rotation and the EOI process to relocate and place members in positions has created an environment of confusion, extreme uncertainty and insecurity. Previously members held a substantive position attached to a specific, particular identifiable physical location, so that entitlement to contractual entitlements, such as MVTA was easily determined. I believe Police are using EOIs and rotation as devices to avoid their contractual obligations to pay these allowances, in a manner that was never intended.

[22] Greg Fleming, Industrial Advocate and National Secretary for the Association, gave evidence of his recollection of the discussions between the parties about the introduction of clause 4.9(ii) into the CEA in 2006. He recalled those discussions were focussed on ensuring that employees were not out of pocket when they were required to perform duties from a temporary or alternative place of work. To his recollection the purpose of the clause was to compensate members who had to travel a greater distance to work than they would otherwise have travelled, if it were not for the temporary position. Mr Fleming observed that the clause was relatively simple as to when the allowance was payable because, at the time it was introduced, the appointment process was equally simple.

[23] Mr Fleming gave evidence of the change in the Police approach to appointments from 2012/2013 which he linked to cutting costs and avoiding the payment of allowances such as the MVR. He said positions that were previously advertised nationally were now advertised only locally, which meant transfer costs could be avoided. From this time rotations became increasingly common in Police as did the filling of positions by EOIs.

[24] Mr Fleming's evidence was that after the introduction of the EOI appointment process, MVR was not paid in situations where it had always been paid, i.e. where an employee was undertaking a temporary move, and where in his view it had always been intended to apply. Mr Fleming also referred to the Association's concerns in regard to rotation, which had previously involved a temporary move from which an employee would return to his/her substantive position. That changed to a situation where employees were being rotated on a temporary basis but without a substantive role to return to. This resulted in Police deeming their temporary workplace as their "normal place of work", which justified their non-payment of the MVR.

[25] A further development occurred when the method of advertising some positions moved to generic, district-based locations instead of specific station locations. One effect of this, in Mr Fleming's evidence, is that employees do not have a designated "home station". He speculates this is a deliberate attempt to avoid paying MVR when employees are moved around the district.

[26] Mr Fleming cited a document drafted by an HR Manager in September 2015 regarding transport assistance in relation to travel around Hawkes Bay. The document distinguished between staff employed before 1 July 2012 and those employed after that date in terms of their eligibility for MVR where their place of work had been relocated. Where the new location resulted in additional travel, compared to their previous place of work, those who had been employed before 1 July 2012 continued to be eligible for MVR whereas those employed after that date were not eligible. This was because staff employed after 1 July 2012 were expected to work in the "Hawkes Bay District". The same document stated that MVR would not apply to those staff employed before 1 July 2012 who had voluntarily expressed an interest and were assigned to a position temporarily.

[27] The Commissioner submits the Association's concerns about the manner in which aspects of the EOI and rotation processes work are matters for discussion with Police. He

says Police are taking steps to address those concerns and the parties have indicated their willingness to engage on the matter.

[28] A Senior HR Manager, Rebecca Hislop, employed by the Commissioner, who gave evidence for Police in the Authority's investigation, said that Police employees have always been, and continue to be, appointed to permanent positions using advertised, merit-based appointment processes. Those who apply through that process and are successful in being appointed to a position do not receive MVR as a result of any location change associated with their appointments.

[29] Ms Hislop noted that, where the position to be filled was not permanent, and could be filled from the skills with the District, an EOI process was frequently used. Police use EOIs for assignments, relieving, rotating and acting appointments. Positions are advertised within a district and expressions of interest are sought. The terms and conditions on offer for the particular position were specified, and may include whether MVR was payable. Ms Hislop said candidates "volunteered" by submitting a detailed expression of interest and said successful candidates were selected on merit. She said there were occasions where Police exercised its discretion to pay MVR in those "volunteer" situations, and gave the example of locations where roles were hard to fill.

[30] The EOI process could result in a candidate being "assigned" to a particular project or operation; "relieving", if they were filling in for someone who was away due to a short term and unplanned absence; "rotating", if not relieving, and where the position was at the same grade and rank; or "acting", if the position was at a higher grade or rank. Ms Hislop's evidence was that these were all movements that had been formally recognised in the HRMIS/My Police[2] systems since 2014 when Police introduced a new Movements policy.

[31] Police's view is that EOIs should, for MVR purposes, be treated in the same way as permanent appointments. Where an employee chooses to apply for, and accept, a role he/she is not "required" by his/her employer to travel to an alternative place of work and therefore does not qualify for MVR. The Commissioner acknowledges that Police will have the same general "requirement" for someone to fill the role but submits it is not about the Police requiring the role, but requiring the employee to travel to an alternative place of work.

[2] The system Police use to record its HR information.

[32] Evidence given by Ms Hislop was that rotations were historically applied to CIB staff only to ensure those employees were trained in and exposed to all the CIB specialist skills. The CIB rotation model was now applied more widely and was used for most other roles in Police. She said that as a general rule MVR was not paid to employees on rotation although Police applied discretion to particular situations where it was deemed to be justified.

[33] Turing to the specific questions asked by the Association, in relation to the first:

(a) In what circumstances would an employee be regarded as being "required to travel to an alternative place of work"?

(i) Is this limited to situations where "a movement or change is required by Police due to operational or resourcing requirements" and that are "ad hoc, temporary and out of the ordinary"?

(ii) Does this apply where the movement occurs as a result of an expression of interest process?

[34] As the first part of the question is very broad I will confine my consideration to the two subsidiary questions. The first may be disposed of quickly as, in the course of the investigation meeting, the respondent conceded that the circumstances in which an employee would be regarded as being "required to travel to an alternative place of work" were not limited to situations where "a movement or change is required by Police due to operational or resourcing requirements" that are "ad hoc, temporary and out of the ordinary".

[35] In relation to the second subsidiary question, I find the plain meaning of clause 4.9.1(ii) does not exclude situations where the movement occurs as a result of an expression of interest process. Clearly that does not mean, however, that MVR will necessarily apply to all movements occurring as a result of an EOI.

[36] What is relevant is whether the EOI process has resulted in a change to the normal place of work of the employee. Where the employee's normal place of work is different from the alternative place of work they are required to attend they will be eligible for MVR. Where the employee's normal place of work has moved they will not be eligible.

[37] That brings into focus the next question: what constitutes an employee's normal place of work. The applicant submits that "an alternative place of work is a place of work that is

different to the place of work associated with their substantive position, which in turn is their 'normal place of work'".

[38] The respondent submits that the question of what constitutes an employee's normal place of work can be answered only by reference to a specific employee, having regard to their particular circumstances. Police focus on the meaning of "required" in clause 4.9.1(ii). It's stance is that an employee whose change of location has resulted from the employee's appointment to a position by an EOI process is not "required" by Police to travel to an alternative place of work. In that situation it says the employee has chosen to travel to the alternative place of work.

[39] I find the respondent's interpretation to be unnatural in that it relates "required" to the process by which the employee obtained the position that resulted in travel to an alternative place of work. I do not find that meaning can reasonably be discerned from the words of the MVR clause. It is an artificial overlay on the clause. Regardless of the process by which an employee obtains a position entailing travel to an alternative place of work from their normal place of work, they are required to undertake that travel in order to fulfil the requirements of the position.

[40] The issue of what constitutes an employee's normal place of work also arises in the next question: where an employee is "rotated" pursuant to s 65 of the Policing Act, what is their "normal place of work"? Section 65 (1) (d) sets out the ways in which Police may relocate employees and refers to rotation at (d)(v) as being "within the district in which he or she is stationed".

[41] The Police view is that an employee in a generic role, subject to rotation, where "changes in location occur periodically due to the employee being rotated into new portfolios" is not moving to an alternative place of work when on rotation. In Police's submission the move is to the employee's new 'normal place of work' and therefore the employee is not entitled to MVR. I am not persuaded by that submission which I find requires a strained interpretation of what constitutes an employee's normal place of work.

[42] I prefer the Association's submission on this point. It notes firstly that there is no provision in either s 65 of the Policing Act or clause 1.7 of the CEA, which concerns rotation, for roles to be designated as rotational. Both the Policing Act and the CEA allow for the rotation of employees, not positions. The Association interprets s 65(1)(d)(v) as denoting a

distinction between the district and the employee's station. It says movement within the district is regarded as a relocation in the sense of moving an employee's normal place of work. I find it reasonable to interpret s 65(1)(d)(v) in that way. When Police employees are appointed, it is to a permanent or substantive position, associated with a particular station. The implication is that an employee's normal place of work is the station at which their substantive position is located within a designated district in which they may be rotated.

[43] This also answers the next question posed by the Association: whether clause 4.9.1 applies where a rotated employee is required to work from a station or workplace other than the station or workplace to which their substantive position relates. It follows from my previous answer that the answer to this question is yes. An employee who is rotated within a district will be eligible for MVR if the rotation entails the employee having to travel a greater distance than they would normally travel to the station at which they are based.

[44] The penultimate question is: does a "district" constitute "a place of work" in terms of clause 4.9.1(ii), or does this refer to the station or workplace that the employee has been appointed to work at?

[45] The respondent submits that there is no statutory or contractual provision that supports the Association's view that an employee's normal place of work must be a single station or workplace. I have already preferred the Association's submission in relation to the distinction, which is made in s 65(1)(d)(ii) and (v) of the Policing Act, between the district and the employee's station within that district.

[46] In terms of the CEA, while there is no provision that explicitly states an employee must be attached to a particular station or workplace, many provisions are based on that assumption. One example is clause 4.12, "Travelling and Relieving Expenses Reimbursement", where "home" is defined for the purpose of the provisions as "the place where the employee normally resides or is stationed." Another example is clause 4.4.4, "Travelling less than 24 hours", concerning employees who travel on duty and "are away from the city or town in which their station is located".

[47] Taking these provisions of the CEA, and s 65 of the Act, into account I find that a "place of work" as referred to in clause 4.9.1(ii) of the CEA means the station or workplace that the employee has been appointed to work at rather than the district in which the employee is stationed.

[48] The final question concerns the ability of the respondent to impose time constraints on the applicability of the motor vehicle reimbursement allowance. It arises from the Commissioner's imposition of an 18 month time on the payment of MVR in the 9 January 2019 memo I have earlier referred to.

[49] There is nothing in clause 4.9.1(ii) that prescribes a maximum time frame on the reimbursement of MVR. That does not mean that reimbursement must continue ad infinitum but nor does it sanction the unilateral imposition of an arbitrary time frame. The respondent accepted in oral submissions that it did not have the ability to impose time limits and I need not take that matter further.

Remedies

[50] The Association has requested various declarations in respect of the above questions. I decline to make declarations and prefer to determine the matter by way of findings. These may be summarised as follows:

(a) The circumstances in which an employee would be regarded as being "required to travel to an alternative place of work" are not limited to "ad hoc, temporary and out of the ordinary" situations. This was conceded by Police.

(b) This does not exclude situations where the movement occurs as a result of an expression of interest process.

(c) Where an employee is rotated their normal place of work is the station at which their substantive position is located within the district in which they may be rotated.

(d) Clause 4.9.1(ii) applies where a rotated employee is required to work from a station or workplace other than the station or workplace to which their substantive position relates.

(e) A station or workplace that the employee has been appointed to work at, not a district, constitutes a "place of work ".

(f) The respondent accepts it cannot place time limits on MVR in the CEA.

Costs

[51] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority