IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2020] NZERA 126
3042731

	BETWEEN	TREVOR NORKETT Applicant
	AND	CHIEF OF NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	Michael Loftus
Representatives:	Caroline Mayston, counsel for the Applicant Channy Mao, counsel for the Respondent
Investigation Meeting:	22 March 2019 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	20 March 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant claims he has been paid less than he is entitled pursuant to his collective agreement. The Defence Force denies that is the case.

Background

[2] Mr Norkett was employed by the Defence Force as a Variable Hours Security Officer between 6 May 2015 and 24 January 2018. While he remains with the Defence Force he is now employed in another capacity. He does, however, retain a view he was underpaid while in the variable hours role which, despite its title, was a permanent full time position.

[3] In explaining the difference between the variable hours role (VHO) and that of the bulk of security officers Mr Norkett says:

> A Security Officer works a fixed roster that never changes, he/she will do a combination of 8 hour days, 12 hour days and 12 hour nights, A VHO does exactly the same job on the same sites, he/she is essentially a Security Officer that does not have a fixed roster but is there to fill in when Security Officers are away sick or on holiday.

[4] Mr Norkett was a member of the Public Service Association and as such his terms of employment were specified in a collective agreement. For the purposes of the current dispute the main body of the agreement contains the following:

> 158. The standard working day is eight (8) hours inclusive of morning and afternoon tea breaks but exclusive of the lunch break. The standard working week is forty (40) hours. Over the working year, the employee will work an average of (40) hours a week.
>
> 159. Standard business hours are between 7am and 7pm, Monday to Friday,
>
> 160. Employees are required to work such hours and days as are reasonably necessary to achieve the performance expectations established in their position description, their performance and development plan, and those required by the NZDF to generally meet operation needs.
>
> 164. The employee's total remuneration is full compensation for all work required and includes salary, superannuation and other remuneration allowances. Therefore, as a general principle overtime is not payable. The NZDF expects employees and managers to manage any ordinary additional hours that are worked from time to time within the flexible work arrangements provided so that an employee works on average forty (40) hours per week.
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> Example: to meet a work output that required the employee to work forty four (44) hours in one (1) week, the NZDF would expect the employee to work thirty six (36) hours – preferably in the following week. Generally, the NZDF expects Mangers to ensure that this shorter week would be undertaken within a four (4) week period.

[5] Appended as part of the agreement is what is labelled a variation. It contains various terms applicable to the occupants of specified positions including Mr Norkett. They include:

> 35. Employees holding a "Rostered/Shift" position on the rotational roster will receive a roster allowance for working the roster. This Roster Allowance is paid fortnightly as a loading additional to base salary, in 26 equal payments a year. It fully compensates employees for all work carried out on their "Rostered/Shift", and for all roster and shift associated conditions.

[6] The 2014 version of the variation also provides:

> 61. Variable Hours Security will be paid a flat hourly rate for all hours worked which is not inconsistent with the hourly rate applying to the salary and roster allowance offered to rostered Security Officers. Variable Hours staff will be offered a guaranteed number of hours either worked and/or payable per week, in accordance with their letter of offer.

[7] Finally it should be noted there is a provision which states that in the event of conflict between the variation and clauses elsewhere in the CEA the variation shall prevail.

[8] Mr Norkett initially worked 40 hour a week but once he gained a required security clearance he was placed on a roster which required, on average, 42 hours work a week and remained doing so till January 2018.

[9] During this time, and irrespective of what hours were worked in accordance with the roster, he recorded 42 hours per week on his timesheet. His payslips however stated he had worked 80 hours a fortnight and his pay did not change once he started rostered work.

[10] Here it should be noted there is no dispute about a consistent weekly pay which the parties identify as a *smoothing* process. As was said in one of the Defence Force's replies:

> To provide stability for our variable hour's security officers, a variable hours security officer will receive the same net pay, regardless of whether he/she has worked less than average hours in a fortnight or more than average hours in a fortnight.[1]

[11] What is in dispute is the amount paid with Mr Norkett forming a view he was being underpaid and he sought his union's assistance.

[12] The letter of 18 December 2017 ([10] above) also records Defences' view of how the roster works. It contains a combination of 8 and twelve hour shifts and:

> Variable hours security officers are paid and rostered over a five fortnightly pay period, using 84 hours pre fortnight as the average and working a total of 420 hours. Our supervisors will confirm that at the end of the five fortnight period, the variable hour's security officer will have worked a total of 420 hours and been paid 420 hours. For example over a five-fortnightly pay period the security officer may have worked a roster as follows,
> First fortnight, 84 hours,
> the second, 96,
> the third, 84,
> the fourth, 84,
> the fifth 72 hours.
> Total rostered hours = 420 hours
> Paid = 420 hours.

[1] Letter Watt/Mayston dated 18 December 2017

[13] While there was discussion about what hours were worked during the investigation it appears there is little dispute about the underlying principles enunciated above, at least in respect to hours if not pay.

Discussion

[14] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[15] The position taken by the PSA on Mr Norkett's behalf is the collective requires variable hours security staff be paid an hourly rate not inconsistent with the hourly rate of Security Officers via salary and roster allowance; that Security Officers work an average of 80 hours a fortnight (plus overtime) while Mr Norkett consistently averaged 84 and that as the two are paid on the same scale it follows Mr Norkett was being underpaid.

[16] Initially it was suggested he was being underpaid by 4 hours a fortnight but the argument now concentrates on a view his hourly rate was deficient. That may be because the evidence shows other security staff actually work more than an average of 80 hours a fortnight.[2]

[17] Defences' position was summarised in its statement in reply where it says:

> Working an average of 84 hours a fortnight was a consequence of working on a rostered basis and it was a term and condition that the Applicant would work outside of standard working hours.
>
> The Applicant was paid an annual salary and an allowance for working on an on-call and/rostered basis and this accounted for all the hours worked, including the variable hours.
>
> The CEA is explicit that the employee's remuneration is full compensation for all the work required and includes salary, superannuation and other remunerative allowances.
>
> There are no arrears for an hourly rate to be claimed because the Applicant was paid on a salary basis, which included an allowance. It was a term of the Applicant's employment to work on a rotating roster, which resulted in the Applicant working an average of 84 hours a fortnight. Therefore the

[2] I refer to the detailed roster chart produced during the investigation

> Applicant was paid in accordance with the terms of his employment agreement and all hours worked have been accounted for.[3]

[18] In expanding on this Defence accepts there are contradictions in the CEA and its a case of *which clause is more persuasive*.[4] In this regard Defence's position is clause 164 is paramount and as a result the agreed salary covers all required work. It is argued this is especially so when it is considered Mr Norkett's pay includes the roster allowance which means he is fully compensated for work carried out on the shift and all roster/shift associated conditions.

[19] To that Defence adds clause 158 (the standard 40 hour working week) is superseded by the variation in that it conflicts with clause 21 there-of which provides those required to work a shift roster will also be required to work outside of standard working hours or in roles which require 24/7 coverage.

[20] Assuming that is correct, and I conclude it is as clause 158 and related provisions simply do not provide for 24/7 rosters, significant problems arise for Defence as clauses 158 and 164 are related. When read in its entirety clause 164 is clearly an attempt to place some rules around how clause 158 shall be applied with clause 164 stating work shall be managed so that it is completed within the flexible work arrangement. That can only be a reference to the fact there is flexibility for the standard working day of 8 hours in clause 158 to be completed within a period of twelve hours (clause 159).

[21] That raises questions about clause 164's applicability for two reasons. The first is the parties accept it is explicit variable hours security staff will work an average of 82 hours a fortnight. The evidence also shows other security staff are required to work hours which exceed those stated in clause 158. In other words clause 158 cannot be complied with in Mr Norkett's situation.

[22] The second issue is that the flexibility provisions cannot be applied to security staff who work to strict and inflexible rosters. As Defence argued I accept clause 158 is superseded by the variation but in the same was so it is clause 164 given the two are intrinsically linked.

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[3] Statement in Reply at [1.2] to [1.5]
[4] Oral closing submission

[23] That returns me to the choice Defence is effectively urging me to make – clause 164 over clause 61 of the variation.

[24] Clause 61 of the variation which requires variable hours staff be paid an hourly rate consistent with other security staff.

[25] In his brief Mr Norkett says:

> NZDF's statement that we are all paid the same is correct in that a Security Officer and a VHO are paid the same gross yearly pay, but not the same hourly rate, which is what the collective agreement requires.
>
> A Security Officer and a VHO on the same base salary receive different hourly rates. This is because NZDF pays both the same standard fortnightly pay, but because the VHO works more hours in the fortnight, they receive a lesser hourly rate.

[26] As already said the evidence supports the claim variable staff work more hours than other security staff though not to the extent originally alleged. Given both are paid the same salary a simple division exercise mean variable staff receive a lesser hourly rate. That in turn means clause 61 of the variation has not been complied with and money is due if that provision was to be applied.

[27] For the following reasons I conclude clause 61 of the variation more persuasive and the appropriate clause to apply. First it is in the variation which the agreement expressly promotes in the case of conflict between clauses. Second, and for reasons just discussed, I find it difficult to prefer clause 164 with its questionable applicability over clause 61 which is wholly and relevant and can be applied directly to the situation.

[28] Finally I comment on the argument the allowance provides recompense for all roster related requirements (refer paragraph [18] above). I disregard that as it is payable to both variable hours and other security staff. It is not a distinguishing factor and the argument is now one about whether or not the hourly rates are comparable.

[29] As already said there was some discussion about how many hours various staff worked. I have to say the issue remained unresolved though the evidence I have would suggest the following as a tentative conclusion. Security officers, on the basis of the table provided, earnt an average of $18.51 an hour while variable staff earnt $17.98. The difference of 53 cents an hour would suggest Mr Norkett is due $1182.96 gross for each year

he spent in the role, hence a total of $3160.00 gross for the period he occupied the variable hours role.

[30] I have to emphasis the above calculation is provided for guidance only as there are factors I do not know such as whether or not salary changed. I leave it to the parties to calculate the amount themselves and reserve leave for a return should they be unable to agree.

Conclusion and Orders

[31] For the above reason I conclude Mr Norkett was, as claimed, underpaid in that he received an hourly rate less than that paid to other workers with whom he had a contractual right of parity.

[32] While guidance is provided I leave it to the parties to calculate the amount owing and reserve leave to return should they be unable to do so.

[33] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority