

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 222
3128194

BETWEEN	RAIL AND MARITIME TRANSPORT UNION First Applicant
AND	JOHN LYNCH, DARREN HAWKINS, FERNANDO PRIYANTHA, SAM PAHIVA, ROHANA GUNASEKARA, ZAID AZAD, TONY KERR, LUBABBU SANJEWLA, JAYATH BATUWANGAL, TREY VAA, SEAN BENNETT, MICHAEL NEALIS, ROD CUTTS, PELE SULUVALE, CHRIS CRYER, MARTIN LEACH AND DAVID MCCORMICK Second Applicants
AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Geoff Davenport, counsel for the Applicant Anthony Russell, counsel for the Respondent
Investigation Meeting:	3, 4 and 5 November 2021
Submissions:	2, 12 and 26 November 2021 for the Applicants 2 and 19 November 2021 for the Respondents
Determination:	31 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination concerns a dispute raised by the Rail and Maritime Transport Union (the union) and 17 of its members who work at the Westfield Servicing mechanical workshop operated by KiwiRail Limited. Since 2015 those 17 union members have worked under a 12-hour fixed roster, that is either on a day shift or on a night shift.

[2] The dispute arose because KiwiRail proposed changing that roster. It wants a roster with the workers rotating over an eight-week cycle through day, afternoon and night shifts, with each shift of eight-hours length. KiwiRail said the change to its “preferred rotational 8-hour shift” would better meet its operational needs and be safer for the workers. In response to the dispute raised by union officials and members about that proposal KiwiRail also proposed an “alternative roster” for consideration alongside its preferred arrangement. The alternative roster would maintain fixed day and night shifts comprising five 12-hour shifts and two 10-hour shifts each fortnight. Both options include reduced pay for workers as fewer hours would be paid on overtime rates.

[3] The 17 union members, with the support of their union officials, oppose both the proposed ‘rotational’ roster and the ‘alternative’ roster. They say a change to working under either roster would have a disproportionately negative effect on their personal and family lives outside work.

[4] KiwiRail says it is entitled to make changes to the roster because its managers have undertaken adequate consultations of the workers who might be affected and because a term in its Multi-Employer Collective Agreement (the CA) with the union allows the company to go ahead with such a change.

[5] For reasons set out in this determination, objective interpretation of the term on setting planned hours or days does allow KiwiRail to make the change it seeks without the workers necessarily agreeing to the change. However, the discretion to do so is not unfettered. In seeking to make such a change, KiwiRail must comply with its own contractual and statutory obligations regarding consultation and all the factors to be weighed in making such decisions. Once it has done so, and if it still then wishes to make such a change, it must implement the change in a way that also observes those obligations.

The Authority's investigation

[6] The Authority's investigation meeting was held over three days while Covid-19 Alert Level 3 restrictions on travel and meetings were in place. Witnesses and representatives joined the meeting by audio-visual links from various locations in Auckland and Wellington.

[7] Eleven witnesses attended the meeting. They each confirmed written witness statements provided earlier and, under affirmation, gave further oral evidence by answering questions.

[8] Four of those witnesses are members of the union who work at the Westfield workshop: Sam Pahiva, Pele Suluvai, John Lynch and Darren Hawkins. By agreement with the parties their evidence was provided as a sample or on a representative basis of the circumstances and concerns of the seventeen worker applicants.

[9] The union's national secretary Wayne Butson and northern regional organiser Rudd Hughes also gave evidence about their dealings with KiwiRail over this proposal to change rosters and the history of relevant terms in the collective agreement.

[10] The other five witnesses were KiwiRail personnel who, in various roles either present or past, had been involved in discussion about the proposal to change the roster or had other information relevant to the dispute about it:

- Stuart Harrison, acting executive general manager – rolling stock;
- Paul Ashton, general manager – operations;
- Christian Whyman, integrated train planning manager;
- Lesley Wildes, a human resources advisor; and
- Rishan Cumarasinghe, site leader for the Westfield Locomotive Depot team from December 2018 to May 2021.

[11] Adam Williams, a former executive general manager for rolling stock for KiwiRail and now resident in Australia, had also provided a witness statement. I did not consider it necessary to hear from him as the relevant information was available from other witnesses and documents provided by the parties as part of the evidence for the investigation.

[12] In addition to asking questions of witnesses attending the investigation meeting, the representatives gave some oral submissions at its conclusion and later provided detailed written closing submissions.

[13] As permitted by s 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. It has not recorded all evidence and submissions received. In particular it has not been necessary to set out a full account of the meetings and correspondence between the parties, over many months, as those details are well known to them. Similarly, the evidence of the four members setting out their concerns that the changes proposed by KiwiRail would have a significant detrimental effect on their personal and family lives was clearly and thoroughly expressed but need not be set out in detail here.

[14] This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.¹

What happened to give rise to the dispute?

[15] In March 2020 Mr Harrison joined KiwiRail as its general manager maintenance delivery. His prior career included various management roles in rail operations in Australia. Soon after taking up his KiwiRail post Mr Harrison began a review of how the company's servicing and maintenance depots operated throughout the country. He formed the view that more could be usefully done to standardise processes used in those depots, in both how tasks were carried out and arrangements for that work.

[16] In early May 2020 Mr Harrison had various KiwiRail personnel help prepare a proposal for changes to the rosters for the teams of mechanical engineers who serviced locomotives at the Westfield depot. Mr Harrison said he started with the Westfield depot because it was in Auckland where he was based.

[17] On 20 May he sent the proposal for change to the shift hours for Westfield servicing engineers to Mr Hughes, as the union's local organiser, and to Mr Pahiva as the union's delegate for the servicing teams.

¹ Employment Relations Act 2000, s 174C(4).

[18] The proposal was explained in a 17-slide PowerPoint presentation and a nine-page Servicing Roster Review Information Pack. The presentation said KiwiRail was starting a period of consultation on a new roster pattern “in line with” clause 23.5 of the CA. The clause includes the heading “Planned Change”.

[19] The accompanying information pack said the proposed change from 12-hour to 8-hour rosters was intended to provide:

- increased locomotive availability, improved cycle time and having vehicles ready in time to meet the train plan requirements so the depot could “deliver to our customers’ demands and expectations”;
- standardisation on how all KiwiRail’s servicing teams worked; and
- work life balance while minimising fatigue related risks.

[20] The pack referred to analysis carried out with a “fatigue assessment tool” (called FAID). The FAID analysis of the servicing teams’ current roster identified, among other things, that long night shifts were a risk, especially where four days or more were worked in a row.

[21] The pack set out three options for a shift pattern using rotating day, afternoon and night shifts. It said those options had to be assessed against how they met requirements for servicing coverage, fatigue assessment scores, how proposed start and finish times fitted with likely traffic and travel times for the workers coming and going from work, “other considerations” concerning work-life balance for the workers and their families and the effect of shift work on the health and well-being of individuals.

[22] Mr Harrison, the site leader Mr Cumaranasinghe and other KiwiRail personnel met with the Westfield servicing team members on 27 May 2020 to discuss the proposal. From the feedback given there and subsequently in writing Mr Harrison had revised versions of the rosters prepared. Those revisions moved a day in a week where one shift was not to be worked, incorporated a two-day break after working a period of night shifts and reduced the number of consecutive night shifts in the proposed 8-hour rotating rosters.

[23] On 11 June 2020 Mr Harrison held a second meeting with the servicing workers. They then provided further written feedback. Shortly after that meeting Mr Harrison also looked at letters some of the workers had been given by KiwiRail in 2015 when

they had agreed to move to their present 12-hours shift arrangement after a wider review of operations held that year.

[24] On 25 June 2020 Mr Harrison held a third consultation meeting about the proposal. No agreement was reached about moving to any of the 8-hour roster options proposed by KiwiRail.

[25] In the following months Mr Harrison had managers and advisors work on preparing a decision document. He made plans for a meeting with the workers on 30 September 2020 to present KiwiRail's decision. He sent Mr Hughes an advance copy of that decision document on 28 September. It confirmed KiwiRail would implement an 8-hour roster, incorporating some aspects of concerns about consecutive days off that the workers had referred to in their feedback on the proposal. The document said the change to rosters would be implemented from 18 October 2020.

[26] The 30 September meeting did not occur because the union, through counsel, raised a dispute about the proposed changes being sought by use of clause 23.5 of the CA. Mediation was requested. KiwiRail agreed to attend mediation and cancelled the meeting.

[27] In mediation the parties agreed to form a working party on proposed shift rosters that reflected "12 hour shifts where possible", non-rotating between day and night and an 80 hour per fortnight shift pattern. From a subsequent meeting of that working party three options for ongoing permanent day and night shifts were devised and costed. However, during a second mediation session, the parties were unable to agree on any of those options.

[28] In December 2020 KiwiRail provided a further revised proposal including two options – its preferred rotational 8 hour shifts as option A and an alternative option of a fixed day and night shift roster pattern consisting of five 12-hour shifts plus two 10-hour shifts each fortnight as option B. The proposal said feedback on the alternative option would be considered before KiwiRail reached any final decisions and whatever final decision was made "will not be implemented prior to the findings of the Employment Relations Authority determination". Through counsel the union and its members said no response would be made to the December 2020 proposal until "the litigation process" had been concluded, referring not only to proceedings in the Authority but also any subsequent proceedings in the courts.

[29] In his witness statement for the Authority investigation Mr Harrison said KiwiRail still preferred the 8-hour rotating shift option but was prepared to consider implementing the alternative option as it kept the 80-hour fortnight referred to in the CA, reduced the number of 12-hour shifts during each fortnight (which were of concern in relation to health and safety) and “has cost savings”.

[30] As part of preparing the revised proposal Mr Harrison had calculations made of projected annual salaries for each team member under KiwiRail’s preferred 8-hour rotating shifts and the alternative fixed shifts of 12 and 10 hours. For the preferred 8-hour rotating option KiwiRail calculated its annual wage costs for each worker would be reduced by amounts ranging from \$4,000 up to around \$21,000 depending on the skill level and position held by the worker. For the alternative 12 and 10-hour fixed option, the anticipated wage reductions ranged from around \$8,500 up to \$12,700 a year.

The issues

[31] The issues for investigation were set out in a minute to the parties’ representative following a case management conference at which timetable directions were made for witness statements and background documents to be lodged to address those issues. Counsel for the union, at the investigation meeting and in submissions, sought to recast the scope or reach of the issues for determination beyond what I, having closely considered the detailed written submissions from both parties and the evidence, have found necessary to resolve this matter. I reached that view because the dispute was raised during a decision-making process of the employer which, because of the dispute and these subsequent proceedings, had not yet been concluded. Some issues the union and its members sought to pursue were therefore premature or capable of change or correction by discussion between the parties rather than needing to be the subject of findings and orders of the Authority at this stage.

[32] Accordingly, for the large part, the evidence has been considered and conclusions reached within the framework of the issues notified to the parties at the outset of the Authority’s investigation, taking account to the extent necessary submissions from both parties about the evidence heard and the legal principles to be applied.

[33] The issues for determination, broadly, were:

- (i) Does clause 23.5 of the CA allow KiwiRail to make changes to the rosters of the applicant workers so their working hours rotate through night and day shifts (a rotational roster) or by adopting different shift lengths (the alternative roster)?
- (ii) Do clauses 5, 11 or 23 of the CA permit KiwiRail to unilaterally impose those changes?
- (iii) Were assurances made to some workers when they began working permanent 12-hour day or night shifts in 2015 that meant KiwiRail was not permitted to unilaterally impose the changes it wished to make?
- (iv) If clause 23.5 does permit such changes, is the proposed change of roster and/or its impact on remuneration, sufficiently significant or substantial to trigger redundancy processes and entitlements in the CA?
- (v) If clause 23.5 does not permit such change, is KiwiRail able to operate the redundancy provisions to make those changes (and if so would that include options for payment of redundancy compensation)?
- (vi) In seeking changes to the roster, in a way said to be contrary to previous assurances about working 12-hour fixed rosters, did KiwiRail breach its good faith obligations to the applicants?
- (vii) Have the changes sought by KiwiRail disadvantaged the applicant workers and, if so, should they be awarded compensation under s 123(1)(c)(i) of the Act and, if so, of what amount and should any award be subject to under s 124 of the Act?
- (viii) If KiwiRail is found to have breached good faith obligations, what orders or awards of damages could or should be made?
- (ix) Should either party contribute to the costs of representation of the other party?

Interpretation of collective agreements

[34] Interpretation of collective agreements is guided by principles summarised by the Supreme Court in *Firm P1 Limited v Zurich Australian Insurance Limited*: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

² *Firm P1 Limited v Zurich Australian Insurance Limited* [2014] NZSC 147 at [60]-[61] (footnotes omitted).

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.

[61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

[62] It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language ... is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties ... The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties' awareness being itself part of the relevant background. ...

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty. ...

[88] Where contractual language, interpreted in the context of the contract as a whole, has a natural and ordinary meaning, the courts will generally give effect to that as they "do not easily accept that people have made linguistic mistakes, particularly in formal documents". The "primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage". It requires a "strong case" to persuade a court that something must have gone wrong with the language. ...

[89] But if consideration of the relevant background forces a court to the conclusion that something has gone wrong with the contractual language, it is not required "to attribute to the parties an intention which they plainly could not have had". Just as the courts have accepted that understanding the commercial purpose of a commercial contract is relevant to its interpretation, so have they accepted that that if a particular interpretation produces a commercially absurd result, that may be a reason to read the contract in a different way than the language might suggest. However, it has also been accepted that a court is not justified in concluding that a contract does not mean what it seems to say simply because the court considers that, so interpreted, the contract is unduly favourable to one party. There is an obvious tension

between these two positions, and it will often be difficult to determine whether particular cases fall within one category or the other.

...

[91] In addition, those who negotiate commercial contracts will be influenced by a range of considerations in reaching their final bargains. The contracts that emerge from the process of negotiation will reflect accommodations of the parties' varying interests, as they assess them at the time. The reasons underlying the compromises that typically occur in commercial negotiations may not be easily perceived or understood by a court, even if they are exposed as part of the relevant background.

[35] In *New Zealand Air Line Pilots Association v Air New Zealand Limited* the Supreme Court also cautioned that, in applying the principles summarised in the *Firm PI* decision to the interpretation of collective agreements, a decision-maker needed to focus on the parties' objectively apparent consensus and not the subjective intent of what one or other of them was trying to achieve in their negotiations.³

[36] Also in that case, in a separate opinion, Justice William Young observed that parties will often offer approaches to resolving disputes about interpretation which lie at opposite ends of the continuum of possible interpretations. In such cases he considered it was "perfectly open" for a decision-maker to reach an interpretation, on the objective standard, which was "somewhere in the middle" between those advanced in argument.⁴

[37] The fact that a given provision has a long history, adopted in successive collective agreements, may also be relevant.⁵

Key clauses of the CA

[38] In applying those principles to the point in dispute in the present matter, the following clauses of the CA were relevant to construing clause 23.5 in the context of the agreement as a whole:

4. Working Together

4.1 KiwiRail and RMTU are developing a cooperative relationship to achieve union and business successes, and agree to:

- Conduct all dealings in "good faith"
- Maintain open and regular communication to keep each other informed on any issues of significance

³ *New Zealand Air Line Pilots Association v Air New Zealand Limited* [2017] NZSC 111 at [77], [79], [85] and [86].

⁴ *NZALPA*, above n 3, at [121]. Employment Relations Act 2000 s 160(3) is to the same effect.

⁵ *Vulcan Steel Limited v Manufacturing & Construction Workers Union* [2022] NZEmpC 78 at [31].

- Problem solve issues of concern promptly
- Reach decisions on projects by consensus, where possible, and respect each other's right to disagree
- Share any information that is relevant to the other party, except where there is a specific prohibition

4.2 KiwiRail and RMTU representatives will meet to problem solve any issues arising from this Multi-Employer Collective Agreement and to review and develop information required to support the Multi-Employer Collective Employment Agreement.

...

5. Good Employment Principles

KiwiRail and the Rail and Maritime Transport Union will be fair and reasonable with one another in our dealings, and accept personal responsibility for our actions.

...

11. Employment Philosophy

11.1 The parties are committed to developing and maintaining a harmonious relationship based on mutual respect. Our objectives include:

- Being an Employer of Choice
- Providing a healthy and safe workplace
- Improving the working environment
- Providing fair and equitable opportunities to all
- Increasing the competitiveness of business through customer focus, efficiency and flexibility
- Encouraging employee participation in the business
- Recognising employees' contributions and family responsibilities

11.2 The parties agree that KiwiRail will become a more effective business if the employees are confident the employment relationship is based on trust, goodwill and mutual respect. We believe well trained employees who are involved in decision making will provide customers with excellent service.

11.3 We can meet our customers changing needs more effectively by working together in teams, cooperating, partnering, learning new skills, taking on new tasks and working flexibly.

11.4 Skilled staff are our main resource. We will sustain and develop our employees to ensure that they strengthen and improve their place in the market. Employees will have a chance to learn new skills, develop career paths and access higher earning and developmental opportunities.

11.5 It is neither possible nor desirable to set rules regarding everything that can happen in a workplace. This agreement, including its schedules sets out the general terms and conditions of employment and continues the foundation for our employment relationship.

...

13. Consultation

- 13.1 We acknowledge that our interests are mutually dependant and that on-going consultation between us is essential. In particular, the employer agrees to consult with the RMTU on proposed changes which may affect conditions of employment.
- 13.2 Managers and supervisors will maintain an open door policy.
- ...
- 13.8 Many of the current work procedures and administrative instructions relating to these procedures were developed in co-operation with employees or the Union. It is the parties' intention to continue this consultative approach in the development of work procedures in the future.
- 13.9 Subject to clause 13.1 the parties will co-operate in the introduction of new and improved work methods, arrangements, processes, equipment and technology.

...

23. Hours of Work

23.1 Mutual Objective

Our mutual objective in setting the hours and days that are worked is to provide as much stability as practicable and yet be adaptable to the changing needs of our customers, whether these are on a planned basis, temporarily or at short notice. This requires a balance between meeting customer needs, efficiency and respect for an individual's personal and family commitments.

...

23.4 Planned Days and Hours

The normal practice in planning days and hours will be to keep them at about 80 hours and up to 10 work periods in the fortnight. If it is more practicable there may be more than 10 planned work periods but the extras are paid as overtime (the Saturday or Sunday work periods will in this case be the overtime). ... There will be at least 10 hours between planned work periods.

23.5 Planned Change

In setting the planned hours or days, the employer will give you as much notice as possible of a proposal to change them (in any case at least 14 days unless you agree otherwise). It will consult with you or the RMTU in accordance with the administrative instructions (e.g. the Rail Operating Manual) applicable to your work area which are developed in consultation with the RMTU from time to time.

...

23.7 Short Notice Change

- 23.7.1 When a change is needed to the planned hours or days of the fortnight that have already been arranged, you will be given as much notice as circumstances permit and consulted where this is possible. We will

respect each other's needs and commitments and will make practical adaptations if this is desirable and necessary. Except where there is no reasonable alternative available, short notice change will be made by mutual agreement. The planned hours and days for the balance of the fortnight will not be reduced as a result of the change (unless you so agree).

Statutory context

[39] In the union's submission the statutory obligations of good faith were also relevant to both how KiwiRail went about making its decisions and what decisions were made. KiwiRail acknowledged the "overarching" good faith obligations but questioned the extent to which the statutory standard assisted with interpreting the relevant provisions of the CA.

[40] The union's submissions pointed to the statutory good faith obligations on parties to an employment relationship:

- to not do anything likely to mislead or deceive the other party;⁶
- to be active, constructive, responsive and communicative in maintaining a productive employment relationship;⁷ and
- for employers, to provide information relevant to continuation of employees' employment when proposing to make a decision likely to have an adverse effect on the continued employment.⁸

[41] Those good faith duties apply to "any" matter arising under a collective agreement while the agreement is in force, consultation about the employees' collective interests and any proposal by an employer that might impact on the employer's employees.⁹

[42] As the dispute arose during a process of consultation about a proposal by KiwiRail to change a roster under a term in a CA in force at the time, those good faith duties clearly applied to how the parties dealt with one another in considering the rostering proposals. They also shed light on the meaning of references to good faith, consultation and continued co-operation in improving work methods in various clauses in the CA.

⁶ Employment Relations Act 2000, s 4(1).

⁷ Section 4(1A)(b)

⁸ Section 4(1A)(c).

⁹ Employment Relations Act 2000, s 4(4)(b), (c) and (d).

Interpreting clause 23.5

Plain reading

[43] The starting point for interpreting clause 23.5 is to acknowledge it is permissive. It places considerable power in the hands of KiwiRail to make changes to planned hours of work and to do so on giving at least 14 days' notice. It is not, however, an unfettered power of decision-making. As accepted in KiwiRail's submissions, use of the clause to change a worker's normal hours and days of work involves first following a mandatory process of consultation.

[44] Two other elements of the clause's ordinary meaning are also made plain by reference to other parts of clause 23.

[45] Firstly, the mutual objective agreed in clause 23.1 requires the setting of hours to balance three factors – meeting customer needs, efficiency and respect for an individual's personal and family commitments. As accepted by witnesses for KiwiRail, no weighting is expressly set for each of those factors. The proposal for change, and consultation about it, "requires" a balancing of them. It is not optional.

[46] Secondly, clause 23.5 requires consultation, not agreement, about the proposed change. Ultimately, it allows the employer to make a decision, provided whatever consultation is carried out meets the contractual and statutory obligations on KiwiRail for that process. This aspect of the plain meaning is confirmed by comparison with the wording of clause 23.7 on short notice changes. That clause specifically refers to changes being "made by mutual agreement". Clause 23.6 on planned short-term change also says changes to days of work in those circumstances will not be made "without your agreement". In light of the wording of those other similar clauses about hours and days of work, if agreement were a requirement for any proposal to change planned hours and days under clause 23.5, the clause would say so. Because it does not, a plain reading of the text of clause 23.5 must accept that agreement to a proposal for change to planned hours and days is, ultimately, not required.

History and operation of the clause

[47] Two aspects of the history of the clause and its operation arose in the evidence and required consideration as to whether this then called for a different interpretation

of the clause and how it could be used in considering and making changes to work arrangements.

[48] The first aspect concerned the history of the clause in collective agreements and, before then, employment contracts between the union and KiwiRail and its predecessor entities reaching back to the early 1990s.

[49] The New Zealand Railways Corporation composite agreement in effect in 1990-1991 and the NZ Rail Limited collective employment agreement operative in 1991 both had an equivalent clause which said the employer “may, with the agreement of the national office of the union, prescribe variations” to the ordinary hours of work.

[50] The New Zealand Rail collective employment contract concluded for the 1992-1994 period had different wording. This time the equivalent clause required no agreement to change of hours. Instead “the employees concerned, or their authorised representatives” were to be consulted and then given at least two weeks’ notice of the changes. The collective contracts and the collective agreements from 1995 onwards have included the equivalent clause in words effectively the same as those in the present clause 23.5.

[51] As Mr Butson acknowledged in his evidence, the removal of the union’s power to disagree with proposed changes in ordinary, planned hours was a direct result of the change in bargaining power between organised workers and their employers under the Employment Contracts Act 1991, in effect from 1991 to 2000. The removal from that particular clause of a requirement for agreement, whether from the workers directly or through their union, was an outcome KiwiRail (or its predecessor employing entities) sought and obtained through the bargaining. The absence since then of any reference to acceptance or agreement confirms the plain reading of clause 23.5 as, ultimately, not requiring agreement of workers to a proposal for a change of hours and days.

[52] The other aspect of the history of the clause and its operation arose from Mr Butson’s evidence about a commitment said to have been made to him by a previous senior manager and authorised representative of KiwiRail about how or whether the company would use clause 23.5 in seeking changes to working arrangements. Mr Butson said a former KiwiRail’s senior employment relations manager, Graeme Boomer, had told him in 2010 that clause 23.5 “would not be used to alter the fundamental nature of the job”. Mr Butson also said Mr Boomer had recently

confirmed to him that Mr Butson's recall was correct. There was no direct evidence from Mr Boomer.

[53] Mr Butson said Mr Boomer's comment was made in the context of discussions in 2010 about changes to working arrangements for infrastructure workers, such as track workers. At that time the track workers' hours of work were limited to between 6am and 6pm on Monday to Friday. As part of negotiations to bring together three collective agreements for different parts of KiwiRail's operations, the parties agreed the track workers' range of hours could be extended to include work at nights. This change was incorporated in the subsequent 2012-14 CA which included the new terms about flexible work periods for those workers. In return for a lump sum payment, existing track workers could agree to be available for flexible working periods and any changes to those periods were to be the subject of consultation.

[54] Mr Butson said KiwiRail was now choosing to ignore the approach it had agreed to in 2010. He provided a text message he had recently received from Mr Boomer which described the approach taken in 2010 as setting a precedent across all KiwiRail business units.

[55] Mr Ashton, who had been involved in various human resources and bargaining roles for KiwiRail during the past 30 years, accepted in his evidence that he knew of Mr Boomer's view of how clause 23.5 should or should not be used in seeking changes to other working arrangements. They had discussed it before Mr Boomer left his KiwiRail role some six or so years beforehand. Mr Ashton did not agree with Mr Boomer's view.

[56] The point for resolution, in the present matter, was whether the available evidence was sufficient to establish that KiwiRail had agreed to limit any use of clause 23.5 in the way that Mr Butson described? The short answer, for the following reasons, was no.

[57] The evidence did not establish, on the balance of probabilities, that KiwiRail had committed on an ongoing basis to eschew any use of clause 23.5 in making changes to working arrangements at any time in the future. Rather the evidence was that Mr Boomer had expressed a view that clause 23.5 should not be used in relation to changes sought in 2010. The company and union members were able to reach a mutually agreeable outcome by other means at that time and incorporate their agreement in new

terms added to the subsequent CA. Mr Boomer had, accepting Mr Butson's evidence, also indicated that what was to be preferred in any future discussions about change. This was not however, in itself, enough to amount to a waiver by KiwiRail of any right to seek to use that clause in any future situation or to amount to an enduring gloss on how it could be applied in such situations.

[58] The CA contains an express provision that its terms can be changed during the time it is current but such changes must be put in writing and signed. Following the 2010 negotiations on flexible working, no changes were made to the wording of clause 23.5 in subsequent renewals of the CA over the next ten years.

[59] A further difficulty arises even if Mr Butson's description of a limit on potential use of clause 23.5 had been agreed on the basis he described. The point for interpretation would be whether whatever change was proposed was altering the 'fundamental' nature of the job. In this case the union members say not working on fixed day or night shifts, as they have since 2015, would fundamentally alter the job. KiwiRail says the nature of the servicing job remains fundamentally the same whatever shift is worked to carry out those duties.

[60] Ultimately, subjective evidence of an alleged oral variation regarding use of the clause was not sufficient to displace the conclusion reached on its plain reading.

The context of the other clauses

[61] As already noted, operation of clause 23.5 is fettered by other obligations on KiwiRail in making decisions and how it goes about doing so.

[62] The clause itself includes an undertaking to its employees covered by the CA that KiwiRail "will consult" them or their union "in accordance with the administrative instructions (e.g. the Rail Operating Manual) applicable to your work area". In this particular case, regarding servicing workers, the Rail Operating Manual (a compilation of various internal procedures) has no provisions applicable to that work area.

[63] However the consultation obligation applies nevertheless by operation of the clause 5 agreement that the company and the union "will be fair and reasonable with one another" and the commitments made in clause 13 that KiwiRail will consult with the union on "proposed changes which may affect conditions of employment" and that the parties will co-operate in introducing improved work arrangements. As already

noted, what is meant by consultation in that context is guided by the statutory good faith duties on an employer to consult workers and their union about any proposal that may affect them.

[64] The following principles, developed through case law, also assist in identifying what is required of KiwiRail in consulting its workers about such a change:¹⁰

- Consultation is not a mere formality. Adequate notification must be given and sufficient time must be allowed to respond to a proposal.
- If consultation must precede change, a decision about change must not be made and a proposal must not be acted on until after consultation has occurred.
- The workers must be given sufficiently precise information and a reasonable opportunity to state their views
- Genuine efforts must be made to accommodate workers' views, with "a tendency to at least seek consensus".
- KiwiRail, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[65] Other clauses of the CA identify factors that KiwiRail had to have in mind during its consultation process and considering the decisions to be made through that process. These include:

- providing a healthy and safe workplace (clause 11 and clause 21.4);
- improving the working environment (clause 11);
- recognising employees' family responsibilities (clause 11); and
- balancing meeting customer needs, efficiency and respect for an individual's personal and family commitments in setting the hours and days that are worked (clause 23.1).

Alleged failures in the consultation process

[66] Reviewed against that framework of expectations and obligations arising from the agreed terms of the CA, the evidence established KiwiRail made substantial efforts to comply with its contractual commitments and the related good faith duties. As submitted by KiwiRail these included:

- providing a detailed consultation document in May 2020;

¹⁰ *Simpson Farms Limited v Aberhart* [2006] ERNZ 825, 841.

- taking time to assess and consider feedback from the workers about the impact on their personal and family lives if the proposed 8-hour rotating roster was introduced;
- adjusting the proposal in way set out in a further consultation document provided in June 2020;
- pausing its plan to announce a final decision in September 2020;
- agreeing not to implement a change of roster due to the dispute raised by the union;
- agreeing to set up a working party in November 2020 to further discuss roster options;
- taking part in the working party discussion to develop three roster options; and
- proposing the alternative 12-10 fixed roster in a further consultation document sent to the union in December 2020 and seeking further feedback.

[67] However concerns also reasonably arose from the evidence about the rationale and information provided in relation to the following points in issue:

- Was the FAID assessment a suitable measure for the conclusions based on it?
- Why was other safety or accident information not assembled and provided as part of assessing the safety of some of the night shifts worked under the current roster?
- Was the notion of standardisation of rosters between depots correct or applicable?
- Was “customer need” as a basis for roster changes adequately established?
- Had KiwiRail adequately weighed the effects on workers’ personal lives as a factor with other reasons (customer needs and efficiency) in reaching conclusions?
- Whether KiwiRail had adequately established and examined the nature of commitments made to workers who moved to 12-hours shifts in 2015 about any future change to that arrangement?
- Whether, overall, a rotating 8-hour roster would inherently be more effective, efficient and safe than the 12-hour fixed roster?

The FAID assessment

[68] FAID was described as a bio-mathematical tool modelling human alertness response to work and rest patterns. Applied to roster information, a “score” of work-related fatigue could be generated. It did not take account of personal factors for any workers working under those rosters, such as sleep disorders, sleep quality and length, lifestyle and general health.

[69] In assessing both current and proposed servicing rosters in this consultation process KiwiRail used a “peak” FAID score of 90. This figure is the peak score used to assess fatigue risk of rosters set for its Locomotive Engineers (LEs). On that measure the third and fourth shifts of the night shift roster for the servicing engineers at the Westfield depot were found to have a high risk of fatigue, with FAID scores of 96 and 116.

[70] Two criticisms were legitimately made of the degree of reliance placed by KiwiRail on use of that tool. Firstly, the largely sedentary nature of the role of LEs made the fatigue risks different from that of the more mobile or active mechanical engineer roles in a servicing depot. Secondly, no on-the-job study was done of the work as carried out in the depot to assess fatigue risks.

Other safety or accident information

[71] KiwiRail has not provided other information about accidents, trips, near miss incidents and medical reports for the current 12-hour shifts worked in the depot. It was information relevant to an assessment of whether there were actual or likely safety issues that needed to be addressed in the ongoing design of rosters.

Standardising depot rosters

[72] KiwiRail put some emphasis on the operational utility of standardising rosters (and some other work procedures) across various depots as part of the rationale for its proposed changes in the Westfield depot. However depots in other parts of the country had a variety of roster patterns, in some part due to the nature of the work carried out or the length of time for which servicing capacity needed to be available on particular days or weeks. In other parts of its operation KiwiRail also continues to use 12-hour rosters for various roles. In that context, the need for an 8-hour servicing roster at Westfield as part of standardising operations lacked a strong evidential basis.

Customer need

[73] Similarly, the degree to which the proposed change was driven by ‘customer need’ for servicing turnaround times was not clearly established. Here the customers being referred to are other parts of the KiwiRail business which rely on the depot to service locomotives within timeframes needed for their operation. Mr Harrison confirmed in his evidence that no specific concerns had been conveyed to the workers during the consultation process about customers reporting delays or other shortcomings that related to the servicing capacity available through the current 12 hour fixed rosters. Without such information meaningful discussion could not take place about whether it was necessary to change rosters to remedy any identified problems.

Balancing the effect of change on personal and family lives

[74] Mr Pahiva, Mr Suluvai, Mr Lynch and Mr Hawkins each gave detailed evidence about how they had arranged their personal and family lives around the pattern of their current 12-hour permanent shifts and what they anticipated would be deep disruption to those arrangements if they had to move to working a rotating roster. It would affect their participation in many family, sport and other community activities, including commitments to children and wider family members. Two of them foresaw having to make a choice to leave their KiwiRail jobs because a rotating shift system involving changes each week to their work times would mean they could not sustain various family commitments.

[75] While the consultation documents acknowledged disruption to family lives could result from the proposed roster changes, KiwiRail’s evidence did not demonstrate how those concerns had been “balanced” with the factors of customer needs and efficiency in preparing its proposal or in assessing feedback about it.

[76] The September 2020 decision document (prepared but not presented to the workers) referred to getting feedback about “work life balance and family responsibilities” and acknowledged the “impact of change” on employees’ lifestyles. However it contained nothing indicating what weight, if any, was actually given to that factor in making its intended decision at that time, compared to the other factors of customer need or efficiency. The best Mr Harrison could say, in his oral evidence on that point, was that workers would have more hours off on each day they worked eight hours, compared to the days they worked 12 hours shifts. This did not address the

difference, from the workers' perspective, that fewer days needed to be worked on 12-hour shifts to reach the usual total of 80 hours a fortnight compared to how many days they would have to go to work if working eight hours shifts.

[77] The balancing exercise is not a point to be glossed over because, as expressed in clause 23.1 on the parties' mutual objectives in setting hours and day of work, it is mandatory ("requires a balance"), not optional.

Any enduring commitments made in 2015?

[78] Another deficiency in the information provided by KiwiRail concerned documentation of the basis on which the servicing workers had moved to a 12-hour fixed roster in 2015 as part of a wider restructuring in its business when diesel passenger trains were replaced by electric trains.

[79] As a result of various other organisational changes, KiwiRail did not have or could not locate records of the correspondence exchanged with some of the workers involved in this case about the terms and arrangements for the changes made in 2015.

[80] For some there was a signed variation recording their new hours of work under the 12-hour fixed roster introduced then. While this noted the hours of work (for example 7am to 7pm), the letter also stated that terms of employment remained consistent with the existing CA and the worker could be required to change rosters to meet KiwiRail service requirements.

[81] For at least one other, Mr Pahiva, the document recording his roster change did not include those references to the CA and possible future change. Instead, he was given a letter of appointment in 2015 stating he had been appointed to work on the 12-hour day shift, with rostered hours from 7am to 7pm. Arguably, those hours then formed part of his individual, ongoing terms of employment and a change to them would require his agreement rather than being imposed by operation of change clauses in the CA. Also arguable is a contrary view that the hours referred to in that letter had to be read in a way consistent with the CA in effect at that time, which included the same provision for change as in the current clause 23.5.

[82] In another instance, Mr Lynch has worked a 12-hour night shift since 2005 so no change resulted to his usual work period through the 2015 restructuring but

KiwiRail's records held no documents about those personal working arrangements or how they were agreed.

[83] For other workers, for whom no correspondence about the 2015 changes is held by KiwiRail, it was not clear what or which arrangement was agreed with them at the time. In those circumstances it could not safely be assumed those arrangements were more like that applying to Mr Pahiva or to those for whom there were signed variation letters.

KiwiRail's preference for rotating 8-hour rosters

[84] Assessed as a whole, the evidence did not establish KiwiRail had observed all its contractual and statutory obligations in concluding by September 2020 that its preferred rotating 8-hour roster was, on balance, more effective, efficient and safer than the 12-hour fixed roster. Mr Harrison's strong personal opinion that eight-hour shifts provided better work-life balance clearly weighed in conclusions reached to that point, but KiwiRail's evidence did not disclose how it had weighed, if at all, the individual personal and family commitments of the affected workers alongside the other factors regarding customer needs and efficiency. As subsequent discussions in mediation and the working party showed, there was at least one other option that could balance those factors of concern to KiwiRail without such substantial disruption to the working pattern of the workers.

Conclusions on issues

[85] Against that background, conclusions on the issues for determination listed at paragraph [33] can be expressed concisely.

(i) What clause 23.5 allows

[86] In the context of other clauses in the CA and taking account of the history of the clause, clause 23.5 allows KiwiRail to make changes to planned days and hours of work without the agreement of the workers, provided it has met other contractual and statutory obligations in considering and making that decision and gives the required notice.

(ii) Other clauses impose requirements on the process and decision

[87] Exercise of the discretion provided in clause 23.5 for setting planned hours and days of work must comply with obligations and requirements arising from other clauses of the CA, including clauses 5, 11 and 23.

(iii) Ability to change arrangements made in 2015

[88] The evidence did not establish any general assurance given to workers who agreed in 2015 to work on 12-hour fixed shifts that KiwiRail would not subsequently ever change those arrangements if business needs required. The arrangements may differ for some individual workers, depending on the detail of what was communicated to them at that time.

(iv) Proposed changes sufficient to trigger the CA's redundancy provisions?

[89] The applicants' statement of problem said the workers should be entitled to have their employment end on the grounds of redundancy, with payment of redundancy compensation, if KiwiRail were permitted to use clause 23.5 to make them change from working on a fixed shift to a rotating shift. They said this was because the change would be "of such a fundamental nature".

[90] In closing submissions they said the prospect that rotating shifts would result in an overall reduction in their take home pay emphasised the fundamental nature of the change KiwiRail sought.

[91] This definition of redundancy is adopted in clause 27.8.1 of the CA:

A 'redundancy' means a situation where an employee's employment is terminated by the employer the termination being attributable, wholly or mainly, to the fact that the position filled by that employee is, or will become, superfluous to the needs of the company, and no alternatives to termination (including those set out in the Redeployment and Redundancy Schedule) are available. The provisions of the Redundancy and Redeployment Schedule shall apply in the event of redundancy or redeployment.

[92] As KiwiRail submitted, the positions held by the union members would not be superfluous to its needs if the change to rosters was made. It would still need people to work in the Mechanical Engineer, Team Leader and other roles presently worked by those union members. Neither would roster changes make duties, work processes and other workplace interactions so fundamentally different that the redundancy provisions would be triggered. And, even if it did, other provisions also operate within the CA to

explore options for redeployment and alternative employment which would limit the prospect of entitlements to redundancy compensation arising.

(v) *Using redundancy provisions (including compensation) for roster changes?*

[93] Although the circumstances of the proposed roster changes do not appear, technically, to meet the redundancy definition, Mr Harrison's witness statement said KiwiRail was prepared to discuss "options" with the union and relevant workers which "could include the option of redundancy as an alternative or consideration of an equalisation allowance".

[94] Equalisation allowances and maintenance payments are used where a worker moves to a job with a lower pay rate, such as under the CA's redeployment provisions as an alternative to redundancy.

[95] Mr Harrison, in his oral evidence, said equalisation allowances, for a period of six to 12 months, had been put forward for consideration. It was not clear this had been conveyed to union representatives in the many discussions over the issue.

[96] Mr Butson's view, in his oral evidence, was that the "strict" wording of the clauses regarding redundancy, alternative employment, redeployment and equalisation payments would not be a barrier to pragmatic solutions.

[97] In that light, whatever informal use the parties may make of those clauses and their criteria is best left in their hands.

(vi) *Has KiwiRail breached good faith obligations, so far?*

[98] The evidence did disclose shortcomings in the extent and nature of the information provided in the consultation process. The delay in providing information about the likely effect of various roster options on take home pay is one example.

[99] However this dispute, and consideration by the Authority of it, is part of a process not yet completed between parties who are in an ongoing employment relationship. In that context, findings about whether those shortcomings were sufficient to be declared breaches of good faith will not necessarily contribute to building productive employment relationships when the issues between the parties are still capable of remedy and resolution between themselves.

(vii) Disadvantage grievances

[100] Similarly, and as noted in the applicants' submissions, it is premature to reach any conclusions about the allegation that the applicant union members have been unjustifiably disadvantaged by KiwiRail's actions in seeking to change their rosters.

[101] KiwiRail has not implemented changes to the rosters and it agreed to take no further steps until after the Authority had issued a determination about the application by the union and its members.

[102] It is also doubtful that grievances could be pursued, at this stage, anyway because the proceedings in the Authority were essentially a dispute about the interpretation, application and operation of an employment agreement. At issue was what clause 23.5 meant, including in the context of other clauses.

[103] Given the union members remain employed, any personal grievances they had about the proposal to change rosters would have to be about a condition of their employment being affected to their disadvantage. Section 103(3) of the Act excludes such disadvantage grievances being pursued where the alleged unjustified action derives solely from disputed interpretation of a provision of an employment agreement.

[104] If the depot workers could pursue grievances on the roster issue, it appears that would need to be once KiwiRail implemented any changes. The disadvantage would relate to that action, not a dispute about the meaning of the clause used to do so.

(viii) No orders regarding good faith obligations?

[105] For reasons already given, no orders regarding good faith obligations needed to be made at this stage.

Costs

[106] Costs are not expected to be an issue as this matter was a primarily about the operation of clauses of a collective agreement between parties in an ongoing employment relationship. A practice note issued by the Authority recently advised that, from 2 May 2022, the Authority's discretion to award costs would generally be exercised on the presumption parties would bear their own costs in such disputes.¹¹

¹¹ www.era.govt.nz/assets/Uploads/practice-note-2.pdf.

However, as this particular matter was raised and investigated before this practice note publicly advised of that presumption, costs are reserved. If the parties cannot resolve any issue of costs between themselves, and an Authority determination of that issue is needed, any party seeking costs must lodge and serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. The other party or parties would 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. Information about the factors considered in setting cost is available on the Authority's website.¹²

Robin Arthur
Member of the Employment Relations Authority

¹² www.era.govt.nz/determinations/awarding-costs-remedies.