

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 779
3261699

BETWEEN	AMALGAMATED WORKERS UNION NEW ZEALAND INCORPORATED Applicant
AND	FULTON HOGAN LIMITED First Respondent
AND	HEB CONSTRUCTION LIMITED Second Respondent

Member of Authority: Sarah Blick

Representatives: Garry Pollak, counsel for the applicant
Alastair Espie, counsel for the respondents

Investigation meeting: 8 December 2023

Submissions and information received: 6 and 8 December 2023 from the applicant
7 and 8 December 2023 from the respondents

Determination: 22 December 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter relates to Amalgamated Workers Union New Zealand Incorporated (AWUNZ) union members who do important and hazardous work on Auckland's busy motorway network responding to motorway incidents, setting up lane closures when road works take place and carrying out other maintenance work.

[2] Fulton Hogan Limited (Fulton) and HEB Construction Limited (HEB) employ the union members, whose work is covered by collective agreements (CAs) with AWUNZ. The parties' CAs reflect the members' existing shift patterns which comprise of 12 hour day or

night shifts, on a four day on/four day off pattern. Fulton and HEB are part of what is called the Auckland System Management Maintenance Alliance (“the Alliance”) along with NZ Transport Agency Waka Kotahi (“Waka Kotahi”). The purpose of the Alliance is to operate and maintain the Auckland motorway network.

[3] The Alliance has made a foreseeably contentious proposal to change the members’ shift patterns to eight hour day or night shifts, on Monday to Friday. Fulton and HEB have undertaken a consultation process around the Alliance’s proposal, it says in accordance with good faith and other legal obligations owed to AWUNZ and its members. The change proposed also includes reducing the number of roles in the CMJ team (of which the members are a part) from 16 to 10 and introducing new roles. The respondents say this may create redundancy situations if a worker is not offered a role or declines to accept a role.

[4] AWUNZ says under the label of a “restructure” the Alliance wishes to change the terms and conditions of the members. It considers the Alliance’s proposed restructure is not a genuine one but intended to breach the conditions of employment of its members and undermine the CAs and the relationship between AWUNZ and its members. It says the respondents are “going behind its back” to members. AWUNZ says none of the members can be required to apply for their own jobs and no conditions of employment can be changed unless the CAs are varied. It points out the work itself is not changing - only the conditions of employment are. Consequently, it submits, none of the changes would result in lawful redundancies.

[5] The respondents say the consultation that is being undertaken in respect of the Alliance’s proposed changes, and the potential employment impacts arising from these proposed changes are part of a genuine restructure/workplace change process. They deny “going behind” AWUNZ’s back to negotiate new terms and conditions with AWUNZ members. The respondents deny they have sought to breach the terms and conditions of the AWUNZ members, or to undermine the CAs and/or its relationship with its members. They say there is no basis for a determination of the sort AWUNZ is seeking, or compliance orders as there have been no breaches.

The Authority’s process

[6] AWUNZ applied for urgency to be accorded to this investigation, which was granted. Although the parties attended a privately-funded mediation in September 2023, they expressed

a willingness to attend further mediation, to which they were directed shortly prior to the investigation meeting. All matters remained unresolved at the further mediation.

[7] The parties agreed to the Authority determining the application based on the statement of problem, statement in reply, documents submitted by the parties, affidavit evidence and submissions.

[8] Affidavits have been provided by AWUNZ from its Union Secretary Maurice Davis and by union delegate Whitiara (Paul) Haku, who is covered by the Fulton collective agreement (Fulton CA). For the respondents, affidavits have been provided for:

- (a) Waka Kotahi's Auckland System Alliance Manager, Paul Geck
- (b) Fulton's North Island HR Manager, David Casey
- (c) Fulton's HR Manager for Region 20, Ankita Panda
- (d) HEB Senior HR Business Partner, Tanya Cotton
- (e) HEB Network Operations Manager, Zane Davidson.

[9] 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 of the evidence and submissions received but which has been fully considered.

The issues

[10] AWUNZ framed what it is seeking in the following way at the investigation meeting:

...orders and a declaration that the Alliance is attempting to breach the CA and further that the CA to be varied requires bargaining with AWUNZ and further, the only way to achieve what it is proposing is by formal agreement. If agreement cannot be reached, then the Alliance is bound to comply with the CA and not continue with this "restructure", until such time as new contractual terms are concluded and the CA formally varied.

[11] AWUNZ's statement of problem had more specifically sought:

- (a) A determination on the application, operation and interpretation of the CAs in relation to the proposed new roles and determine that all positions are covered by the applicable CAs and further that any individual agreement would be inconsistent with the CAs;

- (b) A determination that the proposals are not genuine restructuring rather they are breaches of the CAs and that no employee is “redundant” and further that a redundancy process does not occur merely because the Alliance wishes to change conditions of employment;
- (c) Compliance orders against the Alliance directing it to comply with the CAs and further requiring the Alliance not to dismiss AWUNZ members on the grounds of redundancy when their usual and customary work is still there;
- (d) Compliance orders directing the Alliance to negotiate and communicate with AWUNZ, rather than individual employees “behind AWUNZ’s back”.

[12] At the investigation meeting AWUNZ clarified that determinations and compliance orders were not sought in relation to the Alliance itself, which is not a legal entity - rather they are sought against the respondents.

Background

[13] Relevant terms and conditions of the CAs are outlined below.

AWUNZ – Fulton collective agreement

[14] Clause 2 of the Fulton CA between Fulton and AWUNZ records it came into force on 1 August 2022 and is due to expire on 28 July 2024 unless previously replaced.

[15] Clause 5 of the Fulton CA expressly incorporates appendices attached to the agreement and deems them to form part of the employment agreement for the employee and any breach of the terms and conditions of the appendices shall be deemed a breach of the terms and conditions of the CA.

[16] Clause 6 of the Fulton CA states its conditions may be varied by agreement of all parties to allow for specific conditions. Variations must be confirmed in writing.

[17] Clause 13 is titled “Hours of Work” and relevantly defines day and night shifts:

...Dayshift – work completed substantially during daylight hours between 6am and 6pm from Monday to Friday inclusive

...Night Shift – work completed substantially during night hours between 6pm and 6am from Sunday to Thursday exclusive.

[18] There is what is called an “Addendum” dated 17 August 2022 and signed by Fulton and AWUNZ as part of Fulton CA. It states it is specifically applicable to employees working the 24 hour shift roster for incident response around the “CMJ area”. The Addendum reads:

2. Coverage

This addendum covers employees employed under the Collective Agreement and who work on the Auckland System Management and are working the 12 hour four days on four days off shift pattern as part of the incident response unit. It does not apply to staff that may relieve or provide back-up from time to time from the Auckland region or other ASM staff.

3. Roster

The Core roster for staff will consist of 12 hour shifts with an average of 42 hours per week.

...

5. Roster Payment

Employees specifically working the 12 hour roster in accordance with this addendum will receive an allowance of 14.18% on their base rate as a roster allowance. Employees permanently working the 12 hour night shift will receive an allowance of 16.82% on their base rate. This allowance will only be applicable while the employee is employed on the roster and not for non-CMJ roster work. The Allowance will cease immediately when the employee moves to another position.

To qualify for this payment an employee must work on the roster for a minimum of four consecutive shifts (i.e. one week). Any employee who works less than this will not qualify.

...

6. Shift Leave

Employees working on the 12 hour roster in accordance with this addendum for at least six months shall be entitled to one additional week of shift leave for every year worked. In other words employees working less than six months shall not be entitled to any shift leave.

...

For clarity, one week means 42 hours as an average week.

[19] Clause 11 of the Addendum says the roster and shift pattern will be reviewed in six months from the date of signing of the Addendum. There is no evidence of any review after the date of the Addendum resulting in any agreed changes.

HEB – AWUNZ collective agreement

[20] Clause 3 of the CA between HEB and AWUNZ (HEB CA) records it came into force on 1 November 2021 and expires on 1 November 2024.

[21] Clause 6 of the HEB CA provides for variations of the agreement by agreement between the parties. These must be recorded in writing. It records AWUNZ will not agree to any proposed variation unless it has been ratified by “50 + 1%” of votes of all members in attendance of the official meeting called to discuss the potential variation.

[22] Clause 9 addresses hours of work and states:

9.3 CMJ Teams – four days on and four days off with a minimum of 12 hours per shift, worked during the hours 5.30pm to 5.30am (Nightshift) or 5.30am to 5.30pm (Dayshift), Monday to Sunday (inclusive). The employee's hours of work will be set out in a roster [one month] in advance.

[23] Clause 13 provides an entitlement to a meal allowance where an employee completes 11 hours work in any one day.

[24] Clause 14 states:

Employees permanently working on 12 hour rosters of four days on and four days off within the CMJ or incident response team, will be paid for forty-two hours per week for every week worked (excluding overtime) to ensure continuity of payment throughout the year. Annual leave will also accrue at the rate of 168 hours per annum based on 42 hours as an average week.

The Alliance

[25] The Alliance has its own leadership team and operational structure which is led by the Alliance Manager, Mr Geck from Waka Kotahi. Within the Alliance's operational structure roles are undertaken by employees of individual Alliance participants, including the respondents. It is common ground the Alliance, which is not a legal entity, is not an employer itself.

Alliance proposal

[26] On 18 August 2023 Mr Geck issued a proposal to make changes which impacted different parts of the Alliance's operational structure, including the CMJ team. The Alliance's proposed changes to the CMJ team included:

- (a) Moving from a 12 hour, 4 days on/4 days off shift pattern to an 8 hour, Monday to Friday shift pattern, with shifts confined to the period 5am to 8pm (specifically an AM shift which runs from 5 am to 1 pm, and a PM shift which runs from 12 pm to 8 pm);
- (b) Disestablishing a Team Leader day/night role, STMS day/night role, Backup Driver day/night role and incident response assistant day/night roles (a total of 16 roles);
- (c) Creating new roles: Senior Operations Tactician, Senior Traffic Incident Responder, Incident response Team Leader, Incident response STMS, Incident response Assistant (a total of 10 roles).

[27] The Authority is told there are currently 11 workers in the CMJ team, with five not being filled.

[28] Reasons for these proposed changes were said to include the following; a significant increase in demand arising from incidents between 5 am and 8 pm; needing to be able to deal with as many incidents as possible between 5 am to 8 pm in order to help reduce overall motorway congestion due to unplanned incidents around the network; establishing a scalable incident response team; and avoiding worker fatigue particularly when shifts go beyond 12 hours.

[29] The Alliance proposal explained that if the proposed changes were to be implemented, impacted employees would be able to express interest in the new Alliance roles, and that selection decisions for those roles would be made by representatives of the respondents. The Alliance's change proposal was released to CMJ workers, including employees of the respondents, at a meeting led by Mr Geck on 18 August 2023. Representatives of the respondents and AWUNZ were in attendance at this meeting, and the respondents held further meetings with their own staff in the following days.

[30] The Authority has been provided with examples of the information provided by Fulton to its employees, which included advice:

- (a) If the Alliance decides to proceed with its proposal, there will be opportunities for employees to be redeployed on the Alliance project into the newly created roles;
- (b) If an employee is not redeployed into a new role, there may be opportunities for the employee to be redeployed elsewhere within Fulton;
- (c) If an employee cannot be redeployed, they may be entitled to redundancy compensation.

[31] The Alliance's proposal requested feedback on the proposed changes by 5 September 2023.

[32] Materially similar communication was sent by HEB to its staff, albeit with the consequence for potential redundancy being a "project completion payment" rather than redundancy compensation.

[33] Between 25 and 31 August 2023, Mr Davis on behalf of AWUNZ engaged in email correspondence with Mr Geck. Mr Davis outlined his concerns with the process being followed and the proposed changes. Mr Davis proposed attending mediation as there was a dispute between the parties. The Alliance and respondents agreed to attend mediation, which took place on 14 September 2023. The consultation processes were paused in the meantime. No agreement was reached at mediation or in subsequent without prejudice communications.

Consultation recommenced

[34] On 18 October 2023, the Alliance sent a communication to CMJ staff (with Mr Davis copied in) advising it would recommence the consultation process, that changes had been made to the proposal based on feedback received, and that a consultation briefing would be held on 19 October 2023.

[35] The respondents say as a result of AWUNZ members declining to attend the consultation brief, Fulton wrote to CMJ employees on 30 October 2023 and invited them to attend individual meetings on 1 November 2023 so that the change proposal could be discussed and relevant information provided. Around this time, HEB also contacted AWUNZ to advise it would be contacting its employee who was also an AWUNZ member, about the recommencement of the consultation process.

[36] The respondents say no AWUNZ members attended the individual consultation meetings scheduled for 1 November 2023.

[37] On 2 November 2023, Fulton wrote to impacted CMJ employees to provide further information about the consultation process, with feedback on the Alliance's change proposal to be provided to Mr Geck and feedback on the proposed impacts for Fulton's employees directed to Fulton representatives. The deadline for all feedback was 8 November 2023. Employees were apparently advised of their right to seek independent advice and to be represented during the process.

[38] A materially similar letter was sent by HEB to its employee on 3 November 2023 albeit with no mention of redundancy compensation.

[39] On 8 November 2023 AWUNZ lodged its application in the Authority. The consultation process was then halted again.

[40] On 6 December 2023 the parties attended further mediation but matters remained unresolved.

Discussion

[41] It is clear the work CMJ team is performing, and would continue to perform if the respondents implemented the changes proposed by the Alliance, are within coverage of the CAs between the parties. It is also clear the CAs remain in force until they expire or are replaced.¹

[42] The current shift patterns of 12 hour days with four days on/four days off are specific and agreed terms and conditions in both of the CAs. The relevant clauses do not permit the exercise of management prerogative to alter those specific shift patterns or relevant pay for those shift patterns.

[43] There are clauses in the CAs referencing restructuring which are not applicable to the consultation process or proposed reorganisation. The CAs contain clauses addressing redundancy, but do not provide for any redundancy definitions, redundancy process or address the issue of redeployment – their focus is on whether or not redundancy compensation is available (and quantum of that in the Fulton CA).

[44] The respondents do not dispute that the two CAs would continue to apply to any AWUNZ members who are redeployed into the Alliance's proposed new CMJ roles. However, s 61 of the Act would ultimately apply and prevent any new agreed terms and conditions inconsistent with the terms and conditions relating to shift patterns and pay agreed within the CAs if the new terms are inconsistent with in the Cas. Section 61 says:

- (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any **additional terms and conditions** that are—
 - (a) **mutually agreed to by the employee and the employer**, whether before, on, or after the date on which the employee became bound by the collective agreement; **and**
 - (b) **not inconsistent with the terms and conditions in the collective agreement.**

¹ Employment Relations Act 2000, sections 52 and 53.

[45] Further, rather than being “additional” terms and conditions under s 61, it would appear these would only be variations to existing terms, and both CAs outline the requirement for any variations to be agreed by the parties and in writing.

[46] AWUNZ has not referred the Authority any authorities but says the general principles about the law and interpreting CAs is well known. The respondents have cited one older Employment Court judgment said to be directly applicable to the present situation, *Parsons v Upper Hutt City Council*². In that case, the Court held that roster changes made by an employer for genuine reasons could fundamentally alter an employee’s position, and that because the employee was unwilling to work in accordance with the new arrangements, this gave rise to a redundancy situation. The respondents submit the case is applicable as the evidence is that AWUNZ members are not agreeable to the proposed changes. Further, the respondents submit the reasoning in the *Parsons* case applies with greater force to the present circumstances, as the catalyst for change in this instance would be an operational decision which is the responsibility of a third party (the Alliance) and which is not within the control of the respondents.

[47] The *Parsons* decision involved an employee who had already been dismissed from her employment and had been on an individual employment contract at the time the Employment Contracts Act 1991 was in force. The present case involves current employees who are covered by specific agreed terms and conditions of current CAs which include agreement as to their hours of work, pay and how variations to the CAs may be agreed. It is trite to say the Act provides for a very different statutory regime in relation to collective and individual bargaining for terms and conditions. As noted, here s 61 would ultimately apply and prevent the respondents from agreeing to terms and conditions with individual employees that are inconsistent with the CAs.

[48] Bargaining for variations ought to be the next step for the parties. As stated, the CAs provide for any variations to the CAs to be agreed between the parties and in writing. The respondents are obliged under the CAs to bargain for variations of terms and conditions, just as AWUNZ would be required to if it wished to do so. As far as the Authority is aware, the parties have not to date utilised the collective bargaining mechanisms in the Act for the purposes of bargaining for any variation or new CAs, which would include mediation for that

² WC 62/00, 19 December 2000.

purpose and ultimately facilitation if serious difficulties in concluding agreement are experienced.

[49] The Authority accepts there appear to be genuine reasons for changes to the CMJ team days and hours of work, particularly around health and safety concerns relating to worker fatigue. Both parties highlight serious health and safety issues they see at play but are at odds on whether the current or proposed shift patterns are best placed to address worker wellbeing and fatigue. There is also clearly a dispute around the number of truck mounted attenuators (TMAs) which would be available if the proposed changes take place. The Authority trusts that the parties' discussions in bargaining will be informed by objective data and evidence as to the health and safety considerations of workers under the current and proposed arrangements.

Whether compliance orders should be issued

[50] The Authority finds there is no basis for the issuing of compliance orders under s 137 of the Act. This is because s 137 relevantly states:

- (1) This section applies where any person has not observed or complied with-
 - (a) any provision of-
 - (i) any employment agreement
 - (ii) Part ...6...
- (2) Where this section applies, the Authority may...by order require, in ...any matter before the Authority under this Act to which that person is a party...that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
- (2) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
 - (a) Any person ...who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).

[51] The Authority is not satisfied any of the claimed breaches have been established on the facts, including any breach of good faith. Some of the claimed breaches are clearly anticipatory. Compliance orders are declined.

Outcome

[52] The Authority considers the above meets the requirement to state relevant findings of fact, the relevant issues of law, and express its conclusions on the matters or issues it considers

require determination in order to dispose of this matter.³ Given my conclusions, no orders will be made.

Costs

[53] AWUNZ submits that costs should lie where they fall. The respondents seek recovery of all costs and disbursements incurred as a result of the application. The Authority is satisfied, given the outcome, that costs should lie where they fall in relation to this application. No costs orders are made.

Sarah Blick
Member of the Employment Relations Authority

³ Employment Relations Act 2000, section 174E.