

[3] Mr Larsen's compliance order and penalty applications were subsequently withdrawn. The parties agreed that costs on this matter would be addressed when costs on Mr Larsen's second matter (3147082) were resolved.

[4] Mr Larsen in his second proceedings claimed he had been unjustifiably disadvantaged by FENZ because:

- (a) It failed to allow him to work in his Station Officer role in Whangarei, in breach of the RoS; and
- (b) After he was cleared to return to work after an extended period of sick leave, FENZ had required him to use his accrued annual leave before he commenced back at work on full duties.

[5] FENZ accepted that difficulties had arisen regarding implementation of its RoS obligations to Mr Larsen. The RoS appointed Mr Larsen to a permanent Station Officer role in Whangarei, but his commencement date was deferred in accordance with specific terms recorded in the RoS.

[6] Mr Larsen was to commence work in Whangarei by November 2020, or within two weeks of accepting another permanent Station Officer role in Whangarei, that at FENZ's discretion could be offered to him before then. The parties knew there would be a vacancy by November 2020 at the latest, due to a retirement.

[7] Mr Larsen was offered, and accepted, a permanent Station Officer role in Whangarei on 15 May 2019, which is referred to as "the May 2019 slot".

[8] Although Mr Larsen was due to start work in Whangarei on 3 July 2019, he did not do so because the New Zealand Professional Firefighters Union (NZPFU) raised a written dispute with FENZ about the legality of Mr Larsen's transfer to that position.

[9] NZPFU knew about the RoS, but disputed FENZ could use it to transfer Mr Larsen due to what the union claimed were breaches of the collective agreement and sections 26 and 27 of the Fire and Emergency New Zealand Act 2017 (FENZ Act).

[10] The Station Officer positions in Whangarei were viewed as an important step in career progression, so were highly sought after by internal candidates. Other employees in the local brigade were apparently unhappy they had not been able to apply for the May 2019 slot, because FENZ had transferred Mr Larsen to it.

Material background

Mr Larsen's personal circumstances

[11] Mr Larsen has been employed by FENZ (formerly the New Zealand Fire Service) since August 1999. He has worked in a number of different roles as a Fireman and Station Officer, and he has also been seconded into training roles.

[12] Mr Larsen is not a union member, so is not covered by the Collective Agreements between the NZPFU and FENZ that covered most of the Station Officers, and some other positions.

[13] On 14 March 2017 Mr Larsen signed a new individual employment agreement which incorporated the provisions in the FENZ - NZPFU 2015 to 2018 Collective Agreement (the 2015 CA), but on an individualised basis (the mirror IEA).

[14] Since mid-January 2024 Mr Larsen has been working as a Station Officer at the Whangarei Fire Station. In 2017 Mr Larsen was working as a Station Officer at the St Heliers Fire Station in Auckland.

[15] In 2017 Mr Larsen was living in Auckland while working at the St Heliers Fire Station and his father lived in Kaiwaka. Due to his father's ill health, Mr Larsen decided it would be more beneficial to work in Whangarei rather than Auckland, to enable him to move to Kaiwaka to assist with his father's care.

The October 2017 slot

[16] In October 2017 a vacancy for a Station Officer became available in the Whangarei Fire Station (the October 2017 slot).

[17] The 2015 CA provided for appointments to be made on compassionate grounds. That meant Schedule 6.3.3 of the 2015 CA which dealt with "Transfers, Notification of Vacancies & Appointments Policy" (the Policy) applied to Mr Larsen.

[18] Section 3(iii) of the Policy provided for employees to apply for a notified vacancy on compassionate grounds. Section 4 of the Policy set out the basis on which an employee would gain priority over other job applicants on compassionate grounds for appointment to a notified vacancy.

[19] Mr Larsen applied for the October 2017 slot on compassionate grounds. He was advised on 31 October 2017 that his request for a compassionate grounds transfer had

been declined. His application was therefore considered on its merits. Although Mr Larsen was interviewed, he was not selected for the role.

[20] Mr Larsen appealed that decision on 7 November 2017, by lodging “a review of non-appointment”. On 20 December 2017 the review of non-appointment was considered, and declined. The successful candidate appointed to the October 2017 slot was an NZPFU member, who commenced in that role in December 2017.

[21] On 21 December 2017 Mr Larsen’s counsel wrote to FENZ raising a personal grievance about his compassionate grounds application. He also asked that the appointment to the October 2017 slot be put on hold, pending the outcome of Mr Larsen’s personal grievance.

[22] FENZ declined to put the appointment on hold, because the appointee had already been notified of their appointment.

Original statement of problem

[23] On 18 January 2018 Mr Larsen lodged his original statement of problem (matter 3024035) with the Authority relating to the failure of his compassionate grounds application for the October 2017 slot.

[24] On 22 March 2018 FENZ conducted a second review, with a new appeal panel. The second review resulted in Mr Larsen being advised on 6 August 2018 that his compassionate grounds had been made out.

[25] FENZ said that from 7 to 9 August 2018 it discussed with NZPFU what a workable solution would be for both the successful appointee (union member) and Mr Larsen (a non-union member). FENZ claimed NZPFU did not oppose a practical solution that would involve allocating a future Station Officer slot in Whangarei to Mr Larsen.

[26] On 22 February 2019 FENZ said it spoke with NZPFU Local, who FENZ claimed had remained supportive of a practical solution for Mr Larsen. That would have involved FENZ transferring Mr Larsen to Whangarei when a permanent Station Officer role became available. NZPFU denied that.

Settlement of original claim

[27] The parties attended mediation on 13 August 2018, at which they were both represented by very experienced counsel. Mediation resulted in the RoS dated 13 August 2018.

[28] The RoS provided that Mr Larsen would commence duties as a Station Officer in Whangarei from November 2020 at the latest, with there being an option for him to start earlier than that if a Station Officer slot became available between then and November 2020. As a result of the RoS, Mr Larsen withdrew his original proceedings in matter 3024035.

The May 2019 slot

[29] On 15 May 2019 a Station Officer role in Whangarei became available (the May 2019 slot). FENZ offered this to Mr Larsen under clause 1.2 of the RoS. He accepted it, pursuant to clause 1.3 of the RoS, with an agreed commencement date of 3 July 2019.

[30] As a result of accepting the May 2019 slot, Mr Larsen resigned from a Training Quality role he had been seconded into. He did that so he could return to operations, to ensure his operational skills were current and that he had re-familiarized himself with the use of several specialist trucks that he would be required to ride in his Whangarei Station Officer role.

[31] On 21 June 2019 NZPFU raised a dispute, opposing Mr Larsen's commencement of work in the May 2019 slot, invoking breaches of the FENZ-NZPFU Collective Agreement dated 2018-2021 (the 2018 CA) and of the FENZ Act requirements to notify the vacancy and appoint the best suited candidate.

[32] On 24 June 2019 Mr Larsen raised health and safety related concerns with FENZ about the resentment staff in the Whangarei Fire Station had towards his transfer to the May 2019 slot, which he had been told "would create an enduring unpleasant work environment for him to be in".

[33] That was accepted by all involved as a legitimate concern. Union versus non-union related sensitivities occurred within brigades throughout New Zealand, so that was also likely a contributing factor to the ill will directed at Mr Larsen.

[34] FENZ notified Mr Larsen on 26 June 2019 that he could not start work in the May 2019 slot in Whangarei on 3 July due to the dispute. Mr Larsen's transfer paperwork was not processed by FENZ, meaning he was unable to start work in Whangarei.

[35] However, on 26 June 2019 and then again on 2 July 2019, FENZ offered Mr Larsen secondment, on the same terms and conditions, into a Station Officer role in Whangarei while NZPFU's dispute was resolved. The secondment offers were made without prejudice to Mr Larsen's legal rights/claims.

[36] Mr Larsen did not accept these offers. He said he wanted the permanent Station Officer position in Whangarei that the RoS had given him, not a secondment position.

Compliance order application

[37] On 28 July 2019 Mr Larsen informed FENZ he would commence urgent compliance order proceedings with the Authority.

[38] FENZ replied that it would co-operate with an urgent hearing of his proposed application, and that it would abide by the Authority's determination, whatever the outcome. It also suggested the parties provide the Authority with an agreed statement of facts, to facilitate an early determination of Mr Larsen's claims.

[39] Mr Larsen did not lodge his compliance order application and associated penalty claim for a breach of the RoS until 9 December 2020.

Sickness, absence and light duties

[40] Mr Larsen commenced paid sick leave on 1 July 2019, from which he was cleared to return to full duties on 29 April 2021. He had a short period of light duties from 27 February 2020 to 20 May 2020, where he worked up to five hours a day for three days a week.

[41] FENZ informed Mr Larsen on 16 November 2020 that it would be undertaking a medical review of his fitness to work. Before the review could be completed, Mr Larsen advised that he was fit to return to work.

Mr Larsen's return to work

[42] On 15 April 2021 Mr Larsen informed FENZ he had been cleared to return to full duties on 29 April 2021. He used accrued annual leave from 29 April to 30 July 2021. FENZ said that had occurred by agreement, but Mr Larsen disputed that.

[43] On 24 June 2021 FENZ instructed Mr Larsen to report to work at the St Heliers Fire Station on 31 July 2021, pending the outcome of his Authority proceedings. Mr Larsen was advised he would be placed on leave without pay if he declined to report to work at the St Heliers Fire Station from 31 July 2021.

Failure to report to St Heliers Fire Station

[44] Mr Larsen considered FENZ's order that he reports to St Heliers Fire Station to be an unlawful and unreasonable instruction, which he believed he was not required to comply with. Instead, Mr Larsen advised FENZ he was ready, willing and available to attend work in Whangarei Fire Station, but would not work in the St Heliers Fire Station.

[45] On 28 June 2021 Mr Larsen's counsel raised various unjustified disadvantage personal grievance claims. These included that FENZ had failed to give Mr Larsen work in Whangarei, and had failed to pay him even though he was ready, willing and available to work in Whangarei.

[46] Mr Larsen lodged his second statement of problem relating to these current proceedings with the Authority on 27 July 2021.

[47] When Mr Larsen did not report for work at the St Heliers Fire Station, FENZ put him on unpaid leave from 31 July 2021. Mr Larsen remained on unpaid leave until 4 February 2023, when he was placed back on the payroll while settlement options continued to be explored. That status continued until Mr Larsen started work in Whangarei in mid-January 2024.

The December 2023 slot

[48] During the Authority's investigation meeting, Mr Larsen agreed to make a compassionate grounds application for an advertised vacancy for a Station Officer position in Whangarei (the December 2023 slot).

[49] Mr Larsen made a compassionate grounds application for the December 2023 slot on 17 November 2023. He was offered a transfer to that position on compassionate grounds on 13 December 2023. His transfer application was accepted on 20 December 2023, with an agreed start date of mid-January 2024.

[50] The Authority was told that FENZ's online system recorded Mr Larsen's start date in Whangarei as 15 January 2024. Mr Larsen said his first day "on shift in Whangarei was 18 January 2024" and that he had remained on paid special leave until then.

[51] FENZ informed the Authority that Mr Larsen undertook re-orientation activities and leave from 18 January until his first operational shift as a Station Officer in the Whangarei Fire Station on 22 March 2024.

The Authority's investigation

November 2021 investigation meeting

[52] Mr Larsen's claims were first set down for an in-person Authority investigation meeting (IM) on 19 November 2021. However, that did not proceed because Covid-19 restrictions precluded an in-person investigation meeting from being held.

[53] The Authority therefore advised the parties it wanted to proceed with a Zoom investigation meeting instead. Although FENZ agreed to that, Mr Larsen strongly opposed it. In the face of his strong opposition, the Authority's investigation was adjourned until an in-person investigation meeting could be held.

August 2022 IM

[54] The next in-person investigation meeting was set down on 15 August 2022, which the parties attended. However, the Authority did not undertake an investigation that day. At the beginning of the investigation meeting the parties asked for it to be converted into mediation. The Authority agreed to that, and set a new investigation meeting date of 8 February 2023.

February 2023 IM

[55] At the parties' request, the investigation meeting on 8 February 2023 did not proceed. They asked for an adjournment, to enable FENZ to complete an internal review of its training needs.

[56] Mr Larsen had expressed interest in resolving his claims by accepting a training role. The outcome of the review was needed, so the parties could be clear on how an upcoming potential restructuring could affect any training roles Mr Larsen was interested in.

[57] Settlement was not achieved, so in August 2023 the parties asked for an investigation meeting. A two day in-person investigation meeting was then scheduled for November 2023. NZPFU were provided with a copy of the Notice of Investigation Meeting and were invited to advise the Authority if it wanted to become involved.

Change in Member

[58] A change in Authority Member occurred on 31 October 2023.

November 2023 IM

[59] An in-person substantive investigation meeting for all of Mr Larsen's claims was held on 9 and 10 November 2023. NZPFU was provided with a copy of the parties' evidence and invited to attend the investigation meeting.

[60] NZPFU's counsel, Mr Peter Cranney, attended the investigation meeting on the morning of 9 November 2023 by Zoom, to provide the Authority with an indication of what the union's position was likely to be and to understand what, if any, information the Authority needed from the union.

[61] NZPFU was given leave to apply to join the proceedings, with an indication being given by the Authority that such an application would be successful. However, that did not become necessary, after Mr Larsen agreed to make a compassionate grounds application for the December 2023 slot, which effectively bypassed the union's dispute about the May 2019 slot.

[62] Mr Cranney also indicated to the Authority that NZPFU disputed FENZ's evidence that it had agreed to, then subsequently changed its mind, to solving the problems associated with the appointment of a union member to the December 2017 Station Officer position, when Mr Larsen should have been transferred into that position on compassionate grounds.

[63] NZPFU's witnesses did not provide evidence to the Authority about discussions they had with FENZ about Mr Larsen's situation, although FENZ's witnesses did. This

matter was determined without the Authority needing to resolve that evidential conflict in terms of determining exactly what was said and/or agreed.

The witnesses

[64] Mr Larsen provided three witness statements, and gave evidence in person.

[65] Brad Mosby, District Manager Counties Manukau, lodged two statements and gave evidence in person. Mr Mosby has held various roles with FENZ and, before that, the New Zealand Fire Service, dating back to April 1996.

[66] Chris Wells provided a witness statement, and gave evidence in person. Mr Wells has been employed by FENZ, and before that the New Zealand Fire Service, since November 2011. His roles have included Manager ER and HR Services, Manager Workplace Relations and HR Business Partners. He is currently in the Chief Advisor Key Relationships role.

Additional information and submissions

[67] Additional documents, emails, letters and memorandums were lodged by the parties as a result of developments that occurred after the investigation meeting. The parties also lodged submissions after the investigation meeting.

The issues

[68] The parties agreed that the following issues are to be determined:

- (a) Did FENZ breach the RoS?
- (b) Did Mr Larsen raise his unjustified disadvantage grievance about the use of his accrued annual leave within 90-days?
- (c) If so, did FENZ unjustifiably disadvantage Mr Larsen by requiring him to use his accrued annual leave from 29 April 2021 to 30 July 2021?
- (d) If so, what remedies should be awarded?
- (e) Did FENZ disadvantage Mr Larsen by not permitting him to work in the Whangarei Station Officer role he had been transferred to under the RoS?

- (f) If so, was the disadvantage Mr Larsen experienced by not being permitted to work in the May 2019 slot he had been transferred to under the RoS justified?
- (g) Was the instruction FENZ gave Mr Larsen to report to work at the St Heliers Fire Station lawful and reasonable?
- (h) What remedies should be awarded if Mr Larsen's claims about his work location succeed?
- (i) What costs and disbursements should the successful party be awarded?

The statutory justification test

[69] Section 103A(2) of the Act required the Authority to objectively assess "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the [...] action occurred".

[70] A fair and reasonable employer is expected to comply with its statutory good faith obligations in s 4 of the Act and with the minimum procedural fairness requirements set out in s 103A(3) of the Act, as well as with its contractual obligations. Failure to do so may undermine an employer's ability to justify its actions.

[71] In this case the alleged unjustified actions that need to be assessed under s 103A(2) of the Act was FENZ's:

- (a) Alleged instruction to Mr Larsen to use his accrued annual leave from 29 April to 30 July 2021.
- (b) Instruction to Mr Larsen to report to work at the St Heliers Fire Station from 31 July 2021; and
- (c) Failure to pay Mr Larsen when he did not report to work from 31 July 2021 onwards at the St Heliers Fire Station.

Did FENZ breach the RoS?

[72] The material clauses in the RoS stated:

1. Jonathan Larsen is hereby appointed as a permanent Station Officer in Whangarei but his commencement date is deferred based on the following:

- 1.1 Jonathan will remain in his current role as Station Officer at St Heliers Fire Station.
- 1.2 If a permanent Station Officer slot becomes available in Whangarei between now and October 2020, that position may, at FENZ's discretion, be offered to Jonathan.
- 1.3 If such a slot is offered under clause 1.2, Jonathan will have four weeks to confirm or decline. If Jonathan declines the slot, there will be no further obligation on FENZ in relation to this record of settlement and Jonathan will remain in his current role at St Heliers. If however, Jonathan accepts that slot, he shall commence that slot within two weeks of acceptance.
- 1.4 If no slot is offered under clause 1.3 prior to November 2020, he will commence his duties as Station Officer in Whangarei, effective from November 2020, subject only to him having advised FENZ on no less than three months' prior notice (so provided no later than 1 August 2020) that he will not be taking up that role, in which case he will stay in his role in St Heliers.

The May 2019 slot

[73] FENZ wrote to Mr Larsen on 15 May 2019 offering him the May 2019 slot, as per clause 1.2 of the RoS. Mr Larsen accepted that offer, in accordance with clause 1.3 of the RoS. That meant he had to start work in the May 2019 slot within two weeks of accepting it, or on an alternative agreed date.

The NZPFU dispute

[74] NZPFU raised its written dispute about Mr Larsen's transfer into the May 2019 slot with FENZ on 21 June 2019. FENZ wrote to Mr Larsen on 26 June 2019 attaching notice of the dispute and explaining it was based on the May 2019 slot not being a permanent vacancy, which meant FENZ could not appoint to it without increasing establishment, which had not occurred.

[75] FENZ's letter to Mr Larsen stated:

On the basis of the peace clause of the CEA in your mirror agreement, we are therefore obliged to maintain the status quo that existed when the dispute arose, and therefore are unable to proceed with your appointment to the role in Whangarei at this time. However, I am willing in the interim, until this matter is resolved to offer you a secondment with the same starting conditions and watch placement that you have discussed with AAM Ballantine. If you do not wish to take up this offer you will be required to continue in your current role at this time.

I appreciate that this occurring with very little notice, and this is not my desired course of action. Please let me and your current manager know if you need any flexibility to adjust in the short term.

We will be responding to the substantive merits of the union's dispute once we have taken legal advice, and we will let you know what our proposed course

of action will be, but I need to flag to you that it is possible that you will need to wait until our originally agreed date next year to take up the established officer position or if a position becomes available prior.

[76] Mr Larsen's "current role" was recorded in clause 1.1 of the RoS as "Station Officer at St Heliers Fire Station". FENZ therefore informed Mr Larsen that if he did not accept the secondment offers to start work in Whangarei on 3 July 2019, then he would continue working in his Station Officer position in the St Heliers Fire Station.

Breach of RoS

[77] Mr Larsen did not start work in the May 2019 slot on 3 July 2019, as had been agreed. That was a breach of clause 1.3 the RoS which stated Mr Larsen "shall commence the slot within two weeks of acceptance".

[78] The breach of the RoS occurred because of FENZ's actions. Mr Larsen had been ready, willing and able to start work in Whangarei on 3 July 2021. FENZ stopped him from doing so, due to NZPFU's dispute about the lawfulness of his transfer.

[79] FENZ was solely responsible for that breach of the RoS. Had FENZ not instructed Mr Larsen that he was "required to continue in your current role at this time", then he would have commenced the May 2019 slot on 3 July 2020.

[80] The fact FENZ faced practical difficulties in complying with its obligations to Mr Larsen under the RoS because of NZPFU's dispute was irrelevant to the question of whether or not the RoS had been breached.

[81] While the dispute is an explanation for why the breach occurred, the raising of a dispute by NZPFU about Mr Larsen's transfer did not mean FENZ had not breached clause 1.3 of the RoS by preventing him from commencing work in the May 2019 slot within two weeks of him having accepted it.

[82] The usual remedies for a breach of the RoS would be a compliance order and/or penalty. However, neither of those claims were before the Authority, having been withdrawn by Mr Larsen prior to the issuing of this determination.

Did Mr Larsen raise his unjustified disadvantage grievance about his accrued annual leave within 90-days?

FENZ's position

[83] FENZ claimed the Authority did not have jurisdiction over Mr Larsen's 'use of accrued annual leave' grievance claim, because he had not raised it within 90-days, as required by s 114(1) of the Act.

[84] FENZ relied on an email Assistant Area Commander Callister sent Mr Larsen on 14 December 2020 which stated:

If/when you gain clearance to return to duty you will be required to take your Annual Leave immediately prior to your return to station.

[85] FENZ said the 90-days' period began from the date of the 14 December 2020 email. That was not accepted.

[86] The 14 December 2020 email was a heads up to Mr Larsen about the need to use his accrued leave before he returned to full duties. It recorded an expectation only, it was not a specific instruction to use his accrued annual leave on particular dates. Mr Larsen could not raise a personal grievance in advance of unjustified action having actually occurred.

When did the 'use of accrued annual leave' grievance arise?

[87] The requirement for Mr Larsen to use his accrued annual leave before he returned to full duties was discussed with him on 27 April 2021 by his manager, Assistant Area Commander Callister. Mr Callister emailed Mr Mosby on 28 April 2021 that Mr Larsen "was happy" to use his accrued annual leave before returning to duties.

[88] Mr Larsen disputed that. He said he was told on 27 April 2021 that his employment agreement required him to use his accrued annual leave after he was cleared to return to work, before he commenced full duties. He therefore said he had been instructed to use it from 29 April 2021 to 30 July 2021.

[89] Mr Larsen's disadvantage grievance therefore arose on, and had come to his attention by, 27 April 2021, when he alleged he was told by his manager he had to use his accrued annual leave on particular dates.

When did Mr Larsen raise his personal grievance about the 'use of accrued annual leave' issue?

[90] On 28 June 2021 Mr Larsen's counsel raised personal grievance claims that included (among other things):

[Mr Larsen] was advised by Mr Callister that he was required to take leave, as that was said to be a requirement of the Employment Agreement. This was not a matter of agreement.

[91] One of the remedies sought was "reinstatement of leave entitlements."

[92] This was sufficiently detailed information to have raised Mr Larsen's personal grievance about the requirement to use his accrued annual leave from 29 April 2021 to 30 July 2021.

[93] Mr Larsen's disadvantage grievance was clearly raised within 90 days of the discussion with his manager on 27 April 2021 which he said he was told he had to take accrued annual leave, so the Authority has jurisdiction over it.

Did FENZ unjustifiably disadvantage Mr Larsen by requiring him to use his accrued annual leave from 29 April 2021 to 30 July 2021?

What did the 2015 CA say about the requirement to use accrued annual leave after returning from extended sick leave?

[94] The terms in the 2015 CA are reflected in Mr Larsen's mirror IEA. Part 4 of the 2015 CA dealt with annual leave. Clause 4.1.1 dealt with annual leave, and recorded an expectation that it would be used in the 12 months following its accrual. Clause 4.1.8 addressed the general sick leave entitlement.

[95] When agreement could not be reached about when an employee would use their annual leave, the 2015 CA expressly recognised FENZ's right to give the employee 14 days' notice of the requirement to take their annual leave. That provision also reflected the employer's right in s 19(1) of the Holidays Act 2003 (the HA03) to give an employee 14 days' notice to take their annual leave, if agreement could not be reached about when the employee would take their annual leave.

[96] There was no contractual provision in the 2015 CA requiring an employee to use their accrued annual leave after returning from extended sick leave before they resumed their normal duties. It was therefore not a term of Mr Larsen's mirror IEA.

What was Mr Larsen told about using his accrued annual leave?

[97] There was a material conflict between the parties about what Mr Larsen was told about having to use his accrued annual leave and about whether or not he had agreed to that occurring before he returned to work.

[98] On 15 April 2021 Mr Larsen emailed FENZ via his counsel advising that he had been medically cleared to return to work on 29 April 2021 to undertake full duties.

[99] On 27 April 2021 Mr Larsen and Mr Callister had a discussion about annual leave. FENZ claimed that it was agreed that Mr Larsen would take annual leave that he had accrued during his almost two years on sick leave (for the period 1 July 2019 to 29 April 2021), as per an earlier discussion that had occurred in mid-December 2020.

[100] Mr Larsen claimed he was instructed to use his accrued annual leave during the discussion he had with his manager on 27 April 2021. He said he did not voluntarily agree to do so, because he was not aware that he had any choice in the matter. He said Mr Callister told him it was a contractual requirement that he do so.

[101] Mr Callister confirmed that in an email dated 22 July 2021 he sent to Gareth Keir, which was copied to Mr Larsen and his counsel. The email stated:

Recently you asked me if Jonathan Larsen was on annual leave. I confirm that he was as I had been instructed to ensure that he took all of his “deferred” (by sickness/accident) annual leave on medical clearance (per his mirrored employment agreement).

[102] The use of the phrase “I had been instructed” in that email from Mr Callister suggested he had been required to ensure Mr Larsen used his accrued annual leave. On that basis, it was therefore more likely than not that Mr Callister presented the use of accrued leave as a forgone conclusion (as Mr Larsen had alleged) rather than as a genuine request that could be refused.

Did Mr Larsen agree to use his accrued annual leave?

[103] FENZ’s counsel emailed Mr Larsen’s counsel on 24 June 2021 recording (among other things):

1. Mr Larsen is currently on annual leave by agreement with his manager, and the deduction of his annual leave balance is appropriate and accords with the approach taken when an employee returns to health after a period of extended sick leave (and has accrued annual leave in the interim).

2. This approach was agreed in discussion between Mr Larsen and AAM Callister. AAM Callister has confirmed the discussion that took place, in the attached email.
3. The current period of annual leave expires on 31 July. [...]

[104] At the time of Mr Larsen's return to work from 29 April 2021 his mirror IEA did not include a term requiring an employee who was returning from extended sick leave to use all of their accrued annual leave before they commenced back at work, because the 2015 CA did not contain such a term.

[105] That meant Mr Callister's advice to Mr Larsen that his employment agreement required him to use his accrued annual leave over the period 29 April to 31 July 2021 was incorrect. It was this incorrect advice that Mr Larsen did not question at the time that caused him to use his accrued annual leave over that period.

[106] Although FENZ claimed that Mr Larsen had agreed to use his accrued annual leave, the Authority preferred Mr Larsen's evidence that he was told he had to use it, meaning he was not given a genuinely free or voluntary choice about whether to do so or not. Mr Larsen therefore used his accrued annual leave over that period because he believed he had to, not because he had freely agreed to do so.

Was Mr Larsen disadvantaged by the requirement to use his accrued annual leave?

[107] Mr Larsen explained to the Authority why he had good reasons for not wanting to use all of his accrued annual leave. It was therefore likely he would have resisted doing so, if it had been presented to him as a genuine request instead of as an instruction that had to be obeyed.

[108] Mr Larsen was disadvantaged because he was deprived of an opportunity to raise his personal circumstances, and other factors affecting when he wanted to use his accrued annual leave, as to why he did not want to exhaust his accrued annual leave before he returned to full duties on 31 July 2021.

[109] The fact that Mr Larsen was deprived of this opportunity to genuinely consult about the use of his accrued annual holidays, meant that he was instructed to use that accrued annual holiday without any regard being had by FENZ to his personal circumstances. That disadvantaged Mr Larsen.

Was the disadvantage to Mr Larsen justified?

[110] The decision to require Mr Larsen to use accrued annual leave was substantively justified, because FENZ had genuine and legitimate operational reasons for requiring Mr Larsen to use his accrued annual holiday after his extended sick leave had ended, before he returned to full duties. This was also normal practice in the workplace.

[111] However, the decision to require Mr Larsen to use his accrued annual leave was not carried out in a procedurally fair manner that had met FENZ's good faith obligations to him.

[112] FENZ was required to attempt to agree with Mr Larsen as to when he would use his annual leave. If agreement could not be reached, then FENZ could instruct him to use his annual leave on specific dates, provided it gave him 14 days' notice of that. That process was not properly adhered to.

[113] By presenting the need for Mr Larsen to use his accrued annual leave before 31 July 2021 as a contractual requirement, when it was not, FENZ removed the possibility of the parties reaching a genuine agreement about when the leave would be used. It was only because Mr Larsen had been misled about the contractual obligation to use his accrued annual leave that he did not immediately object to it.

[114] Had Mr Larsen known he had a free choice, then he would have raised his personal and family circumstances with FENZ to explain why he did not want to agree to use all of his accrued annual holiday before returning to duty on 31 July 2021. FENZ would then have had that information available to it before it instructed him to use his accrued annual leave from 19 April 2021 to 30 July 2021.

[115] It was this lack of genuine consultation that unjustifiably disadvantaged Mr Larsen, because it effectively deprived him of the right to be heard. A fair and reasonable employer could not instruct an employee to take annual leave without proper consultation first occurring.

[116] FENZ could and should have consulted with Mr Larsen, before instructing him to use his accrued annual holidays. That is what good faith, procedural fairness, his mirror IEA and the HA03 required of a fair and reasonable employer. The fact that did

not occur, meant FENZ could not establish that “its actions, and how it acted” were what a fair and reasonable employer could have done in all the circumstances.¹

Authority’s finding on the ‘use of accrued annual leave’ disadvantage grievance

[117] Mr Larsen’s unjustified disadvantage claim relating to the requirement that he use his accrued annual holiday from 29 April to 30 July 2021 succeeded on the basis it was substantively justified, but procedurally unjustified because that decision had been implemented in a procedurally unfair manner.

What remedies should Mr Larsen be awarded for his successful ‘use of accrued annual leave’ grievance claim?

Loss of benefit claim

[118] Mr Larsen’s loss of benefit claim under s 123(c)(ii) of the Act, being the reinstatement of the accrued annual leave he used, did not succeed.

[119] Mr Larsen has had the benefit of paid time away from work as a result of his use of accrued annual leave entitlements over the period 29 April 2021 to 30 July 2021. His request for the Authority return the accrued annual leave he used over that period to him was not accepted.

[120] The procedural unfairness that disadvantaged Mr Larsen was that FENZ failed to adequately consult with him and it had led him to believe his employment agreement required him to use his accrued annual leave, when it did not.

[121] However, it was also likely that even if there had been adequate consultation, then for genuine, reasonable and legitimate operational reasons, Mr Larsen would likely have been given 14 days’ notice to use most, if not all, of his accrued annual leave before he returned to work on 31 July 2021.

[122] Mr Larsen had been given a heads-up by Mr Callister in his email dated 14 December 2020 (which followed discussions about the need to use his accrued annual leave) that he would be required to use his annual holiday immediately prior to returning to work, after he had been cleared to do so.

¹ Section 103A(2) of the Act.

[123] Mr Larsen was also asked in mid-December 2020 to provide Mr Callister with a plan for him (Mr Larsen) to use his accrued annual leave, so he had an opportunity to make his views known before he was cleared in mid-April 2021 to return to full duties at the end of April.

[124] These steps meant Mr Larsen had some opportunity to be heard, even though it fell short of meeting FENZ's consultation obligations to him.

Award of distress compensation

[125] An award of distress compensation under s 123(1)(c)(i) of the Act to compensate Mr Larsen for the distress, hurt and injury to feelings he suffered as a result of FENZ's failure to adequately consult with him about the use of his accrued annual leave is the appropriate remedy for his successful 'use of accrued annual leave' grievance claim.

[126] Within 28 days of the date of this determination, FENZ is ordered to pay Mr Larsen \$5,000.00 distress compensation. Section 124 of the Act, which deals with contribution, does not apply as there was no blameworthy conduct by Mr Larsen that warranted his distress compensation being reduced.

Did FENZ disadvantage Mr Larsen by not allowing him to work in the Whangarei Station Officer role he had been transferred to under the RoS?

What did the RoS require?

[127] Clause 1 of the RoS recorded that Mr Larsen had been appointed as a permanent Station Officer in Whangarei, but his start date was deferred.

[128] Clause 1.1 of the RoS recorded "Jonathan will remain in his current role as Station Officer at St Heliers Fire Station."

[129] Clause 1.2 of the RoS gave FENZ the discretion to offer Mr Larsen another Station Officer position in Whangarei before November 2020. That occurred when FENZ offered him the May 2019 slot.

[130] As per clause 1.3, Mr Larsen accepted the offer of the May 2019 slot and the parties agreed he would start work in that position on 3 July 2021.

Was Mr Larsen disadvantaged by not being permitted to transfer to the May 2019 slot?

[131] By accepting the May 2019 slot, Mr Larsen activated an earlier start date for working in Whangarei, that by agreement was 3 July 2019. Mr Larsen expected to start work in Whangarei on 3 July 2019, but FENZ prevented him from doing so.

[132] Instead FENZ required Mr Larsen to work in the St Heliers Fire Station from 31 July 2021. When he refused to do so he was not paid. Mr Larsen did not transfer to a permanent Station Officer position in the Whangarei Fire Station until mid-January 2024.

[133] This significant delay in Mr Larsen starting work in Whangarei disadvantaged him. That is where Mr Larsen wanted to be working, and had his compassionate grounds application for a transfer to the October 2017 slot been successful from the outset, then he would have been working in the Whangarei Fire Station from December 2017.

[134] Mr Larsen still wanted to work in Whangarei upon his return from extended sick leave. He did not want to work in Auckland, for legitimate family related reasons. By requiring Mr Larsen to report to work in St Heliers from 31 July 2021, FENZ disadvantaged him.

Was the disadvantage Mr Larsen experienced by not being permitted to work in the May 2019 slot he had been transferred to under the RoS justified?

Did NZPFU change its mind about an agreed transfer of Mr Larsen to Whangarei?

[135] FENZ said it believed from earlier discussions with NZPFU that it was not opposed to Mr Larsen being transferred into a Station Officer role in Whangarei (which ended up being the May 2019 slot) to resolve the problem about him not having been transferred on compassionate grounds to the October 2017 slot, when he should have been.

[136] FENZ said that at the time the RoS was entered into, there was a mutual wish by those involved not to displace the union member who had been appointed to the October 2017 slot that Mr Larsen should have been transferred to on compassionate grounds.

[137] FENZ claimed NZPFU changed its mind under pressure from the local membership, who were reported to have been aggrieved about Mr Larsen's transfer

because it had prevented them from advancing their own careers by applying for the May 2019 slot.

[138] This conflict between NZPFU and FENZ on this issue was not resolved, because NZPFU's witnesses did not give evidence to the Authority. It was also not material because any union member covered by the 2018 CA in Whangarei could have raised a dispute, they did not require NZPFU to do it for them.

[139] There was also no evidence that every union member in Whangarei had agreed to FENZ transferring Mr Larsen to a permanent Station Officer position in the Whangarei Fire Station, so even if NZPFU had agreed to Mr Larsen's transfer, its local members could still have raised a dispute about it.

What was the dispute about?

[140] NZPFU's written dispute was raised under clause 9 of the 2018 CA. By way of a brief overview, it claimed:

- (a) Mr Larsen had been appointed to a Station Officer vacancy in Whangarei "where there is no full time SO position and therefore is above establishment";
- (b) Mr Larsen's appointment breached sections 26 and 27 of the FENZ Act;
- (c) Mr Larsen's appointment breached the following clauses in the CA:
 - (i) 1.3.7 (establishment);
 - (i) 1.20.1 and 1.20.2 (consultation);
 - (ii) 5.6.1 (Appointment Policy) and
 - (iii) 5.6.3 (Transfer, Notifications of Vacancies & Appointment Policy).

Was the May 2019 slot 'over establishment'?

[141] Under the 2018 CA a vacancy arose when an operational employee permanently leaves a district and as a result the actual staff number is less than the establishment. Clause 1.3.7 in the Collective Agreements defines the term "establishment" as the total number of workers employed in a brigade.

[142] NZPFU claimed the May 2019 slot did not involve a full time Station Officer vacancy, because the position Mr Larsen was being transferred into had arisen due to

the incumbent had been seconded to a National Training role. The May 2019 slot was at that time “being filled by a SFF acting up which is a desired part of providing opportunities for SO qualified SFF’s.”

[143] NZPFU’s claim that Mr Larsen’s appointment to the May 2019 slot would result in ‘over establishment’ upon the return from secondment of the Station Officer, who was in the National Training role, was therefore correct.

Consultation requirements for an ‘over establishment’ position

[144] NZPFU’s claim that FENZ’s decision to transfer Mr Larsen to the May 2019 slot had resulted in over establishment, in circumstances where the required contractual consultation for an ‘over establishment position’ had not occurred was also correct.

[145] Clause 1.3.7 in the 2018 CA set out the process that applied to review the establishment in any brigade. This included consultation by the Chief Executive/National Commander with NZPFU prior to any changes taking place. Consideration of the operational needs of the district and the health and safety of the brigade was also required and NZPFU had to have an opportunity to consult members of the brigade concerned.

[146] Those consultation requirements regarding an ‘over establishment’ position had not been met regarding the May 2019 slot. The discussions with the union that FENZ said had occurred (disputed by NZPFU), fell far short of these required consultation obligations.

Other consultation requirements

[147] FENZ was also required under the 2018 CA to consult with NZPFU over any proposed changes that could impact on the terms and conditions of its members.

[148] Mr Larsen’s transfer to the May 2019 slot did affect (at least) the NZPFU member who was acting up in that position while the incumbent was on secondment in a National Training role, so consultation was required. It also likely affected other Whangarei based union members who could have applied for that position, had it been authorised as an ‘over establishment’ position.

[149] Although FENZ said it had spoken to NZPFU about a proposed ‘transfer by agreement’ of Mr Larsen on at least two occasions prior to entering into the RoS, the

Authority was not provided with documentation recording the discussions and/or any record of the agreement FENZ said it had reached with NZPFU.

[150] There were also no documents to establish what consultation had occurred, when, with whom consultation had occurred or what the consultation had consisted of. NZPFU's claim that adequate consultation about changes to the staffing arrangements associated with the May 2019 slot had not occurred was therefore accepted by the Authority.

Appointment process if 'over establishment' position had been authorised under the CA and adequate consultation had occurred

[151] The Appointment Policy referred to in clause 6.3.1 of the 2018 CA referred to s 65 of the Fire Service Act 1975, which is now s 27 of the FENZ Act.

[152] Section 26 of the FENZ Act deals with "appointments on merit", and requires preference be given to the person who is best suited for the position. Section 27 of the FENZ Act sets out the "obligation to notify vacancies", which required vacant positions, if practicable, to be notified in a manner that enabled qualified persons to apply.

[153] If after consultation the requirements of the CA had been met, and it was agreed that the Whangarei brigade would go over establishment, then the Appointments Policy, and the Transfers, Notification of Vacancies and Appointments Policy (the Policies) applied to permanent (paid) operational positions, such as the May 2019 slot.

[154] The Policies required the position to be advertised and the appointment of the person best suited for the position. The May 2019 slot was not advertised.

[155] Mr Mitchell KC's submission that sections 26 and 27 of the FENZ Act did not apply, as it was not practicable to advertise the May 2019 slot because Mr Larsen already had the role under the RoS was not accepted.

[156] A RoS cannot contract out of statutory obligations. Where there was a conflict between the RoS and the FENZ Act requirements, then the requirements in the FENZ Act should prevail. That finding did not prevent Mr Larsen from pursuing a claim that the RoS had been breached, but it did mean FENZ could not use the RoS to transfer Mr Larsen into a position in Whangarei it was not lawfully permitted to do so under the 2018 CA and/or FENZ Act.

[157] It also would have been practicable to have advertised the vacancy for the May 2019 slot, had the ‘over establishment’ position been agreed in accordance with the requirements of the 2018 CA. However, that did not occur, so the ‘over establishment’ position was not authorised, meaning it never even got to the ‘being advertised’ stage covered by the Policies and FENZ Act.

Relevance of compassionate grounds applications

[158] FENZ said that compassionate grounds applications are “very rare”. While a compassionate grounds application (if accepted) takes priority over other applicants, the person seeking a compassionate grounds appointment is required to apply for an advertised role. If the prospective candidate for the position has their compassionate grounds accepted, then their appointment is prioritised over merit based applications for the position.

[159] The underlying problem here is that Mr Larsen’s compassionate grounds application for the October 2017 slot should have been accepted, but it was not. He then declined to make another compassionate ground application until he did so (at the Authority’s urging) on 17 November 2023 for the December 2023 slot.

[160] Because the May 2019 role was not advertised, Mr Larsen had not made a compassionate grounds application for it, so a compassionate grounds appointment could not be made to that position, even if the ‘over establishment’ situation been authorised.

Should FENZ have transferred Mr Larsen to the May 2019 slot in Whangarei on 3 July 2019?

[161] FENZ’s position that transferring Mr Larsen from St Heliers to Whangarei at that time would have been neither lawful (given the statutory obligation to notify the vacancy), nor in his best interests, given the hostility that a transfer rather than advertisement of the vacancy and notified appointment would have caused was accepted by the Authority.

[162] There was also concern that proceeding with the transfer in the face of the dispute would have likely placed Mr Larsen into a hostile environment, which he himself had noted was a risk in an email he sent FENZ on 24 June 2019. It would also likely have resulted in a breach of contract claim, as transferring him into the May 2019 slot was inconsistent with the peace clause in the 2018 CA.

[163] Regardless of the merits of the dispute, the practical realities of the opposition Mr Larsen faced within the Whangarei brigade meant his transfer into the May 2019 slot on 3 July 2019 would have been inconsistent with FENZ's obligation to provide him with a safe workplace. Nor would it have been consistent with the peace clause in the 2015 CA, which was also a term of Mr Larsen's mirror IEA.

[164] Mr Larsen's transfer to Whangarei was therefore understandably placed on hold, while the parties tried to find a workable solution.

Authority's finding on substantive justification for the disadvantage Mr Larsen experienced

[165] The issues NZPFU raised in its dispute had merit. The transfer of Mr Larsen into the May 2019 slot appeared to be unlawful, notwithstanding the RoS. There were also health and safety issues due to the workplace hostility that had occurred as a result of Mr Larsen being given the May 2019 slot outside to the 2018 CA requirements.

[166] FENZ therefore had good reasons, based on reasonable grounds, for not permitting Mr Larsen to commence work in the May 2019 slot in Whangarei on 3 July 2019. That decision was one that was open to a fair and reasonable employer to have made in all the circumstances.

[167] FENZ was also justified in not wanting to pursue litigation about the dispute itself, because it reasonably believed litigation posed considerable risk of further polarising the parties in Whangarei. That is why FENZ told Mr Larsen it would fully co-operate with an urgent application he had proposed he would make to the Authority, while not wanting to be the applicant in the litigation itself.

[168] Instead, FENZ applied considerable time efforts and resources to delivering Mr Larsen the outcome he wanted, namely a Station Officer position in Whangarei or other training position. The following sections in this determination assess the procedural fairness of FENZ's actions.

Was the instruction FENZ gave Mr Larsen to report to work at St Heliers Fire Station lawful and reasonable?

Mediation

[169] After the dispute on 21 June 2019 FENZ offered to arrange mediation involving Mr Larsen, NZPFU and FENZ, which Mr Larsen declined. His position was that he was

not in a dispute with NZPFU and he did not want the union attending mediation with him. Mr Larsen said he would apply for mediation with FENZ only.

[170] FENZ accepted Mr Larsen's decision not to attend a mediation which involved NZPFU, so had individual mediations with him.

Did the NZPFU dispute involve Mr Larsen?

[171] Mr Larsen has repeatedly emphasised that the dispute NZPFU raised did not involve him, as the dispute was between the union and FENZ only.

[172] While that is strictly correct, in that the parties to the dispute were NZPFU and FENZ, the dispute did involve Mr Larsen because it involved his transfer to the May 2019 slot in the Whangarei Fire Station. It was therefore artificial for Mr Larsen to maintain his stance that the dispute "had nothing to do with him", so he was not required to do anything to help resolve it.

[173] The dispute had everything to do with Mr Larsen, because NZPFU had claimed his transfer was unlawful, so could not occur. Mr Larsen could not reasonably expect FENZ to simply transfer him to the May 2019 slot, in the face of the legitimate issues that had been raised by NZPFU in its written dispute. FENZ's position that the dispute had created a serious employment relationship problem for all involved was accepted by the Authority.

[174] As a party to an employment relationship with FENZ, the NZPFU dispute had created an employment relationship problem for Mr Larsen personally (even though he was not a party to the dispute) because FENZ did not allow him to start work in the May 2019 slot on 3 July 2019 as agreed.

[175] FENZ had also instructed Mr Larsen to continue in his current position, which meant working in the St Heliers Fire Station, when he did not believe that was a lawful or reasonable instruction. Nor did Mr Larsen accept that FENZ could stop paying him if he did not report to work at the St Heliers Fire Station from 31 July 2021 onwards. These are examples of how the NZPFU's dispute affected Mr Larsen personally, meaning it had in fact involved him.

[176] As the person who was personally affected by the dispute, Mr Larsen could and should have pursued his strongly held belief that the obligations FENZ had to him in the RoS effectively 'trumped' the issues NZPFU had raised in the dispute notice, as to

identifying why his transfer would be unlawful. That was necessary as the dispute had effectively ‘tied FENZ’s hands’ in terms of continuing with Mr Larsen’s transfer to the May 2019 slot.

The peace clause

[177] The disputes procedure in the parties’ collective agreements includes what is referred to as “the peace clause”, which states:

(i) Peace Obligation:

It is agreed that no worker shall discontinue or impede normal work, either totally or partially, because of any matter that is the subject of the observance of this procedure, and the employer shall ensure that the circumstances which prevailed in each brigade prior to the matter becoming subject to this procedure shall be maintained until the dispute has been resolved.

[178] The purpose of the peace clause is to preserve the status quo until the dispute has been resolved.

Did the peace clause apply to Mr Larsen?

[179] On 2 July 2019 FENZ invoked the “peace clause” in Mr Larsen’s mirror IEA. This provided that the status quo would remain in place while the dispute was resolved.

[180] Mr Larsen disputed that the peace clause could be applied to his situation. That submission was not accepted.

[181] The offer letter dated 14 March 2017 Mr Larsen accepted made the peace clause a term of his mirror IEA, because it was based on the 2015 CA terms and conditions of employment.

[182] The peace clause was also drafted widely enough to cover Mr Larsen’s situation where a dispute affected him, even though he was not a party to it. It also expressly provided for the status quo in the Whangarei brigade to continue, meaning Mr Larsen’s intended transfer could not be completed.

[183] The peace clause preserved the status quo, because the effect of it was that “no worker”, which included Mr Larsen, could change their normal duties, and the circumstances in the affected brigade were to be maintained, until the dispute had been resolved. The peace clause effectively paused the existing situation until the dispute was resolved.

What was the status quo for Mr Larsen?

[184] The whole point of a clause preserving the status quo was to not make changes to the current arrangements while the dispute was being resolved.

[185] Mr Larsen claimed that even if the peace clause applied to him, then the status quo required him to work in Whangarei, because the RoS had already appointed him to a permanent Station Officer position in Whangarei. That was not accepted.

[186] Clause 1.1 of the RoS provided that until Mr Larsen had started work in Whangarei he “will remain in his current role as Station Officer at St Heliers Fire Station.”

[187] When FENZ invoked the peace clause on 26 June 2019 Mr Larsen had not yet started work in Whangarei. His “current role” as at 26 June 2019 was therefore in the St Heliers Fire Station. Preserving the status quo by maintaining the current arrangement for Mr Larsen, required him continuing to work in his “current role” as Station Officer at St Heliers Fire Station.

[188] Preserving the status quo for the Whangarei brigade that was affected by the dispute required not transferring Mr Larsen into the May 2019 slot in the Whangarei Fire Station until the dispute had been resolved, because to have transferred him would have changed the staffing of the Whangarei brigade, which the peace clause prevented.

Was Mr Larsen denied work in Whangarei?

[189] The dispute was about Mr Larsen being transferred into the May 2019 slot, without it being authorised as ‘over establishment’, and then if that authorisation had been obtained (which it had not), advertising it, with the best candidate being appointed to that position.

[190] There was no issue with Mr Larsen being transferred to an advertised position on compassionate grounds, or with him being seconded to another Station Officer position in Whangarei while the dispute was being resolved. Mr Larsen could have solved his work location problem very easily by pursuing one of those alternative routes to work as a Station Officer in Whangarei.

[191] By letter dated 26 June 2019, FENZ offered to resolve Mr Larsen’s work location problem by offering him a secondment as a Station Officer in Whangarei, with

the same starting conditions and watch placement that he had discussed with Assistant Area Manager Ballantine.

[192] This would have enabled Mr Larsen to have started working in the Whangarei Fire Station, on the same terms and conditions he had under the transfer to the May 2019 slot that had been made under the RoS. The only difference was that instead of being transferred into a permanent role, he would be on secondment while the parties worked through the issues raised by the dispute.

[193] Mr Larsen was also informed on 26 June 2019 that if he did not want to accept the secondment offer then he would be required to continue in his current role. At that point, as per clause 1.1 of the RoS, his current role was in the St Heliers Fire Station. He therefore knew from the outset that if his transfer did not proceed, and he did not accept FENZ's alternative offers of work in Whangarei, then he would have to continue working in the St Heliers Fire Station.

[194] The offer of a secondment to Whangarei was repeated in a letter from FENZ dated 2 July 2019. Mr Larsen was also invited to apply on compassionate grounds for a number of advertised Station Officer roles in Whangarei, which he would have been transferred to on compassionate grounds had he applied for them.

[195] FENZ had already agreed Mr Larsen's circumstances met the compassionate grounds requirements, so he could have simply reused that same information in a new compassionate grounds application for an advertised vacancy. That would not have been onerous for him to have done.

[196] The secondment offers were also without prejudice to any claims Mr Larsen had, so he could have transferred to Whangarei under a secondment, then lodged an urgent compliance order application regarding the May 2019 slot to enforce what he believed was his right to transfer under the RoS.

[197] However, Mr Larsen did not agree to these suitable options, instead electing to rely on his belief that because the RoS had given him a permanent position in Whangarei that was the end of the matter, and he did not have to personally take any other steps to facilitate his transfer to Whangarei occurring.

[198] Mr Larsen's unjustified disadvantage personal grievance claim that "work in Whangarei was denied to him" was therefore not accepted by the Authority. Mr Larsen

was offered suitable work in Whangārei, which he could have commenced on 3 July 2019 had he wanted to do so.

[199] Although there is obviously a difference between a position Mr Larsen had been seconded into and a permanent position, for the purposes of achieving the outcome that he wanted, namely a Station Officer position in Whangareī, that he could commence on 3 July 2019, then that opportunity was made available to him, just not in the May 2019 slot.

[200] After declining offers of secondment to the Whangareī Station Officer role from 3 July 2019, Mr Larsen commenced paid sick leave from 1 July 2019. He was on paid sick leave or light duties for a period in excess of 17 months (from 1 July 2019 until 29 April 2021).

[201] A number of subsequent Station Officer vacancies arose, along with other potentially suitable Training roles, which FENZ encouraged Mr Larsen to consider applying for.

[202] However, Mr Larsen held rigidly to his stance that he should not have to apply for any other positions, because he already had the permanent Station Officer role he wanted in Whangareī, as recorded in the RoS.

[203] That stance was inconsistent with Mr Larsen's duty of good faith, which required him to be constructive in resolving employment relations problems. FENZ offered Mr Larsen many solutions to the work location problem that NZPFU's dispute had caused the parties.

Finding on lawfulness of FENZ's instruction to Mr Larsen to report to St Heliers Fire Station

[204] FENZ's instruction to Mr Larsen that he reports to work from 31 July 2021 in the St Heliers Fire Station was lawful and reasonable, as was the decision not to pay him when he failed to report to work at that location.

[205] The instruction was consistent with the peace clause and with the RoS that recorded Mr Larsen's "current role" was in the St Heliers Fire Station. It was an instruction that a fair and reasonable employer could have given in all the circumstances, so it was substantively justified.

[206] The instruction was also issued after a fair and proper process, which had included offering Mr Larsen realistic alternative options that would have met his objective of working in a Station Officer position in Whangarei from 3 July 2019 onwards.

[207] FENZ also complied with its statutory good faith and procedural fairness requirements and with its contractual obligations to Mr Larsen.

[208] The instruction FENZ gave Mr Larsen to report to work at the St Heliers Fire Station from 31 July 2021, and the decision it made to not continue paying him when he failed to do so, was procedurally justified.

[209] A summary of the ‘on the record’ offers FENZ made Mr Larsen follows, which supports the Authority’s jurisdiction finding.

What offers were made to Mr Larsen?

[210] FENZ made a number of reasonable offers to Mr Larsen, without prejudice to any of his rights or claims, to address the employment relationship problem associated with the RoS, the NZPFU dispute and his work location.

Secondment offer to Training Quality position

[211] Mr Larsen was offered secondment into a Training Quality role he had expressed interest in. The secondment would have commenced on 12 August 2019 and would have ended on 7 August 2020. This secondment offer made on 26 July 2019 was not accepted by Mr Larsen.

Payment of Mr Larsen’s legal costs

[212] On 9 October 2019 Mr Larsen wrote to FENZ via counsel, stating that any resolution of his employment relationship problem would require his legal costs to first be paid. FENZ did that as a sign of good faith in order to try and advance matters. Despite that having occurred, no solution was secured.

The October 2019 slot

[213] On 16 October 2019 FENZ proposed a solution whereby Mr Larsen would submit a fresh application on compassionate grounds for an advertised Station Officer role in Whangarei (the October 2019 slot), noting that it would most likely be successful

given that compassionate grounds applications were “very rare”. Mr Larsen refused to apply for it.

[214] The appointee had not made a compassionate grounds application, meaning that had Mr Larsen applied for that role back in October 2019 then he would have been appointed, as the only possible candidate who had established he had compassionate grounds for a transfer. Mr Larsen therefore would have taken priority over the candidate who was appointed to that role.

[215] The only difference is Mr Larsen would have been transferred into the vacant October 2019 slot instead of the May 2019 slot, which had not been authorised as ‘over establishment’.

[216] If Mr Larsen had applied for the October 2019 slot then he would have achieved the desired outcome while also nullifying the union’s dispute and the risk of litigation over non-compliance with the collective agreements and/or with the advertisement and appointment requirements of the FENZ Act. He also would have been able to have started work in Whangarei before the November 2020 date recorded in the RoS.

[217] Had Mr Larsen adopted that proposed path to Whangarei back in October 2019, then the issue of unpaid leave from 31 July 2021 would also never have arisen.

Senior Trainer – Training Quality role – November 2019

[218] During November 2019 FENZ offered Mr Larsen a senior training role with the job title Senior Trainer – Training Quality. This offer was not accepted.

[219] Mr Larsen told the Authority he believed that role was under review, but the evidence produced during the investigation meeting contradicted that. This role was not disestablished by a subsequent review of FENZ’s people branch and training.

Senior training role – June 2020

[220] FENZ reiterated its offer of a senior training role via a letter of offer dated 2 June 2020. Mr Larsen was again offered the role of Senior Trainer – Training Quality, which was open to be accepted until 16 June 2020. This was a permanent ongoing role.

[221] FENZ advised Mr Larsen that if he did not accept the offer of the Senior Trainer – Training Quality role by 16 June 2020 then he would be required to return to full duties as a Station Officer at the St Heliers Fire Station in Auckland.

[222] Mr Larsen did not accept that offer. On 2 July 2020 he advised via counsel that in order for him to accept the offer of this Senior Trainer role a historical matter (which had been previously raised by Mr Larsen and rejected by FENZ) involving superannuation/KiwiSaver would need to be resolved.

Reiteration of offer of Senior Training role – August 2020

[223] By letter dated 13 August 2020, FENZ re-stated its offer of the senior training role. FENZ noted in this offer that Mr Larsen had:

sought to introduce into these [settlement] issues, a claim that he should not be bound by current superannuation treatment that has applied to him, a claim which has been tabled and rejected previously but which he now says must be accepted and resolved as part of the resolution of issues regarding the RoS and associated NZPFU dispute.

[224] FENZ advised Mr Larsen that the superannuation matter was entirely separate, and would not be part of any settlement of the work location/RoS issues. Mr Larsen did not accept that position.

[225] Mr Larsen declined the August 2020 offer. The offer was repeated again on 8 September 2020, but was still not accepted.

The September 2020 slot

[226] On 8 September 2020 FENZ proposed to Mr Larsen that he submit a fresh compassionate grounds application for a vacant Station Officer role in Whangarei, noting that it would most likely be successful (the September 2020 slot). This role had arisen as a result of a retirement, so was separate from the May 2019 slot that had arisen due to a secondment.

[227] This offer was put forward as a practical solution that would have enabled Mr Larsen to commence in Whangarei as a Station Officer in a non-litigious and timely manner, without the need to have litigation around the May 2019 slot resolved, which could have been a costly, time consuming process.

[228] Mr Larsen was advised that “Subject to there being no more compelling compassionate applications from another applicant, it is likely you would be appointed.” Had this offer been accepted by Mr Larsen, he would have been appointed to a permanent Station Officer role in Whangarei before November 2020, which was

the outcome intended by the RoS. Mr Larsen declined to make a compassionate grounds application for the September 2020 slot.

Resumption of work from 31 July 2021 at St Heliers Fire Station

[229] FENZ's letter of 8 September 2020 identified that if Mr Larsen did not want to apply for the September 2020 slot in Whangarei, and did not want to accept the training role that had been proposed to him in August 2020, then the third option would be for him to resume his duties in his current role as Station Officer in the St Heliers Fire Station.

[230] The same offer made for the September 2020 slot had been made to Mr Larsen for the October 2019 slot.

[231] It was only after Mr Larsen had rejected all of FENZ's proposals that it instructed him to report to work in the St Heliers Fire Station from 31 July 2021.

[232] After having made seven reasonable proposals, and having all of them rejected, FENZ by letter dated 24 June 2021 gave Mr Larsen six weeks' notice that if he declined to report for work at St Heliers Fire Station on 31 July 2021, then he would be placed on unpaid leave.

The October 2021 slot

[233] An eighth attempt was made by FENZ in October 2021 to resolve the issue of Mr Larsen's work location. FENZ again proposed that Mr Larsen apply for an advertised Station Officer role in Whangarei on compassionate grounds. This offer was made by letter dated 1 October 2021 (the October 2021 slot).

[234] FENZ pointed out that Mr Larsen applying on compassionate grounds for the position it would represent a practical solution to enable him to commence working in Whangarei as a Station Officer in a non-litigious manner, thereby resolving the central problem and dispute.

[235] The offer enabled Mr Larsen to reserve his position regarding any other matters of dispute or claims he had against FENZ, including his claim involving non-payment of salary.

[236] Mr Larsen was also informed that, subject to there being a no more compelling compassionate grounds application from another applicant (which it noted would be

very unlikely) then he would be appointed to the October 2021 slot. Mr Larsen declined to make a compassionate grounds application for the October 2021 slot.

Outcome of the ‘not being provided work in Whangarei’ disadvantage grievance

[237] In accordance with the RoS, Mr Larsen’s move to Whangarei could occur any time during the period up to November 2020, so it was anticipated when he settled his original personal grievance claim in August 2018 that it may take until November 2020 before he could commence work in Whangarei.

[238] FENZ sought to find a workable solution to the employment relationship problem that had arisen. It offered Mr Larsen opportunities that would have enabled him to have started working in a permanent Station Officer position in Whangarei before November 2020, although none of these alternative positions were the disputed May 2019 slot.

[239] The offers that FENZ made did require Mr Larsen to take some steps, in terms of applying for a Whangarei Station Officer vacancy on compassionate grounds. Making such an application would have enabled the parties to achieve what had been intended under the RoS, namely enabling Mr Larsen to work in a Station Officer role in Whangarei.

[240] By making a new compassionate grounds application for the Whangarei Station Officer vacancies, Mr Larsen would have neutralised the union’s dispute regarding his transfer to the May 2019 slot.

[241] None of the Station Officer vacancies Mr Larsen was invited to apply for on compassionate grounds had resulted in any other compassionate grounds applications being made by any other applicants for those positions. Therefore, had Mr Larsen applied for any of these positions, then his compassionate grounds application for a transfer would have taken priority over other merit based applicants.

[242] The suitability of that course of action as an appropriate way of addressing the parties’ employment relationship problem regarding Mr Larsen’s work location was evident from the outcome that was achieved at the end of 2023. Had Mr Larsen agreed to have done that for any of the earlier Station Officer vacancies in Whangarei, then he would have been able to work in the Whangarei station far earlier than has occurred.

Summary of outcome

[243] FENZ's failure to allow Mr Larsen to commence work in the May 2019 slot in Whangarei on 3 July 2019 was procedurally and substantively justified. In particular, FENZ:

- (a) Had good reasons, based on reasonable grounds, for instructing Mr Larsen to work in the St Heliers Fire Station instead of allowing him to commence the May 2019 slot in Whangarei on 3 July 2019;
- (b) Engaged with Mr Larsen in good faith about the work location issues;
- (c) Adopted a fair and reasonable process before issuing Mr Larsen with the instruction to report to work at St Heliers Fire Station from 31 July 2021;
- (d) Offered Mr Larsen multiple options that would have enabled him to have commenced work in a different Station Officer position in the Whangarei Fire Station on 3 July 2019, and later in another Station Officer position that was not the subject of the NZPFU dispute, so that he did not have to work in the St Heliers Fire Station. All he had to do was make a compassionate grounds application for an advertised vacancy, that was not the subject of the NZPFU dispute.

[244] However, Mr Larsen maintained that he wanted to be transferred to the May 2019 slot that FENZ was legally unable to place him into. That was unreasonable.

[245] FENZ was also procedurally and substantially justified in not paying Mr Larsen when he failed to report to work in the St Heliers Fire Station from 31 July 2021. Mr Larsen was not entitled to be paid when he had not made himself available to work in the St Heliers Fire Station, which was his current work location at the time FENZ issued that instruction.

[246] Mr Larsen refused eight reasonable proposals, each of which would have placed him at work in Whangarei. Seven of these proposals were tabled on or before September 2020.

[247] FENZ's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances. FENZ therefore satisfied the Authority that it met the requirements of the justification test in s 103A(2) of the Act regarding its

decision not to allow Mr Larsen to complete his transfer to the May 2019 slot on 3 July 2019, and the instructions it gave him as a result of that.

[248] Accordingly, Mr Larsen's disadvantage grievance about not being permitted to work in Whangarei, in breach of the RoS, did not succeed.

Orders

[249] Within 28 days of the date of this determination, FENZ is ordered to pay Mr Larsen \$5,000.00 under s 123(1)(cc)(i) of the Act as distress compensation for his successful 'use of accrued annual leave' unjustified disadvantage personal grievance.

[250] Costs are reserved.

What costs and disbursements should be awarded?

[251] The parties are encouraged to resolve any issue of costs between themselves regarding both of these matters (3128394 & 3147082).

[252] For the purposes of assessing costs, Mr Larsen is to be treated as the successful party because his 'use of accrued annual leave' disadvantage grievance succeeded.

[253] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Larsen as the successful party may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination.

[254] From the date of service of that memorandum, FENZ will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[255] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.²

Rachel Larmer
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1