

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 572
3278599

BETWEEN MARK DONNELLY AND 32
OTHERS
Applicants

AND FIRE AND EMERGENCY
NEW ZEALAND
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Aishleen Sluiters and William Buckley, counsel for the
Applicants
Victoria Casey KC and Geoff Davenport, counsel for
the Respondent

Investigation Meeting: On the papers

Submissions and further 17 May and 25 July 2024 from Applicants
information received: 5 June and 25 July 2024 from Respondent

Determination: 27 September 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mark Donnelly and 32 other applicants (as listed in Schedule A to this determination) are all former employees of Fire and Emergency New Zealand (FENZ) who were employed to perform duties related to the prevention, suppression and extinction of fire, and other emergency services (firefighters). They were also members of the New Zealand Professional Firefighters Union (NZPFU).

[2] FENZ and NZPFU are parties to the Collective Agreement for Uniformed and Communications Centre Employees (the Collective).¹

[3] Agreement was reached in December 2022 to increase base wage rates for firefighters with back payments where necessary to recognise a significant change to the role of firefighter. In 2018 the role changed when firefighters were required to respond to emergency medical call outs.

[4] The Collective records both FENZ and NZPFU accept this represented a change to the scope of the role and the increase in the base rate of pay was to address this. A small portion of the increase was to recognise the impact on firefighters of adding the emergency medical response to the role with the remainder of the increase in base pay said to be based on a job size evaluation because of the expanded role.²

[5] While the applicants resigned before the wage increase and backpay in the Collective was agreed, they claim they are nonetheless entitled to backpay. This determination deals with their disadvantage grievance based on disparity of treatment alleged to have occurred when current employees (covered by the Collective) received back payment of the increase in base rate, but the applicants did not.

[6] FENZ initially submitted this disadvantage claim was not raised within the statutory 90-day time limit and that it lacked merit because there could be no entitlement to backpay when the applicants' employment had ended before the wage increase was agreed to. Having more detail about the claim FENZ now submits, for a number of reasons other than the 90-day issue, the claim must fail because a personal grievance cannot arise post the ending of employment.³

[7] FENZ also submits there is another fundamental issue arising from the fact there are concurrent claims for both a dispute as to the interpretation of the Collective and the disadvantage grievance for disparate treatment and both are based on the same facts.

[8] The applicants did not make any submission on that point and I will return to the dispute claim below.

¹ Collective Agreement for Uniformed and Communications Centre Employees, 1 July 2021 to 30 June 2024.

² Collective Agreement, part 2 clause 2.6.1.3 and part 3 clause 3.3.2.

³ *Principle of Auckland College of Education v Hagg* [1996] 1 ERNZ 150 (CA) and *Victoria University of Wellington v Haddon* [1996] 1 ERNA 139 (CA).

[9] The disadvantage claim (claim 2) is one of four claims lodged in the Authority by the applicants on 8 February 2024. It was agreed this claim would be determined as a preliminary matter on the papers. Both parties lodged written submissions.

Background

[10] The background to the agreement in the Collective to pay backpay stems from acceptance by the parties that the role of firefighter increased in scope in 2018 when firefighters were required to attend emergency medical call outs. This meant firefighters attended all medical emergencies as co-responders from that point on.

[11] The increase in the base rate of pay agreed to in the Collective included agreement to pay backpay. The terms of settlement relating to these increases are dated 6 December 2022 with backpay available backdated to 1 July 2021. None of the applicants received backpay and that is what the disadvantage claim of disparate treatment is based on.

[12] On 28 July 2023 the applicants say they raised this grievance in writing. The letter recorded:

It is manifestly unjust and unfair that the Former Firefighters, who suffered the emotional and psychological harm that was expressly acknowledged in the CEA, have been disadvantaged and treated differently to their peers simply because they were not employed at Ratification. For many of the Former Firefighters, it was the extreme physical and emotional toll of their incorrectly scoped roles, and the protracted nature of bargaining (which lasted 18 months), which saw them leave FENZ prior to Ratification.

[13] The applicants say if the role of firefighter was incorrectly scoped from 2018 onwards, they are entitled to backpay because they were employed over that period. They also say they suffered the significant emotional and psychological harm acknowledged in the Collective.

Submissions and analysis

90 days

[14] The applicants' submissions focus on the 90-day statutory time frame and say the disadvantage grievance was raised within time because it was raised within 90 days of 3 May 2023. This was the date FENZ agreed to make back payments to the other firefighters and therefore the date the applicants say their disadvantage grievance, (based on disparate treatment), crystallised.

[15] FENZ submits there are four reasons why this disadvantage claim is outside the jurisdiction of the Authority and cannot proceed. Firstly, it is based on an event that occurred after the applicants' employment had ended, and secondly the claim relies on events dating back to 2013. As no personal grievance was raised until 28 July 2023, the claim is therefore outside of the statutory 90-day time frame. Thirdly, even if events after the end of the employment relationship can form part of a personal grievance the facts show the applicants knew they were not eligible for backpay months prior to raising the personal grievance and for this reason it was also raised outside the 90-day timeframe.

[16] FENZ's final submission is that the disadvantage claim is statute barred given the effect of ss103(3) and 129(1) of the Act.

Disadvantage

[17] The nature of a disadvantage grievance based on disparity means it must occur during employment. Section 103(1)(b) sets out a disadvantage grievance as follows:

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer

...

[18] FENZ says the Collective was negotiated after the applicants had left their employment. As this was part of the subsequent collective agreement and the payment of backpay was not a term of any of the applicants' employment at the date each of their employment ended there can be no disadvantage grievance about a condition of the applicants' employment.

[19] The parties do not disagree that the applicants were no longer employed at the time the collective agreement containing the agreement to pay backpay was ratified. I was not pointed to any condition that survived termination that would be relevant to the applicants' claim.

[20] The payment of backpay for the increase in base rate was not a term of the applicants' employment as at the date their employment ended which makes it difficult to see how a disadvantage grievance based on disparity can have arisen.

[21] I conclude that no disadvantage grievance based on disparity arises between the applicants and the other employees because the applicants' employment relationships had already ended before the action by the employer alleged to have affected the applicants to their disadvantage.

[22] Having reached that conclusion there is no need to consider jurisdiction in terms of the 90-day timeframe.

Dispute about interpretation of the Collective

[23] The applicants also claim they are entitled to back-payment of wages pursuant to the Collective between FENZ and NZPFU. It appears the dispute claim is based on the same facts as claim 2. The dispute claim is framed as follows:

Claim 1 - They are entitled to back-payment of wages pursuant to the 2022 Collective Employment Agreement ("CEA") between the Respondent and the New Zealand Professional Firefighters Union ("NZPFU")

[24] There are issues as to jurisdiction in the Authority when a disadvantage is claimed but the problem is in fact a dispute. Section 103(3) of the Act sets out the following:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation of any provision of any employment agreement.

[25] The combination of s 103(3) and s 129(1) of the Act, providing that a dispute as to interpretation of an employment agreement can be pursued in employment institutions in accordance with Part 10 of the Act, mean the applicants are prohibited from pursuing a personal grievance over what is in substance a dispute about the non-payment of backpay under an employment agreement. This means the applicants could not have sought to pursue a personal grievance in relation to backpay if it was in fact a disputed non-payment of a sum under an employment agreement.⁴

[26] I note the applicants have not made any submissions on this point focussing instead on the 90-day issue. Nonetheless with the dispute as to interpretation of the terms of the Collective framed as it is in the statement of problem, there seems little argument that entitlement to backpay is framed as a dispute and both the disadvantage personal grievance and the dispute over interpretation of the Collective are based on the

⁴ *Breen v Prime Resources Company Limited* [2023] NZEmpC 199 at [24] and [25].

same facts. The practical effect of s 103(3) is that a disadvantage grievance cannot form the basis of a claim if a matter is in fact a dispute about interpretation of an employment agreement. The policy reasons for this rule were recently set out in *Breen*.⁵

[27] In the context of claim 1 raising a dispute about the interpretation of the Collective relating to non-payment of backpay to the applicants, the disadvantage claim cannot coexist with a dispute about the same facts. Disputes are excluded from the definition of disadvantage grievances in s 103(1)b). That means this matter could only proceed as a dispute.

Summary of findings

[28] The disadvantage grievance based on disparity between the applicants' and other employees who received backpay cannot proceed because no disparity occurred during employment.

[29] Even if the alleged disparity had occurred during employment, the issue of non-payment of backpay is claimed as a dispute which is also before the Authority for resolution. The applicants cannot pursue both a personal grievance and a dispute claim about non-payment of backpay under the Collective.

Next steps

[30] A case management call will be scheduled with the parties to progress the remaining claims including the dispute.

Costs

[31] Costs are reserved until the substantive matters are resolved.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁵ Above n4 at [23].

⁶ [Awarding remedies and costs | Employment Relations Authority \(era.govt.nz\)](https://era.govt.nz/awarding-remedies-and-costs)

Daniel Hayman	Peter Aitken
Mark Donnelly	Donald Bowker
Graeme Ivamy	Daniel Bradley
Roger Kilkelly	Frank Ramage
Kevin Morrison	
Ian King	
Ian Butler	
Mike Cornford	
Trevor Sheehan	
Gregory McFarlane	
Maurice Kemsley	
Neville Christiansen	
Paul Single	
Steve Kahu	
Peter Draper	
Mark Dyer	
Mike Woolhouse	
Kevin Woolett	
Peter McArdle	
Roger Pickett	
Ross Pitcher	
Peter Harwood	
Wayne Underhay	
John Parker	
Keith Norton	
Robert Franklin	
Allen Barr	
Tim Seutter	
Kyle Rosling	