

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 227
3309680

BETWEEN

JOSHUA STRAUSS
First Applicant

NEW ZEALAND PROFESSIONAL
FIREFIGHTERS' UNION
Second Applicant

AND

FIRE AND EMERGENCY NEW
ZEALAND
Respondent

Member of Authority: Peter van Keulen

Representatives: Kathryn Dalziel, counsel for the Applicant
Tanya Kennedy, counsel for the Respondent

Investigation Meeting: 24 – 26 February 2025 at Christchurch
6 March 2025 by AVL

Submissions Received: 5 & 6 March 2025 from the Applicant
5 & 6 March 2025 from the Respondent

Date of Determination: 24 April 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about Joshua Strauss's use of an allowance paid by Fire and Emergency New Zealand (FENZ) – specifically a Mess Allowance paid pursuant to Part 1, Clause 15 of a collective agreement between FENZ and the New Zealand

Professional Firefighters' Union (the Union) covering the period 1 June 2021 to 30 June 2024 (the Collective Agreement).

[2] During Mr Strauss's work FENZ became concerned that he had paid to himself and a group of colleagues, money from an account he had established to collect part of the Mess Allowance paid to the team Mr Strauss was part of (the Account). FENZ commenced disciplinary action against Mr Strauss alleging that the payments were potentially a breach of the FENZ Code of Behaviour and Standards of Conduct.

[3] In response Mr Strauss and the Union raised a dispute with FENZ stating that FENZ did not have the power under Part 1, Clause 15 of the Collective Agreement to pursue enquiries into the payments Mr Strauss had made. And, this dispute meant it could not take disciplinary action against him.

[4] FENZ did not accept there was a dispute, and it continued the disciplinary action against Mr Strauss.

Mr Strauss and the Union obtained an interim injunction

[5] Mr Strauss and the Union lodged a statement of problem in the Authority; an employment relationship based on the dispute. They sought an interim injunction, pending the outcome of the substantive claim, to restrain FENZ from continuing with its disciplinary process with Mr Strauss.

[6] On 16 September 2024 I granted an interim injunction to Mr Strauss and the Union preventing FENZ from continuing its disciplinary process pending the outcome of the employment relationship problem, that being the dispute as to powers conferred on FENZ under the Collective Agreement.¹

The Authority's investigation

[7] This determination deals with the dispute and wider issues that arise in the employment relationship problem.

¹ *Strauss and Anor v Fire and Emergency New Zealand* [2024] NZERA 554.

[8] I investigated this employment relationship problem by receiving written evidence and documents, holding an investigation meeting on 24 – 26 February 2025 and 6 March 2025 and assessing the oral and written submissions of the parties’ representatives.

[9] I received witness statements from Mr Strauss and five of his colleagues, as well as three firefighters in senior roles within FENZ. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties’ representatives. The representatives then provided oral and written submissions.

[10] As permitted by s174E of the Employment Relations Act 2000 my determination has not recorded all the evidence and submissions received. I have stated relevant findings of fact, and the relevant principles of law. Based on this I have reached a conclusion on whether the interim injunction should be granted or declined.

What happened?

[11] In my interim determination I set out the facts as ascertained from the affidavit evidence. Many of these facts have now been established from the evidence in my investigation meeting – I have set the facts out below, repeating the proven facts from the interim matter and adding additional facts.

The Mess Allowance

[12] The Mess Allowance was paid to firefighters pursuant to Part 1, Clause 15 of the Collective Agreement:

Mess Allowance

1.15.1 Fire and Emergency New Zealand shall pay to each brigade (and each Communication Centre) a “Mess Allowance” for each worker under this Agreement of the amount specified in Table 1 of Part 5 of this Agreement.

1.15.1.1 Such allowance shall be used for the purchase of tea, coffee, sugar, milk and biscuits and/or to pay all or part of the wages of a cook.

1.15.1.2 Where there is no agreement among the workers regarding the mess allowance, the matter shall be decided by Management.

[13] Part 1, Clause 15 of the Collective Agreement is the only written reference to the Mess Allowance. There was no policy or process governing the payment of the Mess Allowance; so, there was no formal guidance or written requirements about how the Mess Allowance was paid, how it was to be spent and how it was to be accounted for (if at all) by firefighters.

[14] That said, payments of the Mess Allowance by FENZ followed a standard process across the country:

- (a) FENZ paid the Mess Allowance, which was calculated per firefighter, to each Brigade in New Zealand.
- (b) Each Brigade would then distribute the Mess Allowance to each of its Stations. Each Station would use the Mess Allowance to buy common supplies of tea, coffee, sugar, milk and biscuits as provided for in the Collective Agreement as well as other food and drink related items as the Station saw fit.
- (c) After communal supplies were purchased any surplus portion of the Mess Allowance was paid to each Watch², often without any notification or direction on its use. Each Watch would then spend the surplus Mess Allowance on biscuits – it appeared that the purchase of biscuits for firefighters in a Watch was a reasonably serious task and ensuring there were sufficient biscuits and a suitable selection for a Watch was a high priority. Any remaining surplus Mess Allowance, once biscuits had been purchased, would be spent on other things, commonly other food related items, particularly if the Watch undertook some cooking for the firefighters.

[15] FENZ suggested in their evidence that what the surplus Mess Allowance could be used for was well known as a form of custom and practice. The evidence did not bear this out – the variance amongst the firefighters of how the surplus Mess Allowance was used over time and across the country was significant and even FENZ management who gave evidence could not agree on what the surplus Mess Allowance could be used for.

² Each Station would have four Watches: Blue, Green, Brown and Red. These four Watches work a rotating shift pattern – two day shifts and two night shifts in an eight day cycle - that enables the Station to maintain a 24 response.

[16] The evidence showed that the surplus Mess Allowance was used for many things other than biscuits. Primarily this was pantry supplies for meals, such as dinner or breakfast, or snacks whilst on shift, but it also included food for events like Christmas lunch for the Watch firefighters on duty as well as their families who would attend. And purchases included non-food items such as a freezer and chalk pens, and there was limited evidence that suggested, historically at least, firefighters used some of the surplus Mess Allowance on social functions outside of the station.

[17] The evidence also established that FENZ management was aware that, nationwide, surplus Mess Allowance was being pooled by Watches both in cash in containers at their Station or in bank accounts set up by a Watch member. FENZ management was also aware of the variety of goods purchased by Watches with this Mess Allowance – including knowing that the Watch Mr Strauss was part of had used surplus Mess Allowance to contribute to the purchase of a freezer and to buy chalk pens for industrial action.

[18] In addition to the Mess Allowance money received by a Watch, some Watches also pooled personal money to buy food and cook meals together when members of the Watch were working - this practice was not standard practice across FENZ and where it did occur Watches appeared to have differing ways of organising this.

Mr Strauss opens a bank account for Wigram Blue Watch money

[19] Mr Strauss was a member of the Wigram Fire Station from September 2021. The key period of time in respect of this matter runs from October 2021 until January 2024 (the Key Period) and during this time Mr Strauss was a member of the Blue Watch at Wigram Station.

[20] When Mr Strauss joined the Wigram Blue Watch their surplus Mess Allowance was kept in a container in the Station. With agreement of the other members of Wigram Blue Watch, Mr Strauss opened the Account on 22 October 2021, to collect the surplus Mess Allowance and to pool money to purchase supplies for shared meals. Despite being set up in October 2021, the Account was first used in January 2022.

[21] Mr Strauss set up the Account at the credit union where he held other accounts. The Account was a personal bank account; the Account was in Mr Strauss's name using his credit

union member number. This was the same as his other accounts at the credit union, and he labelled it “Blue Watch Mess - Station”.

[22] Regan Blogg also a firefighter and member of Wigram Blue Watch at the time had signatory authority on the Account that enabled him to have an eftpos card for it.

[23] At the time the members of Wigram Blue Watch included Mr Strauss, Mr Blogg, Peter McGrail, Jacob Greenlaw, Nick Parsons and Rob Schiphorst “the Founding Members”.

[24] The agreement between the Founding Members about collecting and pooling money in the Account included:

- (a) Any surplus Mess Allowance paid to the Wigram Blue Watch would be paid into the Account rather than kept as cash in a container in the Wigram Station.
- (b) The Founding Members, whilst they were members of Wigram Blue Watch, would contribute regular payments to the Account to pay for the ingredients for meals made on any Blue Watch shift. The payments being made by the Founding Members would be made regardless of whether they were working on the shift in which a meal was prepared.
- (c) Any other firefighters covering duties on a Blue Watch shift who ate a meal prepared for that shift would pay a contribution into the Account, which was set at a rate to cover the cost of their meal.

[25] This payment arrangement was agreed so that any excess money paid in by the Founding Members could be used by them for an end of year social activity, such as a group breakfast. I note here that it was not the Founding Members’ intention to create a profit from the contributions by firefighters who covered a shift with Wigram Blue Watch and ate a meal with the Blue watch – as set out above, those firefighters paid an amount that covered the cost of their meal; some rudimentary calculations that I stepped through with witnesses proved this to be accurate.

[26] Payments made into the Account during the Key Period included:

- (a) Surplus Mess Allowance – Dave Mitton, Senior Station Officer at Wigram who administered the Mess Allowance for Wigram Station, paid three amounts into the Account as surplus Mess Allowance, totalling \$1,400. Notably one payment was for \$1,000 and was surplus Mess Allowance arising out of back pay of the Mess Allowance.
- (b) Founding Member payments – these firefighters paid \$20 per week until they left Wigram Blue Watch.
- (c) New Blue Watch members payments – when firefighters joined Wigram Blue Watch they were invited to participate in the evening meals and paid a regular payment of \$10 per week, which increased to \$12.50 per week during the Key Period.
- (d) Other firefighters' contributions made when they covered a Wigram Blue Watch shift and ate a meal with the Watch.

[27] The money pooled in the Account was used to buy a variety of things including biscuits, food and pantry items for cooking meals, a freezer for use at Wigram Station, which one other Wigram Watch contributed to, and chalk pens.

[28] Members of the Wigram Blue Watch were able to use the eftpos cards for the Account or were reimbursed for items they purchased. There was no agreed process for accounting for, or recording, purchases. The Account and purchases made from it operated on a trust basis.

FENZ seeks to access the Account

[29] From 13 November 2023 until 19 December 2023 Mr Strauss was absent from work on leave. During this time members of Wigram Blue Watch were unable to withdraw money from the Account as they only had a new eftpos card that Mr Blogg had, which he had been unable to activate.

[30] Mr Blogg attempted to resolve this problem directly with the credit union. Mr Blogg explained the problem with accessing the Account and that the Wigram Blue Watch used the account for purchases for their meals. Mr Blogg then asked to have the new eftpos card for

the Account activated. On 24 November 2023 the credit union advised, by email to Mr Blogg, that without an approval by Mr Strauss, they could not activate the eftpos card or release funds from the Account.

[31] On 2 January 2024 there was another attempt made by Wigram Blue Watch to gain access to the money in the Account. Richard Hobbs, Senior Station Officer at Wigram Station who was also a member of Wigram Blue Watch and had contributed to the Account, wrote to the credit union and advised:³

I am writing to confirm that Joshua Struss (sic) is currently on Military Leave from Fire and Emergency New Zealand and has effectively left Blue Watch Wigram.

I can confirm my new staff member to replace Josh is [IEZ] and he is now stationed at Wigram Station on the blue watch.

As the manager (Senior Station Officer) of Wigram Station blue watch I confirm that I am giving authority to [IEZ] to oversee (sic) this account.

Account number ...

[IEZ] will be in touch to arrange ID verification and request a replacement card and access to previous statements so we can get abreast of the account and pay parties that are owed money.

[32] Mr Hobbs then emailed this letter to the credit union stating that it was an authority letter for IEZ to take over the operation of “Wigram Blue Watch Mess Account”.

[33] This contact by Mr Hobbs appeared to have the desired effect as the credit union sent an email to IEZ on 4 January 2024 stating, “we want to give authority on the Wigram Blue watch Mess Account but I need to complete biometric ID verification and require you (sic) mobile number – can you please advise?”

[34] Notwithstanding this contact and an apparent solution for the Wigram Blue Watch, IEZ contacted Mr Strauss on 7 January 2024 and asked him to transfer the money in the Account to a new account that he had set up for the pooling of Wigram Blue Watch members’ money.

³ In this letter Mr Hobbs named a new member of the Wigram Blue Watch to take control of the Account. This firefighter did not provide any evidence in my investigation so I have decided to not identify him and will refer to him by the letters IEZ.

[35] At this time Mr Strauss was still a member of the Wigram Blue Watch but he had been stationed elsewhere from November 2023. Also, the other Founding Members had all left Blue Watch and had been replaced by new firefighters.

[36] After discussing the request for transfer with some of the Founding Members, Mr Strauss transferred what that group believed to be the current members of Wigram Blue Watch's share of personal contributions; with the balance retained representing amounts contributed by Founding Members that had not been used by them but had been accumulated for a group function.

[37] So, by 7 January 2024 the current members of Wigram Blue Watch had access to pooled money to purchase biscuits and supplies for meals. By my calculations the transfer to the current members of Wigram Blue Watch was enough to cover any surplus Mess Allowance money remaining in the Account and the current members' share of the unused contributions of personal money up to that point.

FENZ uses access to the Account to review the transaction history

[38] The credit union then sent a further email to IEZ on 16 January 2024. In this email they advised that they still wanted to give him authority on the Account but they needed to complete the biometric verification and receive his mobile phone number.

[39] IEZ must have provided this information as he gained access to the Account – he was able to deposit the funds from the new Wigram Blue Watch account and he received copies of bank statements for the Account from the credit union.

[40] On 17 January 2024 IEZ undertook a review of the bank statements he had received for the Account. He then asked Mr Hobbs to come to his computer to view some of the transactions in the Account. Mr Hobbs viewed the transactions and decided there were “discrepancies” with some of them so he took over access to the Account via internet banking, he changed the passwords to the Account and he contacted Area Management to advise them of concerns he had.

[41] Mr Hobbs then undertook a detailed analysis of the Account and the transactions. He provided a summary of events in connection with the Account to the Group

Manager/Assistant District Commander. Mr Hobbs identified what he believed to be amounts owed by previous Wigram Blue Watch members based on his understanding of the agreed contributions that would be made by members, this included an amount owed by him. Mr Hobbs then summarised his view that there were some discrepancies with transactions.

FENZ commences a disciplinary process

[42] FENZ then carried out an investigation into Mr Strauss's operation of the Account. Mr Hobbs assisted this investigation, requesting further information from the credit union about the operation of the Account.

[43] Through its investigation FENZ identified five transactions in the Account that were of concern to it. FENZ believed the transactions were made by Mr Strauss as no one else had access to the Account, particularly internet banking.

[44] FENZ then decided it would commence a disciplinary process with Mr Strauss. On 26 February 2024 FENZ wrote to Mr Strauss outlining its concerns. In this letter FENZ raised its concern that it appeared that Mr Strauss had not transferred all of the money in the Account to the new account. FENZ then identified five transactions made by Mr Strauss that appeared to be for personal reasons. FENZ then stated:

The specific allegations against you are:

- You have accessed money that belongs to the Blue Mess (from contributions from Blue Mess members and Fire and Emergency).
- The money that you have accessed has been used for personal use in a manner which is not intended for.

[45] FENZ also advised that it considered the behaviour to potentially be serious misconduct and that dismissal or a final written warning were possible outcomes of the process.

The disciplinary process

[46] On 9 March 2024 Mr Strauss raised a personal grievance through the Union for unjustified action causing disadvantage as FENZ had used information obtained unlawfully to level allegations against him. In raising this grievance, the Union:

- (a) Asserted that FENZ had accessed a private bank account and that appeared to have been by misuse of FENZ authority.
- (b) Advised FENZ that Mr Strauss would be laying a complaint with Financial Services Complaints (the financial ombudsman service) and potentially filing a complaint with the Privacy Commissioner.
- (c) Advised FENZ that it had made a complaint to the Ombudsman regarding FENZ using personal information that it had obtained unlawfully.
- (d) Requested, amongst other things, that FENZ immediately cease the process underway regarding the allegations against Mr Strauss.
- (e) Requested that FENZ provide copies of all documents used to obtain Mr Strauss's financial information and records of all bank transactions FENZ had for the Account that had been obtained without Mr Strauss's consent.

[47] On 25 March 2024 FENZ responded to Mr Strauss's personal grievance asserting that it had not obtained the information unlawfully and whilst it was prepared to meet to discuss Mr Strauss's personal grievance it still wanted to meet separately with Mr Strauss as part of the disciplinary process.

[48] On 4 April 2024 FENZ provided Mr Strauss with information he had requested regarding the disciplinary process and his personal grievance.

[49] From 4 April 2024 through to 3 May 2024 correspondence was exchanged between the parties regarding the various allegations, complaints, document requests and possible meeting times.

[50] This exchange included a letter of 15 April 2024 from counsel for the Union and Mr Strauss advising that they had been instructed and advising of availability for a meeting. A meeting was agreed for 3 May 2024.

[51] In the meeting of 3 May 2024, and a letter of the same day, counsel set out Mr Strauss's position in respect of the disciplinary process. Counsel explained:

- (a) The Account was a private bank account which had nothing to do with FENZ. They provided support for this proposition by setting out how and why the Account was established and how it was operated.
- (b) That FENZ had no right either generally or under the Collective Agreement to insert itself into long established arrangements between firefighters for pooling money.
- (c) The FENZ investigation and disciplinary process was flawed for many reasons, which were set out.
- (d) There had been privacy breaches by FENZ and the credit union, with the basis of these breaches set out.
- (e) Mr Strauss was not obliged to explain the transaction in the Account to FENZ but, in any event, Mr Strauss had accessed money given to him by contributing Wigram Blue Watch members for lawful and approved purposes.

[52] On 31 May 2024 FENZ responded, setting out:

- (a) The basis for the provision of the Mess Allowance under the Collective Agreement and how the Mess Allowance was used, including amounts being paid to a Watch.
- (b) That the part of the Mess Allowance paid to a Watch was to be used only for specified purposes, buying "tea, coffee, sugar, milk and biscuits and/or to pay all or part of the wages of a cook." And, if agreement could not be reached

over the use of the Mess Allowance Management could become involved and make a decision.

(c) That any personal monies were mixed in with the Mess Allowance, which FENZ had an interest in.

(d) That if the Mess Allowance was not used for the specified purposes, then FENZ were entitled to investigate. And Part 1, Clause 15 of the Collective Agreement did not prevent FENZ from dealing with the allegations against Mr Strauss.

[53] On 5 June 2024 the Union formally raised a dispute with FENZ over Part 1 Clause 15 of the Collective Agreement. The Union invoked the “Peace Obligations” under Part 1, Clause 9 of the Collective Agreement, which they said required preservation of the status quo pending the resolution of the dispute.

[54] On 7 June 2024 FENZ responded acknowledging the dispute but advised that the basis of the dispute was not clear and it was happy to discuss the interpretation of Part 1, Clause 15 of the Collective Agreement, but in the interim the “Peace Obligation” did not prevent FENZ from proceeding with the disciplinary process with Mr Strauss.

[55] The Union responded to this explaining the basis for the dispute and asserting that continuing any process with Mr Strauss was a breach of the Collective Agreement.

[56] In a letter of 10 June 2024 counsel responded to the FENZ letter of 31 May 2024, advising that a dispute had been raised and the disciplinary process with Mr Strauss could not proceed until the dispute had been resolved.

[57] On 12 June 2024 in a letter to counsel, FENZ restated its position in respect of Part 1, Clause 15 of the Collective Agreement, the alleged dispute in connection with that clause and the effect of the “Peace Obligation”; it then concluded it could proceed with the disciplinary process with Mr Strauss and it sought a response from Mr Strauss to the allegations.

[58] On 17 June 2024 counsel put FENZ on notice that if it continued with the disciplinary process with Mr Strauss, they would lodge a claim in the Authority based on the dispute and

they would seek an interim injunction restraining the disciplinary process pending determination of the claim.

[59] On 9 July 2024 FENZ set out its preliminary views in the disciplinary process with Mr Strauss. In short, FENZ had concluded that Mr Strauss had accessed money that belonged to members of the Wigram Blue Watch Mess, which included contributions from FENZ, and he had undertaken transactions that were not authorised. FENZ concluded that this amounted to serious misconduct and dismissal was the appropriate disciplinary outcome.

Mr Strauss and the Union lodged a statement of problem in the Authority

[60] On 19 July 2024 Mr Strauss and FENZ lodged a statement of problem in the Authority; this was based on a dispute over Part 1, Clause 15 of the Collective Agreement.

[61] In the statement of problem Mr Strauss and the Union sought:

- (a) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to assert authority over a private bank account set up by workers for the pooling of the portion of the Mess Allowance distributed to them by FENZ.
- (a) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to investigate the use of the proportion of the mess allowance distributed to workers in the absence of any dispute or non-agreement under clause 15 (1.15.1.1); and in the absence of any evidence that there is any deficit in the purchase of tea, coffee, sugar, milk and biscuits and/or the payment of all or part of the wages of a cook.
- (b) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to an explanation of transactions in a private bank account set up by the workers for the pooling of the portion of the Mess Allowance distributed to them by FENZ when it has been advised by the workers contributing to that private account that:

- i. not all the monies in the account are from the portion of the Mess Allowance distributed to workers;
- ii. all the transactions have been made with consent; and
- iii. no worker contributing to that account has raised any enquiry or dispute with the other workers in respect of the purchase of tea, coffee, sugar, milk and biscuits and/or the payment of all or part of the wages of a cook.

[62] In response, FENZ's position was:

- (a) The Mess Allowance could only be used for the specific, stated, purpose.
- (b) If the Mess Allowance was not being used for the specific, stated, purpose then FENZ was entitled to investigate and take disciplinary action.
- (c) If there was a disagreement between firefighters regarding the use of Mess Allowance then FENZ could investigate and determine the dispute.
- (d) Part 1, Clause 15 of the Collective Agreement did not prevent FENZ from taking steps (b) and (c) above.

[63] Based on the employment relationship problem lodged with the Authority, including the application for an interim injunction that I investigated, the disciplinary process was halted by my interim injunction of 16 September 2024.

The issues

[64] Through the course of my investigation into the application for an interim injunction the issues evolved. Interestingly the parties take differing views on what is in issue in this employment relationship problem.

[65] Counsel for Mr Strauss and the Union submits there are three issues:

- (a) Was FENZ authorised to access the Account pursuant to Part 1, Clause 15 of the Collective Agreement.

- (b) If FENZ was not authorised to access the Account, then was the information it obtained from the Account unlawfully and/or improperly obtained.
- (c) If the information FENZ obtained from the Account was unlawfully and/or improperly obtained could FENZ conduct a disciplinary process based on that information.

[66] Counsel for FENZ submits that the issues are:

- (a) Could FENZ investigate an employee's complaint about:
 - i. the misuse of Mess Allowance pursuant to Part 1, Clause 15 of the Collective Agreement; and/or
 - ii. the misuse of money pooled in the Account for purchasing ingredients for meals, and which includes a portion of the Mess Allowance?
- (b) Did Part 1, Clause 15 of the Collective Agreement prevent FENZ from investigating an employee's complaint about:
 - i. the alleged misuse of Mess Allowance monies; and/or
 - ii. the alleged misuse of money pooled in the Account for purchasing ingredients for meals?
- (c) Is FENZ prevented from investigating and disciplining an employee for misuse of Mess Allowance monies where the allegation was not about tea, coffee, sugar, milk and biscuits and/or the payment of all or part of the wages of a cook?

[67] Having considered the nature of the employment relationship problem I conclude that both sets of issues apply. Broadly the employment relationship problem is a dispute is over the power granted to, or the impediments imposed on, FENZ by Part 1, Clause 15 of the Collective Agreement as that relates to FENZ's investigation into Mr Strauss's use of the Mess Allowance. Based on the outcome of that dispute there are then more general questions

that relate to whether FENZ could take disciplinary action against Mr Strauss in the circumstances.

[68] I have summarised the issues identified into five questions that I will answer to resolve the employment relationship problem:

- (a) Could FENZ investigate complaints about misuse of the Mess Allowance and/or the misuse of Wigram Blue Watch pooled money based on Part 1, Clause 15 of the Collective Agreement or otherwise?
- (b) Did Part 1, Clause 15 of the Collective Agreement then prevent or restrict FENZ from investigating such complaints?
- (c) Did Part 1, Clause 15 of the Collective Agreement give FENZ rights or authority to access the Account?
- (d) If not, was FENZ entitled to access the Account?
- (e) If not, was FENZ able to use the information it obtained from the Account to conduct a disciplinary process?

My analysis of the dispute

Can FENZ investigate complaints about misuse of the Mess Allowance and/or misuse of Wigram Blue Watch pooled money?

[69] As a first step, I am satisfied that IEZ and Mr Hobbs both made complaints about Mr Strauss's use of money in the Account. Those complaints arose because both IEZ and Mr Hobbs knew that the money in the Account comprised surplus Mess Allowance and Wigram Blue Watch pooled money and some of the transactions in the Account appeared to be inconsistent with their understanding of what that money could be used for.

[70] Given the nature of the complaints – and importantly, putting aside the question of access to the Account which provided the basis for the complaints, which I will address in question three and four - FENZ would have a right to act on complaints received:

- (a) As to a complaint related to use of the surplus Mess Allowance, Part 1, Clause 15 of the Collective Agreement specifically enabled that investigation as the complaints suggested a disagreement amongst workers regarding the Mess Allowance (i.e., applying clause 1.15.1.2).
- (b) As to a complaint related to the use of Wigram Blue Watch pooled money, Part 1, Clause 15 had no relevance to an investigation and FENZ generally has a right to investigate a complaint about behaviour of an employee in the course of his employment, by a colleague.

Does Part 1, Clause 15 of the Collective Agreement then prevent FENZ from investigating such complaints?

[71] As I have already noted Part 1, Clause 15 of the Collective Agreement had no relevance to a complaint about the use of Wigram Blue Watch pooled money and therefore does not prevent FENZ from investigating such a complaint.

[72] I do not interpret Part 1, Clause 15 of the Collective Agreement as restricting FENZ's right to investigate the use of the surplus Mess Allowance. Part 1, Clause 15 does not mean the complaint needs to be about whether the surplus Mess Allowance was spent on "tea, coffee, sugar, milk and biscuits and/or to pay all or part of the wages of a cook."

[73] For completeness I also record that I do not conclude that the action of paying the surplus Mess Allowance to a Watch meant that FENZ lost the right to investigate how the surplus Mess Allowance was spent. FENZ would, however, have difficulty in arguing that surplus Mess Allowance was spent improperly, except in the most obvious cases. This is because of the lack of any policy governing use and because FENZ had clearly accepted, through the known use of surplus Mess Allowance to purchase a vast array of items, that the surplus Mess Allowance could be spent on almost anything related to firefighters' work.

[74] Specifically in relation to the complaints about Mr Strauss's use of surplus Mess Allowance and Wigram Blue watch pooled money – again putting aside the question of access to the Account which provided the basis for the complaints, which I will address in question three and four - on receiving the complaints FENZ was concerned that:

- (a) Mr Strauss appeared to have used surplus Mess Allowance inappropriately i.e. for his own benefit and/or to purchase things other than what it was intended for both specifically and through custom and practice.
- (b) Mr Strauss appeared to have used Wigram Blue Watch pooled money for purchases and/or transactions not intended or agreed to by all employees who had contributed to the pooled money.

[75] These concerns if proven might amount to breaches of FENZ Standards of conduct and/or the FENZ Anti-fraud and Corruption Policy. And this generated the right to investigate.

Did Part 1, Clause 15 of the Collective Agreement give FENZ rights to access the Account?

[76] The question of access to the Account is a crucial part of resolving this employment relationship problem. It was only through accessing the Account that FENZ received the information on which the complaints were made and FENZ used much of that information in its investigation which in turn informed the disciplinary process.

[77] Part 1, Clause 15 of the Collective Agreement does not confer a right on FENZ to access the Account; this is not expressed in the clause. Part 1, Clause 15 merely provides a right for FENZ to decide matters in dispute over the use of the Mess Allowance and this cannot be interpreted to confer a right to access a bank account into which any part of the Mess Allowance was paid.

Did FENZ otherwise have a right to access the Account?

[78] The starting point is that the Account was a personal bank account in Mr Strauss's name. That it was labelled "Blue Watch Mess – Station" or that the address was the Wigram Station did not change this. As this was Mr Strauss's personal bank account no one else was able to access the Account. None of the other firefighters in Wigram Blue Watch had access to the Account; Mr Blogg had limited signing authority so he could hold an additional eftpos card. If the Account was to be a bank account by which other Wigram Blue Watch firefighters had rights of access it would need to be a joint account or a club account.

[79] It was because none of the Wigram Blue Watch firefighters (other than Mr Strauss) had access to the Account and because FENZ believed that they should, that on 2 January 2024 Mr Hobbs sent an “authority letter for [IEZ] to take over the account”. Mr Hobbs acting in his capacity as “the manager (Senior Station Officer) of Wigram Station blue watch” authorised IEZ to oversee the Account, in that authority letter. It was this authority letter that was the basis on which IEZ was granted access to the Account – as the credit union responded to the authority letter by stating it wanted to give authority on the Account, presumably to IEZ.

[80] Therefore, it was FENZ that gained the access to the Account not a firefighter of Wigram Blue watch; and FENZ gained its access by a Senior Station Officer asserting a right to authorise another firefighter to take over the Account.

[81] FENZ’s claimed authority over the Account was based on the assertion that the Account was a Wigram Blue Watch account and was used to pool money (both surplus Mess Allowance and Wigram Blue Watch money) for Wigram Blue Watch’s use. FENZ was not asserting authority to take over the Account because it wanted to trace the use of surplus Mess Allowance or because it had concerns about fraudulent behaviour in respect of money in the Account.⁴

[82] So, the question becomes, did the use of Mr Strauss’s personal bank account to collect and pool money for Wigram Blue Watch change its status and/or give FENZ authority to take control of it?

[83] My conclusion on this question is that an employer cannot take control over an employee’s property because it has been intermingled with employer property or colleagues’ property or has been used for work purposes.

[84] This is akin to an employer taking control of an employee’s personal mobile phone because the employee used that phone to access the employer’s email system or used it to

⁴ Tracing the use of surplus Mess Allowance or investigating concerns over fraudulent conduct by an employee might have been a basis a basis for getting access to the Account through appropriate means, but that is not a relevant consideration here.

participate in an employees' group chat about work. This would not be possible even in circumstances where the employee only used that phone for work related matters.

[85] There might be a situation where an employer can gain access to an employee's property to investigate concerns about employee conduct. For example, where an employer can get access to an employee's personal laptop if it has a legitimate basis for a concern, such as downloading confidential information in breach of the applicable employment agreement, and it gets authority from the Employment Court by applying for and being granted a search order – none of which applied here.

[86] Intermingling does not change ownership rights, nor does it create access rights. There would be an extreme and chilling effect if an employer could authorise itself to take control over, or access, an employee's personal bank account because an allowance, payable to an employee, was paid by the employer into that personal bank account (normal practice). I accept the situation here is more nuanced than this but at its simplest this is what FENZ is proposing.

[87] FENZ's basis for obtaining access to the Account was because it believed the Account was a Wigram Blue Watch Account and not a personal bank account of Mr Strauss and all the Wigram Blue Watch Firefighters should have access to the money in the Account. This was incorrect.

[88] I conclude that FENZ was not able to authorise access to the Account and obtaining access to the Account was improperly and unlawfully gained.

Was FENZ able to use the information it obtained from the Account to conduct a disciplinary process based on that information?

[89] There are two key aspects that inform my conclusion on the question of whether FENZ could use the information it received from the credit union as a result of improperly and unlawfully accessing the Account – was the information also improperly and unlawfully obtained and was FENZ's use of that information a breach of the Privacy Act 2020.

[90] Counsel for FENZ says the information FENZ received, the Account statements, was not requested by it and it did not access the Account and obtain them; the Account statements

were forwarded by the credit union. And this means FENZ did not improperly obtain the information.

[91] I do not accept this submission. The Account statements were provided by the credit union after it had granted FENZ access to the Account and in response to FENZ asserting authority over the Account. As FENZ had improperly obtained access to the Account the information it received was also improperly and unlawfully obtained.

[92] FENZ's use of that information was in breach of the Privacy Act 2020. In coming to this conclusion, I am grateful for the comprehensive submissions from counsel for Mr Strauss and the Union on the implications of the Privacy Act to this matter. I accept those submissions.

[93] The Privacy Act can be relevant to an employment relationship problem and is in this case.⁵ FENZ's actions both in accessing the Account and using the information received amounted to breaches of Privacy Principles as follows:

- (a) Privacy Principle 1 by collecting personal information which it was not authorised to do as a necessary and lawful purpose of collection.
- (b) Privacy Principle 2 by collecting personal information of Mr Strauss's colleagues from a third party without permission, where permission could have been obtained.
- (c) Privacy Principle 3 by failing to notify Mr Strauss of the collection of his personal information.
- (d) Privacy Principle 4 by not acting fairly in the collection of Mr Strauss's personal information.
- (e) Privacy Principle 11 by disclosing Mr Strauss's personal information to the credit union in the course of its investigation.

⁵ *MW v Spiga* [2024] NZEmpC 147; *R v Commissioner of Police* (2018) 15 NZELR 1127; and *R v Alsford* [2017] 1NZLR 710.

[94] By using improperly and unlawfully obtained information and acting in breach of the Privacy Act, FENZ breached the duty of good faith,⁶ and it did not act justifiably.⁷

[95] In terms of answering the question posed in this section – FENZ could not use the information it obtained from the Account in conducting the disciplinary process with Mr Strauss as doing so would be a breach of the duty of good faith and would not constitute actions that a fair and reasonable employer could take.

Summary

[96] If a complaint was made by a colleague about Mr Strauss's use of surplus Mess Allowance or Wigram Blue Watch firefighters' pooled money, FENZ would be entitled to investigate that complaint.

[97] Part 1, Clause 15 of the Collective Agreement would not impose any impediment's on FENZ's ability to investigate a complaint about Mr Strauss's use of surplus Mess Allowance or Wigram Blue Watch firefighters' pooled money.

[98] Part 1, Clause 15 did not empower FENZ to access to the Account, which was Mr Strauss's personal bank account, notwithstanding that it was used for surplus Mess Allowance and Wigram Blue Watch pooled money.

[99] FENZ's access to the Account was improperly and unlawfully obtained. The information that informed the complaint about Mr Strauss's use of surplus Mess Allowance or Wigram Blue Watch firefighters' pooled money, was the key evidence in the investigation of that complaint and comprised the facts on which the disciplinary process was conducted, was improperly and unlawfully obtained and used in breach of the Privacy Act 2020. This taints all those aspects of FENZ's actions. I conclude that FENZ should not have acted on the complaint, used the information to investigate the complaint or proceeded with a disciplinary process against Mr Strauss. In doing so FENZ has breached the duty of good faith and not acted as a fair and reasonable employer could in all the circumstances.

⁶ Employment Relations Act 2000, s 4.

⁷ Employment Relations Act 2000, s 103A.

[100] Without the information that was received through the improperly obtained access to the Account and without using it in breach of the Privacy Act 2020 it appears that FENZ has no basis to proceed with its disciplinary process against Mr Strauss – noting here that the evidence given by Mr Strauss and his colleagues in my investigation about the operation of the Account was for my investigation and cannot be used by FENZ in its disciplinary process. Proceeding with the disciplinary process against Mr Strauss in these circumstances would likely be a further breach of the duty of good faith and would not likely be an action that a fair and reasonable employer could take in all the circumstances.

[101] In short, FENZ used its position as Mr Strauss's employer to improperly and unlawfully gain access to his personal bank account and then it relied on the information in that account to investigate a complaint and conduct a disciplinary process against him – this is not justifiable behaviour, nor does it meet the duty of good faith.

Conclusion

[102] This employment relationship problem is resolved in favour of Mr Strauss and the Union.

[103] The dispute over Part 1, Clause 15 of the Collective Agreement is answered by my decision that:

- (a) Part 1, Clause 15 would not prevent FENZ from investigating a complaint made about Mr Strauss's use of the surplus Mess Allowance or Wigram Blue Watch pooled money.
- (b) However, Part 1, Clause 15 would not enable FENZ to act as it has in relation to the Account.

[104] There was no other basis on which FENZ could access the Account. Therefore, FENZ's access to the Account was improperly and unlawfully obtained as was the information it received as a result. FENZ's use of that information was in breach of the Privacy Act.

[105] FENZ should not proceed with the disciplinary action against Mr Strauss. The improperly and unlawfully obtained information, used in breach of the Privacy Act, informed the complaint, was the basis of the investigation and provided the evidence in the disciplinary process. Continuing with the disciplinary process would likely be a breach of the duty of good faith and would not likely be an action that a fair and reasonable employer could take in the circumstances.

Costs

[106] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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

[108] 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.⁸

Peter van Keulen
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1