

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 301
3282579

BETWEEN ALISTAIR HUTT
Applicant

AND FIRE AND EMERGENCY NEW
ZEALAND
Respondent

Member of Authority: Lucia Vincent

Representatives: Tim Cleary, counsel for the Applicant
Geoff Davenport, counsel for the Respondent

Investigation Meeting: 13 March 2025 in Christchurch

Further Information and
Submissions Received: Up to and including 31 March 2025

Determination: 30 May 2025

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Mr Hutt worked for Fire and Emergency New Zealand (FENZ) from 1 July 2017 until he retired on 1 May 2024. He says FENZ should have paid him a retirement gratuity. This is based on his history of having worked in a rural fire role at Selwyn District Council (SDC) and prior to that working for a considerable time at the Department of Conservation (DOC) and the Department of Lands and Surveys (DLS), among other things.

[2] Mr Hutt initially raised a dispute about his entitlement to a retirement gratuity under the collective agreement between FENZ and the New Zealand Fire and Emergency Commanders Association (FECA) for the term 1 April 2023 to 1 October 2025 (2023 CA). Mr Hutt then raised a personal grievance for unjustified disadvantage

because FENZ did not pay him a gratuity upon his retirement (whether based on an entitlement or as an ex gratia payment). He has also claimed FENZ was unjustly enriched by his work because he expected he would receive a gratuity upon retiring. If entitled, Mr Hutt could be awarded an amount equivalent to a retirement gratuity as a remedy.

[3] FENZ says Mr Hutt had no entitlement to a gratuity on any basis. It raises jurisdictional concerns about Mr Hutt developing his dispute into a personal grievance, whether his grievance was raised within time, and additional statutory constraints.

[4] The Authority is tasked with resolving the employment relationship problem.

How did the Authority investigate?

[5] As Mr Cleary acknowledged, this matter followed an unorthodox path.

[6] Mr Hutt lodged his original statement of problem raising a dispute on 4 March 2024. FENZ lodged its original statement in reply on 18 March 2024. After a case management conference on 30 May 2024, the parties agreed on a statement of facts dated 1 July 2024 and then that the matter could be dealt with on the papers. Submissions were lodged up to and including 24 September 2024.

[7] In submissions, Mr Hutt sought to have his dispute dealt with as a personal grievance (or alternatively, as a dispute). Having reviewed the information and submissions provided, the Authority directed that an amended statement of problem and statement in reply and evidence be lodged, with an investigation meeting to be held.

[8] Mr Hutt's amended statement of problem asked the Authority to determine the matter primarily as a personal grievance, alternatively as a dispute or claim for unjust enrichment.

[9] The Authority held an investigation meeting on 13 March 2025, hearing from witnesses under oath or affirmation. For the applicant, this included Messrs' Hutt, Irving and Keown. For the respondent, the Authority heard from Mr Stevenson.

[10] As permitted by s 174E of the Employment Relations Act 2000 (Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

How did we get here?

[11] Context is necessary to understand the parties respective positions.

Statutory gratuities retained for Fire Service employees transferred to FENZ

[12] The Fire and Emergency New Zealand Act 2017 (FENZ Act) repealed and replaced the Fire Service Act 1975 (FSA). It aims to reform the law relating to fire services, including by unifying fire services by establishing FENZ.¹

[13] Clause 15 of Schedule 1 of the FENZ Act (which came into force on 1 July 2017), continued retirement gratuities under s 55 of the FSA, for members of the New Zealand Fire Service Commission (Fire Service) who transferred to FENZ on and from the commencement of the clause:

15 Gratuities on retirement or death of transferred members of Fire Service

(1) Despite its repeal by section 195(a) of this Act, section 55 of the Fire Service Act 1975 continues to apply to any person who,—

(a) immediately before the commencement of this clause, was a member of the Fire Service; and

(b) on and from the commencement of this clause, is an employee of FENZ.

(2) For the purposes of subclause (1), in section 55 of the Fire Service Act 1975,—

(a) a reference to a member of the Fire Service is to be read as a reference to an employee of FENZ:

(b) a reference to the chief executive is to be read as a reference to FENZ:

(c) a reference to service in the Fire Service includes service as an employee of FENZ.

[14] Section 55 of the FSA provided for retirement gratuities for members of the Fire Service:

55 Gratuities on retirement or death of members of Fire Service

(1) On the retirement from the Fire Service of any member who has not had less than 10 years continuous service the chief executive may pay to that member, and shall not unreasonably withhold, an amount by way of gratuity not exceeding an amount equal to 6 months' pay at the rate payable to that member at the time of that member's retirement.

...

(3) For the purposes of this section, service in the Fire Service shall include service with any predecessor of the Commission or with any Urban Fire Authority declared or continued under the Fire Services Act 1972 or with the predecessor of any such Authority or in the Public Service.

¹ FENZ Act, s 3(a)(i).

2023 CA covered Mr Hutt

[15] Clause 14 of the 2023 CA refers to s 55 of the FSA, retirement gratuities and long service leave. It states:

LONG SERVICE LEAVE/GRATUITY

(a) The employee is eligible for twenty-eight consecutive days long service leave at the completion of 20 years' continuous service with Fire and Emergency New Zealand.

(b) This leave must be taken within five years of the entitlement falling due. Fire and Emergency New Zealand and the employee will agree a mutually acceptable time for the employee to take this leave.

(c) Each employee will receive a personalised letter from the employer setting out the commencement of their service for the purposes of calculating long service leave and where applicable the payment of a Gratuity as provided under section 55 of the Fire Service Act 1975, for employees who were previously employed with the New Zealand Fire Service.

[16] The previous version of the 2023 CA has the same clause, for the term 1 April 2021 to 31 March 2023 (2021 CA). The 2021 CA was the first collective agreement that covered Mr Hutt and his work.

[17] Prior versions of the 2021 CA have a shorter clause. For the term 1 April 2018 to 31 March 2021 the clause omits "where applicable" and "for employees who were previously employed with the New Zealand Fire Service:"

Each employee will receive a personalised letter from the employer setting out the commencement of their service for the purposes of calculating long service leave and the payment of a Gratuity as provided under section 55 of the Fire Service Act 1975.

[18] The version immediately prior (between the Fire Service and the New Zealand Fire and Rescue Commanders Association) for the term 1 February 2016 to 31 March 2018 contained this version of the clause too.

FENZ had a policy on gratuities

[19] FENZ had a policy on gratuities at the time Mr Hutt retired: POLHR 6.6 Gratuity (POLHR6.6):

(a) Beside the heading "Who it applies to" in POLHR6.6, it lists employees who joined the Fire Service prior to FENZ being established on 1 July 2017, or employees who have gratuities specifically provided for in their employment agreement – with additional eligibility criteria applying.

- (b) To qualify for a gratuity payment, employees must have completed ten years' continuous service with the Fire Service.
- (c) When calculating continuous service, POLHR 6.6 includes service with any predecessor of or with the Fire Service or Urban Fire Authority, or with the Public Service. Continuous service of at least ten years need not be immediately preceding the date of retirement - provided any one period of continuous service was at least ten years, in which case the other periods of service (more or less than ten years) could be recognised.
- (d) FENZ records it amended POLHR6.6 on 1 July 2017 - reviewing and updating eligibility criteria as part of implementing the FENZ Act. It also records that the NZPFU collective agreement attached POLHR6.6.
- (e) Beside the heading "When to use" POLHR6.6 says it outlines the rules applicable to paying gratuities on retirement from the Fire Service as provided for in s 55 of the FSA.
- (f) The "Purpose" of POLHR6.6 refers to paying gratuities in accordance with s 55. It also includes a statement that: "Gratuities are discretionary payments but will not be unreasonably withheld. Every case for the payment of a gratuity will be considered on its merits."

[20] Mr Hutt highlights a paragraph in POLHR6.6 beside the heading "Gratuity ex-gratia payments" that says:

The Chief Executive may exercise discretion in respect of *ex gratia* payments to employees who leave the New Zealand Fire Service as either a consequence of redundancy, voluntary severance or voluntary resignation. In any event, the employee seeking an *ex gratia* payment must have at least ten years' continuous service as is prescribed in respect of a gratuity payment. An *ex gratia* payment awarded under this policy will not in any circumstances be greater than the employee could expect to receive by way of a gratuity.

Mr Hutt came from a career in fire management

[21] Immediately before being employed by FENZ, Mr Hutt came from a career in fire management. From 13 September 2000, Mr Hutt worked for the SDC as a Ranger for nearly 17 years. He held the role of Deputy Principal Rural Fire Officer appointed under the Forest and Rural Fires Act 1977.

[22] From April 1987 to 13 September 2000 (except for 18 months working elsewhere after a few years), Mr Hutt worked for DOC as the Officer in charge of Banks Peninsula. He held the role of Rural Fire Officer appointed under the National Rural Fire Authority constituted under the FSA.

[23] From 1980 until 31 March 1987, the DLS employed Mr Hutt as a Ranger Assistant. He managed the scenic reserves at National Parks and his duties included fire management.

FENZ employed Mr Hutt from 1 July 2017 on an IEA then collective agreement

[24] FENZ employed Mr Hutt from 1 July 2017 in the role of Deputy Principal Rural Fire Officer until he retired on 1 May 2024.

[25] A letter of offer from FENZ dated 18 May 2017 attached Mr Hutt's individual employment agreement with FENZ (IEA). The IEA included a clause about long service leave (LSL) that recognised previous service with organisations that had equivalent LSL provisions.² FENZ later recognised Mr Hutt's prior service with SDC for the purposes of LSL (but not a gratuity, which had a more restrictive recognition of prior service that excluded local bodies). The IEA also referred to complying with policies but excluded policies from the IEA unless expressly noted.³ The IEA did not refer to any entitlement to a gratuity nor did Mr Hutt receive a personalised letter recording any.

[26] Prior to being employed by FENZ, Mr Hutt recalls talking to two FENZ representatives (the Regional Manager for Rural and Senior Advisor for the Integration Team) over lunch. He acknowledged they did not directly discuss a gratuity. Despite that, Mr Hutt thought he "wouldn't not get one" based on representations made publicly about all FENZ staff being in the same waka, consistent with the aim of unifying fire services. Mr Hutt was aware gratuities were granted to members of the Fire Service, and he expected he would not be disadvantaged by coming across to FENZ. To him that meant getting the same as members of the Fire Service upon retirement i.e. a gratuity. Mr Irving, Secretary for New Zealand Fire Emergency Commanders Association (FECA) and its predecessor, also had this expectation for members.

² Clause 4.

³ Clause 5.

[27] On 8 April 2021, Mr Hutt became a member of FECA. He recalls he became covered by the 2021 CA with FENZ from 27 September 2021, then the 2023 CA.

Mr Hutt asked about his gratuity before he retired

[28] When considering retirement, Mr Hutt asked Mr Irving to represent him. Mr Irving also happened to be FECA's lead negotiator for the 2023 CA.

[29] Mr Irving initially emailed a local FENZ representative, Mr A,⁴ asking to discuss Mr Hutt's LSL on 15 February 2023.

[30] Although the 2023 CA did not have a LSL provision recognising service with other organisations, Mr Hutt's IEA did, so FENZ recognised that. Mr A emailed Mr Irving on 14 March 2023 confirming FENZ would recognise Mr Hutt's prior service regarding his LSL if he:

- (a) Worked for an eligible organisation (he had);
- (b) Had an equivalent LSL provision in his old employment agreement (which FENZ needed); and
- (c) Had not used his LSL (FENZ wanted confirmation of this from the SDC).

[31] In relation to Mr Hutt's gratuity, Mr A noted Mr Hutt was covered by the 2023 CA and included a copy of clause 14(c) of the 2023 CA. He then said:

Gratuity

This only applies to those employed by the New Zealand Fire Service before 1 July 2017 unless someone has it in their employment agreement after.

Al is not entitled to retirement gratuity as he was not an employee of the New Zealand Fire Service.

[32] Mr Irving responded the next day raising a dispute about Mr Hutt's entitlement to a gratuity and LSL. He claimed Mr Hutt's service with SDC and DOC counted as public service under s 55(3) of the FSA (preserved by clause 15 of Schedule 1 of the FENZ Act), for the purposes of a retirement gratuity. He attached confirmation of Mr Hutt's LSL having been recognised by FENZ.

⁴ Mr A did not give evidence. I have used Mr A as an anonymised reference.

[33] The Chief Advisor of Key Relationships for FENZ wrote to Mr Irving by way of letter dated 25 May 2023 responding to the dispute that Mr Irving had raised. They confirmed FENZ would load Mr Hutt's LSL into payroll. They then outlined the reasons why FENZ did not consider Mr Hutt was entitled to a gratuity: He was not entitled to a gratuity under s 55 of the FSA as he did not work for then retire from the Fire Service, and clause 15 of Schedule 1 of the FENZ Act only applied to those who previously had a gratuity with the Fire Service. FENZ declined to make a payment.

[34] Mr Irving met with Senior Advisor - Workplace Relations for FENZ on 2 July 2023 via Teams to discuss the matter. Mr Irving followed up this meeting with an email to them on 9 August 2023 expressing the view that Mr Hutt was a member of the Fire Service immediately prior to 1 July 2017, and was entitled to a gratuity under clause 14(c) of the 2023 CA. He referred to a 2017 Board Update in support of this, saying it showed that employees under NZFRCA (FECA's previous name) like Mr Hutt and two others who had received gratuity payments already, were entitled to a gratuity upon retirement.

[35] The Board update for the Fire Service in March 2017 (2017 Board update), when referring to the planned transition to FENZ on 1 July 2017, said:

Gratuities will remain in place for anyone who is currently eligible to receive them. Any new personnel of Fire and Emergency New Zealand, who are employed after 1 July on Collective Employment Agreements (CEAs) with the NZPFU, NZFRCA and PSA, and new urban volunteers who are eligible under current policy, will also be eligible to receive gratuities.

We recognise that there are differences in the payments that people receive across the sector such as gratuity eligibility, payments and reimbursements for volunteers, and varying employment agreements. This is not ideal, nor is it possible to fix before 1 July. We are well aware of these issues and will be looking to address them with Fire and Emergency New Zealand personnel, and unions and associations, in the 'integration' phase over the next three years.

You also have our commitment that everyone will receive fair consideration and treatment throughout the transfer process – all transfers will be legally compliant with the Employment Relations Act 2000 and will be made as per the provisions of the new Fire and Emergency New Zealand legislation, which is still expected to pass in Parliament in mid-April.

[36] The Senior Advisor - Workplace Relations for FENZ responded substantively to Mr Irving's August email in a letter dated 21 September 2023 explaining why FENZ would not recognise Mr Hutt's prior service with the SDC for the purposes of a gratuity under s 55(3) of the FSA (continued by clause 15 of Schedule 1 of the FENZ Act):

Appendix A of the FENZ Gratuity Policy (attached) lists the qualifying public service organisations for the purpose for the purpose of this clause. This list does not include local government organisations. That is different to the long service leave provisions which Al was originally employed under, which are wider and do recognise local government.

We have also looked at the Public Service Act 2020 and the State Sector Act 1998 (which follow this letter) in case local government were included in their definitions of public service. Neither of them include local government.

Therefore, as local government does not come under the definition of Public Service, Al's time at SDC is not recognised as service and will not be included. It has however already been recognised for the purposes of long service leave, because the terms Al was employed under when he started provided for that.

[37] The letter went onto say the 2017 Board update was irrelevant because Mr Hutt did not have ten years continuous service as required for a gratuity (because his service with the SDC did not count).

[38] In his statement of evidence, Mr Irving also referred to and provided a copy of an email from the former National Commander dated 1 June 2018 to a FENZ representative with information about gratuities. This email attached the March 2017 Board update. It also contained an excerpt from the Select Committee's commentary when making its decision on gratuities. The excerpt noted that the Forest and Rural Fires Act did not refer to gratuities. It also referred to concerns about the gratuity provisions being interpreted as taking away a negotiated entitlement from future personnel, and that the intention of the law was not to remove gratuities, which would remain for current and future personnel unless later removed. For this reason, the excerpt said, the Select Committee recommended including a clause to reflect that.⁵

[39] Despite his initial views expressed above (that Mr Hutt qualified under clause 14(c) of the 2023 CA because of his prior service with the SDC), Mr Irving now accepts gratuities were grand parented under the FENZ Act without specifically consulting or advising FECA. He acknowledged Mr Hutt was not technically entitled to a statutory gratuity because he was not employed by the Fire Service immediately prior to 1 July 2017. However, he considered FENZ duty bound to pay Mr Hutt a gratuity because it had paid gratuities to others in comparable situations to Mr Hutt's, and FECA expected a unified FENZ would pay an ex gratia amount for retirements like Mr Hutt's.

⁵ Section 25(4) of the FENZ Act currently says: "To avoid doubt, nothing in this Act affects the ability of the board to pay gratuities to any person as (an employee of FENZ)."

Mr Hutt retired on 1 May 2024 - before working for FENZ for ten years

[40] Before retiring from FENZ, Mr Hutt completed a Gratuity Request Form. He signed this on 16 April 2024 noting his intended retirement date of 1 May 2024. The signatory for FENZ signed the form on 20 June 2024.

[41] Mr Hutt had not worked for FENZ for ten years at the time he retired.

[42] FENZ did not pay Mr Hutt a gratuity when he retired.

Mr Hutt raised a personal grievance

[43] Mr Irving emailed FENZ on 28 July 2024 raising a personal grievance on behalf of Mr Hutt:⁶

Al Hutt retired on 1 May 2024. FENZ has, since that time, failed or refused to pay Mr Hutt an amount based on a retirement gratuity.

Al Hutt hereby raises a personal grievance of unjustified disadvantage under s 103(b) of the Employment Relations Act 2000. The grounds include that as a good employer and being bound by an implied duty of fair dealing FENZ is obliged to pay Al Hutt a gratuity or ex gratia payment on his retirement but has failed or refused to do so. Al Hutt has been further unjustifiably disadvantaged in his employment because FENZ employees (*Officers A, B and C*) on their retirement were all paid an amount reflecting their service despite not being entitled to such a payment under statute or contract. Al Hutt also repeats his Statement of Problem dated 4 March 2024 including as to remedies sought.

This personal grievance will be added to Al Hutt's claim before the Authority.

Three to four other employees got retirement gratuities without clear eligibility

[44] Three FENZ employees (Officers A, B and C) received gratuities when they retired whom Mr Hutt and Mr Irving say were in the same category as Mr Hutt i.e. Officers involved in rural firefighting roles outside of being employed by the Fire Service. Mr Hutt was not surprised at the time he learned Officers A, B and C were being paid retirement gratuities because he thought all rural officers were eligible and he too would receive a gratuity (even if he retired before completing ten years service with FENZ).

⁶ I have used anonymised references for these employees and a further employee, Officer D. None of them gave evidence.

[45] A payslip provided by Mr Irving for Officer B records a narration for the payment as “Gratuity – exgratia.”

[46] Mr Stevenson for FENZ says it paid Officers A, B and C a retirement gratuity by mistake, before FENZ had properly considered the impact of the FENZ Act.

[47] Mr Keown gave evidence that he was aware of peers from a rural firefighting background who left FENZ and had a gratuity paid. As recently as Christmas 2024, he referred to Officer D who received a gratuity and had been employed by the National Rural Fire Authority before joining FENZ. A payslip records the narration “Gratuity – Retirement.” Mr Keown expressed concern about Mr Hutt’s situation. He said he had also joined FENZ thinking he would be entitled to a retirement gratuity, which was supported by his observations of peers receiving them.

[48] FENZ says Officer D was entitled to a gratuity under their terms of employment. A copy of the individual employment agreement prior to working for FENZ confirms that.

Mr A forwarded email on 5 February to Mr Irving

[49] Mr Irving says until he heard formally from Mr A on 5 February 2025 FENZ had not to his knowledge formally answered Mr Hutt’s claim for a gratuity after his last day of work. He provided an email from Mr A which he received as a result of Mr Irving asking Mr A days earlier about obtaining FENZ’ formal response to Mr Hutt’s request for a gratuity. This email, dated 5 February 2025, was a forward of Mr A’s email to Mr Irving dated 14 March 2023 without any additional content, explaining the reasons Mr A had previously outlined for why FENZ did not consider Mr Hutt entitled to a retirement gratuity.

What are the issues?

[50] In that context, the issues for determination by the Authority are:

- (a) Does FENZ’s alleged unjustified action derive solely from the disputed interpretation, application or operation of an employment agreement?
- (b) If the Authority has jurisdiction to investigate Mr Hutt’s personal grievance, did FENZ unjustifiably disadvantage Mr Hutt (and did he raise it within time)?

- (c) Was FENZ unjustly enriched by Mr Hutt's work?
- (d) What (if any) remedies should the Authority grant?

Does FENZ's alleged unjustified action derive solely from the disputed interpretation, application or operation of an employment agreement?

An unjustified disadvantage personal grievance exclusion applies

[51] If the alleged unjustified action of FENZ is an action derived solely from the interpretation, application, or operation (or a dispute over those things), of any provision of an employment agreement, then Mr Hutt cannot raise a personal grievance and must pursue the matter as a dispute.

[52] Section 129 of the Act says that where there is a dispute about the interpretation, application, or operation of an employment agreement, any person bound by the agreement may pursue that dispute in accordance with Part 10 (and not Part 9 that deals with personal grievances). Section 103(3) of Part 9 expressly excludes from the definition of an unjustified disadvantage personal grievance, an action deriving *solely* from the interpretation, application, or operation, (or dispute over) any provision of an employment agreement.

[53] The Employment Court has made the following comments about identifying the difference:⁷

The way in which a litigant crafts their claim (as a personal grievance or as a dispute) is not the central issue and does not impact the jurisdictional bar imposed by (now) s 103(3). The central issue is what the claim derives from. If it derives solely from the interpretation and/or operation of the employment agreement, or derives solely from a dispute about the interpretation and/or operation of the agreement, it must be pursued by way of the disputes procedure - it cannot be pursued by way of personal grievance.

As subsequent judgments reflect, the circumstances in which an action will be found to "derive solely" from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement will vary.

[54] Assessing the interpretation, application and operation of clause 14(c) of the 2023 CA has helped determine whether the circumstances of the current matter fall within the grievance exclusion.

⁷ *Breen v Prime Resources Co Limited* [2023] NZEmpC 199 at [17] and [18].

Interpretation principles well established

[55] The principles to follow when interpreting employment agreements are well established:⁸

In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the Supreme Court summarised the position as follows:

... the proper approach is an objective one, the aim being to ascertain ‘the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as ‘background’, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

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

...

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

In *Vector Gas v Bay of Plenty Energy Ltd*, it was confirmed that extrinsic evidence of post-contract conduct is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively the meaning parties intended their words to bear.

The Supreme Court has confirmed that these principles apply to employment agreements. We are accordingly guided by them.

No entitlement for Mr Hutt objectively interpreting clause 14(c) of 2023 CA

[56] Clause 14(c) of the 2023 CA says each employee will receive a personalised letter from FENZ setting out the commencement of their service for the purposes of

⁸ As summarised by Judge Corkill in *Mathews v Bay of Plenty District Health Board* [2019] NZEmpC 94 at [51] to [53] (numbering and footnotes omitted).

calculating LSL and “where applicable” the payment of a gratuity as provided under s 55 of the FSA for employees who were previously employed with the Fire Service. The use of the phrase “where applicable” suggests the payment of a gratuity will not apply to everyone. Clause 14(c) then links any gratuity to s 55 of the FSA for employees previously employed by the Fire Service.

[57] The reference to “as provided under s 55 of the FSA” (which has been continued by clause 15 of schedule 1 of the FENZ Act) can be reasonably read as requiring an employee to meet the criteria in s 55 to for a gratuity to apply to them:

- (a) Section 55(1) requires “members of the Fire Service” to have least ten years continuous service with an eligible organisation; and
- (b) Section 55(3) says service shall include service with the Fire Service or with any Urban Fire Authority (or predecessor) or in the public service.

[58] Mr Hutt had significant service with the SDC in a rural fire services role. Regrettably, his 17 years service with the SDC did not count towards the service requirements under s 55 of the FSA. Although the DLS was an eligible organisation (listed in Appendix A of POLHR6.6), the length of time worked there was not a discrete instance of at least ten years continuous service.

[59] There is a further stumbling block for Mr Hutt. Clause 15 of schedule 1 of the FENZ Act further qualifies any entitlement by reiterating that the continued application of s 55 is only for transferred members of the Fire Service i.e. members of the Fire Service immediately prior to 1 July 2017, who on and from that date, became an employee of FENZ. Both parties accepted Mr Hutt did not become an employee of FENZ until 1 July 2017. Mr Hutt accepts he was not a member of the Fire Service prior to 1 July 2017 (he joined FENZ on that date from the SDC) so he was not “a member of the Fire Service” as defined in s 2 of the FSA (every employee of the Fire Service).

[60] Mr Hutt also did not get a personalised letter setting out any entitlement to a gratuity. Clause 14(c) of the 2023 says every employee will receive a personalised letter for two reasons. One, to set out their service commencement date for calculating LSL. Two, for the purposes of determining eligibility for and a calculation of the amount of any gratuity (for transferred Fire Service employees). Mr Hutt received a letter of offer with his IEA that contained a clause recognising an entitlement to LSL. It did not refer to a gratuity. In the absence of such a personalised letter also confirming FENZ intended

to recognise Mr Hutt's prior service with the SDC (where he worked for at least ten continuous years), for the purposes of a gratuity, clause 14(c) of the 2023 CA did not entitle Mr Hutt to a gratuity on that basis either.

[61] In short, unless a personalised letter records an entitlement to a gratuity, employees must satisfy two criteria to be entitled to a gratuity under clause 14(c) of the 2023 CA. Specifically, an employee of FENZ must have:

- (a) Worked for the Fire Service prior to 1 July 2017, then transferred to FENZ on and from that date; and
- (b) At least ten years continuous service with the Fire Service, FENZ or another qualifying organisation.

[62] Mr Hutt did not satisfy either of these criteria.

[63] Relevant context reinforces the above interpretation of clause 14(c) of the 2023 CA and how it was applied (or not applied) to Mr Hutt:

- (a) Clause 32(c) of the 2023 CA suggests not everyone is entitled to a gratuity. A clause about a long notice retiring benefit, it refers to workers not eligible for a retiring gratuity according to its normal terms and conditions.
- (b) The 2023 CA contains a completeness clause that supersedes all previous negotiations, communications and commitments whether written or oral.⁹ Even without a completeness clause, communications and commitments relied upon to say FENZ is duty bound to give future staff a gratuity, did not make a clear or specific promise every employee would get a gratuity.
- (c) The 2017 Board update did not promise all employees would get a gratuity. It starts with saying gratuities will remain in place for anyone currently eligible to receive them. Although it refers to new FENZ personnel being eligible to receive gratuities, it also refers to being eligible under current policy (which Mr Hutt was not). It goes on to recognise the differences in payments received across the sector such as gratuity eligibility, and that it was not possible to fix before 1 July 2017.

⁹ Clause 22.

The 2017 Board update did not go as far as saying currently ineligible employees would become eligible.

- (d) POLHR6.6, which FENZ applies when determining if someone is eligible under s 55 of the FSA for a retirement gratuity, did not apply to Mr Hutt because:
 - (i) It applies to employees who joined the Fire Service prior to FENZ being established on 1 July 2017, or who had gratuities specifically provided for in their employment agreement (Mr Hutt had neither).
 - (ii) Mr Hutt did not qualify for a gratuity payment because he had not completed ten years' continuous service with the Fire Service or another eligible organisation.
 - (iii) The ex gratia paragraph Mr Hutt relies on, describes a discretion to pay a retirement gratuity to an otherwise eligible employee who has a different mode of termination than retirement such as resignation or redundancy. It does not apply to qualification for consideration under s 55 and POLHR6.6 in the first place.
- (e) Making a mistake in paying Officers A, B and C under clause 14(c) of the 2023 CA, statute or POLHR6.6, did not bind FENZ to keep making that mistake in future. A good employer acting fairly and in accordance with the duty of good faith, could reasonably change its practice based on its interpretation of the 2023 CA after having considered more carefully the changes made by the FENZ Act.

[64] Applying accepted principles of interpretation to his situation, I find Mr Hutt was not entitled to a gratuity under clause 14(c) of the 2023 CA because he did not meet the criteria in [61] above.

Grievance exclusion applies

[65] FENZ has acted in accordance with its interpretation of clause 14(c) of the 2023 CA when declining Mr Hutt's request for a gratuity. FENZ first told Mr Hutt he was not entitled to a gratuity by email on 14 March 2023 from Mr A. Subsequent correspondence on 25 May and 21 September 2023 reiterated that answer. FENZ relied

on its interpretation of s 14(c) of the 2023 CA (which incorporated s 55 of the FSA) to decline Mr Hutt's request for a gratuity upon retirement.

[66] Mr Cleary says Mr Hutt's claims go beyond a dispute over s 14(c) of the 2023 CA. For example, he points to POLHR6.6 and a discretion Mr Hutt says FENZ ought to have exercised in Mr Hutt's favour to make an ex gratia payment, outside of what he was contractually entitled to, and potentially based on another informal policy. He also refers to broader obligations such as FENZ being a good employer acting fairly and in accordance with the duty of good faith to say FENZ should have paid Mr Hutt a gratuity given the payments it made in materially indistinct circumstances to Officers A, B, C and D (who also did not meet the criteria of clause 14(c) of the 2023 CA).

[67] When determining whether the exclusion applies, I have focussed on the action(s) or inaction(s) of FENZ, rather than how Mr Hutt framed his claims. Although the arguments made by Mr Cleary appeal more generally to a sense of fairness for a long serving firefighter on his retirement, they still rely on the allegedly unjustified action of FENZ failing or refusing to pay a gratuity – an action FENZ has taken based on its interpretation, application or operation of clause 14(c) of the 2023 CA. Although it was unfortunate Mr Hutt was the first to have his request for a gratuity declined in circumstances where others were not, I am not satisfied FENZ declined his payment for any other reason than the position taken by FENZ on the dispute.

[68] Taking all of this into account, I have concluded that the exclusion in s 103(3) applies. Mr Hutt is prevented from proceeding with his claim as a grievance.

Was FENZ unjustly enriched?

[69] Mr Hutt says FENZ were unjustly enriched by his work which he performed in the expectation of a retirement gratuity or equivalent ex gratia payment under policy.

[70] Mr Cleary refers to *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90 where the Employment Court referred to elements of unjust enrichment and confirmed such a cause of action was within the Authority's jurisdiction if based on an employment relationship problem:¹⁰

There are three principal elements of the unjust enrichment cause of action. They are, first, proof of the recipient's enrichment by receipt of a benefit. Second, there must be a corresponding deprivation to the donor. Third, there must be an absence of any juristic reason for the enrichment. Absence of juristic reason may include a mistake.

[71] This is consistent with the Supreme Court's comments in *FMV v TZB* [2021] NZSC 102 about the breadth and depth of the Authority's jurisdiction under s 161 of the Act and focus on resolving employment relationships problems generally without regard to technicality.

[72] Mr Cleary conceptualises the claim for Mr Hutt as his work for FENZ being partly done in reasonable expectation of a retirement gratuity at the end, and when it was not paid, FENZ had been unjustly enriched by his work.

[73] I have concluded Mr Hutt was not entitled to a retirement gratuity and that FENZ did not pay one to Mr Hutt based on its reasonable interpretation of clause 14(c) of the 2023 CA. Mr Hutt hoped for, but was not entitled to a gratuity upon retirement. Mr Hutt performed his work for his contractual remuneration. FENZ was not unjustly enriched by Mr Hutt's work.

[74] Mr Hutt does not succeed in his unjust enrichment claim.

Costs

[75] This matter started as a dispute. Disputes fall within one of the matter categories generally not subject to a daily tariff. It is presumed parties will bear their own costs.¹¹

[76] I record that although this matter developed from solely a dispute into a broader claim requiring further evidence and submissions, I found all of the evidence and

¹⁰ At [19], [37] and [39].

¹¹ [Practice Direction of the Employment Relations Authority](#)

submissions helpful in determining the dispute. That has relevance when considering costs.

[77] I reserve any issue as to costs and encourage the parties to resolve it by agreement. If the parties are unable to resolve any issue as to costs between themselves, then the party who believes they are entitled to costs may lodge, and then serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. On request by either party, the Authority may grant an extension of time for the parties to continue to negotiate costs between themselves.

Lucia Vincent
Member of the Employment Relations Authority