IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 149
CRC 50/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION First Plaintiff
AND	ALAN CAHILL Second Plaintiff
AND	CRAWFORD MORRIS Third Plaintiff
AND	THE NEW ZEALAND FIRE SERVICE COMMISSON Defendant

Hearing: 1 September 2011
(and submissions filed on 15, 29 September 2011 and 6 October 2011)
(Heard at Wellington)

Appearances: Simon Meikle, counsel for the plaintiffs
Geoff Davenport, counsel for the defendant

Judgment: 21 November 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The parties are in dispute over the interpretation of a particular clause in the New Zealand Professional Firefighters' Union Collective Agreement for Uniformed and Communications Centre Employees 2009 – 2010 (the collective agreement). The clause provides for an on-call roster in relation to a category of employee in the Fire Service known as Fire Risk Management Officers, sometimes referred to as Fire

Safety Officers. For convenience, I shall refer to them in this judgment as, "Fire Safety Officers". The short point at issue is whether the clause in question entitles the defendant (the Fire Service) to make changes to the on-call roster without first securing the agreement of the employees concerned.

[2] The plaintiffs seek a declaration that the Fire Service cannot unilaterally make changes to the on-call roster. For its part, the Fire Service claims in its statement of defence that the clause in question provides it with the entitlement to place Fire Safety Officers on an on-call roster and change that roster from time to time for operational reasons.

[3] In a determination[1] dated 10 December 2010, the Employment Relations Authority (the Authority) found in favour of the Fire Service concluding:

> [37] It follows from the foregoing discussion that I am satisfied that the Fire Service has the right to place Fire Safety Officers on an on-call roster and that the Fire Service can alter such a roster from time to time in accordance with the operational requirements of the Fire Service.
>
> ...

In this proceeding, the plaintiffs challenge the whole of the Authority's determination.

Background

[4] At the time of the Authority hearing, there were eight fire regions in New Zealand but that number has subsequently been reduced to five. The Court was told in relation to the current five regions, that Region 1 covers an area from the far north to just south of Auckland; Region 2 covers the area from Region 1 to the southern end of Lake Taupo; Region 3 covers the remainder of the North Island, including Wellington; Region 4 covers the South Island as far south as the Waitaki River and Region 5 covers the area south of the Waitaki River including the whole of Otago, Southland and Stewart Island. This case is concerned with Region 5 which, for convenience, I will refer to as the Southern Region. The evidence was that the Southern Region has the same coverage at the present time as it did when there were

[1] CA 228/10.

eight fire regions in New Zealand. Under the eight fire region structure, the Southern Region was geographically the largest region in the country.

[5] The function of Fire Safety Officers was canvassed in evidence. Essentially, they are responsible for investigating and determining the cause of fires. There are occasions, for example fires involving fatalities, when Fire Safety Officers are automatically required to attend the scene and carry out an investigation. There will be other occasions when the officer in charge of the firefighting crew who responds to a fire may require assistance in determining the cause of the fire and in that event a Fire Safety Officer will be called to the scene to investigate. Typically, the firefighting crew will await the arrival of the Fire Safety Officer (or arrange a scene guard) before they are able to leave the scene of any fire that needs to be investigated by a Fire Safety Officer.

[6] At the present time, there are four Fire Safety Officers in the Southern Region. Two are based in Otago and two in Southland. Their normal hours of work are between 8.00 am and 5.00 pm Monday to Friday but they also operate under a "one week on, one week off" on-call roster in respect of all hours outside their normal office working hours. The Court was told that the roster runs on the basis that in any one week there will be two Fire Safety Officers on call, one of whom is based in Southland and the other in Otago and they will each respond to callouts in their respective districts. In other words, the on-call officer from Southland will respond to callouts within the Southland area and the Otago based officer will respond to callouts in the Otago area.

[7] The Court was told that one important advantage of such a roster is that it reduces the travel time involved in responding to callouts. There was evidence, for example, that if a Southland Fire Safety Officer based in Invercargill had to travel to Oamaru in Otago to investigate a fire, then the travelling time involved in the 420 kilometre journey would be in excess of four hours whereas if an Otago officer, based in Dunedin, had to make the same journey the travelling time involved would be considerably reduced. There was no dispute between the parties on these issues. Likewise, there was no dispute about the significance of saving travel time. The evidence highlighted several important factors relevant to the need to reduce travel

time for Fire Safety Officers engaged in investigation work. The first relates to the issue of volunteers.

[8] The evidence was that there are only two paid brigades in the Southern Region, namely at Dunedin and Invercargill. Other fire stations at places like Queenstown, Gore, Te Anau, Manapouri and Oamaru are all manned by volunteer firefighters. Nationally, 80 per cent of the Fire Service workforce is made up of volunteers but in the Southern Region, where there are approximately 70 volunteers, the percentage is in the order of 90 per cent. It is obviously very much in the interests of the Fire Service, therefore, to maintain the goodwill of its voluntary workforce and for that reason the Fire Service aims to reduce the amount of time volunteers may have to be at the scene of a fire awaiting the arrival of a Fire Safety Officer.

[9] The Court heard of other reasons as to why the Fire Service is keen to reduce the travelling time for Fire Safety Officers having to travel to investigate a fire. An important factor in the context of the present case is that reduced travel time lessens the fatigue and strain associated with long-distance driving during the night, particularly after a busy day's work in the office. Against that background, I now turn to consider the particular clause in contention.

The on-call roster provisions

[10] There are six parts to the collective agreement. Part 4 deals with "Conditions Relating to Fire Safety, Operational Planning, Training & Volunteer Support Officers". The clause in question, which provides for an on-call roster for Fire Safety Officers, appears in one part of cl 4.3.4. As much of the argument before me related to context, I set out the whole of Part 4, Clause 3:

> **PART 4 – CLAUSE 3 – HOURS OF WORK/ON-CALL ARRANGEMENTS**
>
> 4.3.1 Employees employed at the time that this Agreement commenced will normally work an eight hour day, five days per week, between 0700 hours and 1800 hours from Monday to Friday inclusive (with no more than one hour for lunch each day).
>
> 4.3.2 It is recognised that the roles of Training, Fire Safety and Volunteer Support Officers must be responsive to the operational needs of the

employer and the requirements of volunteers and the public. As such, the hours set out above may be varied by the employer with agreement of the existing employee on either a temporary or permanent basis, provided that an overall average of 40 hours per week is maintained.

4.3.3 From 1 July 2006, with the exception of Operational Planning Officers, employees employed into roles covered by this part of the Agreement may be employed on hours of work that meet the employer's genuine and ongoing business needs provided that the hours are agreed with the employee and average 40 hours per week.

4.3.4 Employees may from time to time be required to work in excess of 40 hours per week due to planned activities or the non-emergency requirements of their roles. *Fire Safety, Operational Planning and Volunteer Support Officers may be rostered on call in accordance with an availability roster and may be called-out in the event of an emergency incident.*

4.3.5 Additional hours worked beyond 40 hours a week may be compensated by time in lieu or payment of T1.5, at the discretion of the employee, provided that these hours comply with the Fire Service's Fatigue Management Policy and are approved by the employee's manager in advance.

(Emphasis added)

[11] The thrust of the case for the Fire Service is that the italicised words must be given their plain meaning and nowhere does cl 4.3.4 require the employee's agreement in order to implement or modify on-call rosters for Fire Safety Officers. The thrust of the case for the plaintiff on the other hand is that cl 4.3.4, in the context of other parts of Clause 3 and in the context of the collective agreement as a whole, requires the agreement of Fire Safety Officers before they work any on-call roster. I now turn to consider the principles applicable to the interpretation of contractual provisions.

Principles on construction

[12] The leading authority on contract interpretation is the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[2] Although that decision related to the construction of a commercial contract, the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*[3] made it clear that *Vector* had equal application to the interpretation of employment

[2] [2010] NZSC 5, [2010] 2 NZLR 444.
[3] [2010] NZCA 317.

agreements. The Court is required to apply a principled approach to the interpretation of employment agreements and any dispute as to meanings must be determined objectively.

[13] The basic principles are perhaps best summed up in the following passages from *Vector*. First, from the judgment of Justice Tipping:

> [19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

In his judgment, Justice McGrath summarised and adopted the five principles of interpretation fashioned by Lord Hoffmann on behalf of the majority in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[4]

> [61] ... In summary, Lord Hoffmann said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[14] Another relevant principle of construction recognised in *Vector* and noted in *Silver Fern Farms*[5] is that material extrinsic to a contract can be used to clarify the

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[4] [1998] 1 WLR 896.
[5] At [26].

meaning of an agreement, whether or not the terms used are ambiguous. In *Vector*, Justice Tipping observed:[6]

> This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean.

[15] A little later in his judgment, Justice Tipping highlighted what his Honour referred to as "the essential line between subjectivity and objectivity of approach"[7] in the interpretation exercise, concluding:

> [31] There is no logical reason why the same approach should not be taken to both post-contract and pre-contract evidence. The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear.

[16] Finally, there is the further principle of interpretation recognised by the Court of Appeal in *Silver Fern Farms*,[8] namely, that it is appropriate for the Court to take into account undisputed evidence as to the terms of prior instruments or agreements. Relevantly, that case involved the interpretation of two collective employment agreements.

[17] In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text.[9] It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve.[10] If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to

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[6] At [22].
[7] At [30].
[8] At [43].
[9] McGrath J at [80].
[10] Tipping J at [26].

a reasonable person with all the background knowledge available to the parties.[11] Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear.[12] Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.[13]

[18] Historically, as the Court of Appeal recognised in *Silver Fern Farms*, contextual considerations have always had a particular significance in relation to the interpretation of industrial agreements. At [15] of that case the Court of Appeal noted with approval[14] the approach of Judge Shaw in the Employment Court which had included the following observations from her earlier decision in *New Zealand Merchant Service Guild IUOW Inc v Interisland Line (a division of Tranz Rail Ltd)*:[15]

> ...employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and long-standing provisions.

[19] Although in a different jurisdiction, not dissimilar observations were expressed by Justice Kirby in the High Court of Australia in *Amcor Ltd v Construction, Forestry, Mining and Energy Union*:[16]

> [66] ... Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements. Indeed, before this approach became normal in the courts, in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation.

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[11] Wilson J at [127].
[12] Tipping J at [31].
[13] Tipping J at [19].
[14] At [42].
[15] [2003] 1 ERNZ 510 at [19].
[16] [2005] HCA 10, (2005) 222 CLR 241.

The evidence

[20] There was only one witness called on the plaintiffs' side, the second plaintiff, Mr Alan Cahill. Mr Cahill is an employee of the Fire Service and a member of the union. He resides in Invercargill and is one of the four Fire Safety Officers based in the Southern Region. The one witness called on behalf of the Fire Service was Mr Stuart Rooney, the Manager/Commander for the Southern Region.

[21] The evidence was that the on-call roster clause has been included in prior collective employment agreements going back a number of years. Mr Cahill outlined the history of the on-call roster arrangements. He noted that during the 18 months preceding 2003 when the roster system "was relatively new" there were two Fire Safety Officers in Southland and two in Otago and they operated the on-call roster under a one week on, one week off system as at present. Between late 2003 and October 2004 there were only three Fire Safety Officers in the Southern Region and the on-call roster was changed to one week on and two weeks off. There was some conflict in the evidence as to how the roster system operated in the next period up until March 2008 but the indications were that a mixture of rosters were worked during that time including, for an unidentified period, the present style one week on, one week off format. Mr Rooney said, in evidence which I accept, that whenever they had a full complement of four Fire Safety Officers available during that period they operated a one week on, one week off roster.

[22] In around March 2008, one of the Fire Safety Officers resigned, reducing the number to three, and the on-call roster was then changed from the one week on, one week off system to one week on and two weeks off. This change was made unilaterally by the Fire Service following consultation with the Fire Safety Officers. The evidence, however, was that the Fire Service found that roster arrangement unsatisfactory and so they took steps to recruit a fourth Fire Safety Officer for the region. The fourth person became available in October 2009 and Mr Rooney then proposed reintroducing the one week on, one week off roster. Two of the Fire Safety Officers, however, including Mr Cahill, objected to that proposal and the union initiated a dispute regarding the interpretation of the on-call roster provision in the collective agreement.

[23] The Court heard extensive evidence about the efforts subsequently made by the Fire Service (including mediation) to try to resolve the matter but the dispute was not settled and it progressed to the Authority and subsequently to this Court. The Authority determination was issued on 10 December 2010. Since January 2011 all four Fire Safety Officers in the Southern Region have operated the on-call roster on a one week on, one week off basis. The number of callouts in the Southern Region appears to be relatively low. The evidence was that during the first eight months of 2011, Mr Cahill had been called out under the on-call roster system on only three occasions.

Discussion

[24] The Authority concluded that the plain meaning of the clause in question was that it gave the Fire Service the right to determine what rostering arrangements would apply in respect of Fire Safety Officers. The Authority Member stated:[17]

> I reach this conclusion principally because the structure of the clause, when looked at and analysed in the way that I have suggested, seems so deliberate. The first three provisions relate specifically to work within the usual 40 hour week span and the provisions that can be made within that time period. The final clause (the one we are principally concerned with) deals with the requirement that the roles of some employees may require work beyond 40 hours. It simply cannot be the position that the operational integrity of the employer is compromised in a safety-sensitive industry because the employer is unable to secure agreement about the provision of fire investigations.

[25] Counsel for the plaintiff, Mr Meikle, took issue with the Authority's conclusion and submitted that the requirement in cls 4.3.2 and 4.3.3 for agreement between the employer and the employee "strongly suggests that agreement is required under 4.3.4". In comparing cl 4.3.4 with the other subclauses in cl 4, Mr Meikle submitted:

> 14. A brief look at the meaning of the parts of clause 4 might be helpful. Clauses 4.3.1, 4.3.2 and 4.3.3 all require the agreement of the NZFS and the employees where the overall average of hours worked per week is no more than 40. It is logical to assert that if the NZFS and the employees agreed to agree to variations within the 40-hour average then they would also have agreed to agree to variations in excess of an average of 40 hours per week. Flexibility inside a 40-

[17] At [33].

> hour working week is not followed by flexibility outside a 40-hour working week unless it is agreed to by the employees.

[26] Mr Meikle analysed the relevant terminology submitting, "...the word 'may' is not needed to empower the NZFS to draft a roster; rather it is there to require agreement". Mr Meikle summarised the plaintiffs' submissions as to the plain and ordinary meaning of the clause in these terms:

> 18. Accordingly, it is submitted that a simple and uncluttered reading of the CEA gives rise to clause 4.3.4 requiring the agreement of the employees before they work the on call roster.

[27] In his submissions in response, counsel for the defendant, Mr Davenport, stressed that the plain words used in the clause do not support the plaintiffs' contention that "agreement" is required because they make no reference to such agreement. In counsel's words:

> 14. Had the parties intended that each employee's agreement was required before the on call roster could be introduced or altered, they could readily have inserted the requirement for employee agreement or employee discretion into that clause, as indeed they have done in clauses 4.3.2, 4.3.3, and 4.3.5. They have not done so.

[28] It appears to me that there is considerable substance in Mr Davenport's submissions. Clauses 4.3.2 and 4.3.3 specifically spell out the requirement for the employees' agreement. It would have been an easy matter to include such a requirement in cl 4.3.4 had that been the intention of the parties. There is no reference, however, to any such requirement. With respect, I do not accept Mr Meikle's "logical" analysis in [25] above. There is no logical reason why different provisions might not apply to callout work compared to the provisions applying to regular work within the 40-hour working week. I therefore find that on a plain and literal interpretation, there is no ambiguity in cl 4.3.4. Agreement with the relevant employees is not a prerequisite before the Fire Service can implement or vary an availability on-call roster.

[29] As the authorities referred to above indicate, having reached the preliminary view that the language used is plain and unambiguous, the Court should not readily accept any suggestion that there is, nevertheless, an error in that interpretation but it is still necessary to carry out the contextual cross-check Justice Tipping referred to in

Vector in order to affirm that the plain and unambiguous meaning has not been altered by context.

[30] A number of submissions were made by counsel in relation to contextual interpretation. They centred upon the requirement for an interpretation that would not flout business commonsense; the subsequent conduct of the parties and the legal implications of the opposing contentions. In relation to business commonsense and commercial purpose, Mr Meikle queried whether it was appropriate to speak about the "commercial purpose" of a collective employment agreement and opined that it may be more accurate to refer to the relationship between the Fire Service and government as the one that had a commercial purpose rather than the relationship between the Fire Service and its employees. In all events, counsel submitted that the plaintiffs' contention that agreement was needed did not reduce the ability of the Fire Service to prevent and/or fight fires. The implication being that the interpretation argued for by the plaintiffs did not flout business commonsense.

[31] In response, Mr Davenport submitted that an interpretation which would effectively allow one Fire Safety Officer to object, thus preventing any changes to a roster in "such a safety critical area, cannot accord with commercial purpose". Mr Davenport's submission was based on Mr Cahill's assertion in evidence that if three of the Fire Safety Officers in the Southern Region agreed to a roster change but he (Mr Cahill) disagreed, then the proposed change could not be implemented. Mr Cahill's evidence as to his understanding of the clause in question was subjective of course and carried no weight in the contextual interpretation exercise but the example hypothesised did not assist the plaintiffs' argument that their suggested interpretation of the clause in question was commercially unobjectionable. On the contrary, I was not persuaded that my preliminary view as to the plain and literal meaning of the clause in any way defied business commonsense.

[32] Mr Meikle's submissions in relation to the subsequent conduct of the parties were based on evidence relating to the implementation of the on-call roster under previous collective employment agreements. Counsel submitted that the claim by the Fire Service that the status quo prior to March 2008 in relation to the on-call availability roster for Fire Safety Officers was essentially one week on and one week

off, as at present, was inaccurate. Mr Meikle contended that Mr Cahill's evidence on the subject was more credible than Mr Rooney's. Mr Meikle also noted that there was no reliable evidence before the Court of any regional or nationwide custom in relation to the clause in question. I did not find the evidence or submissions relating to subsequent conduct in this sense very helpful or relevant. In the interpretation exercise, evidence of post-contractual conduct is relevant only if it is capable of demonstrating objectively what meaning the parties intended their words to bear. Much of the evidence on this aspect of the case was inconclusive and very much subjective. The collective agreement, of course, has national application but there was simply no reliable evidence as to how the clause in question has been applied in other fire regions.

[33] The principal submission made by Mr Meikle in relation to contextual interpretation centred on the legal implications of the contention by the Fire Service that agreement was not required in order to implement and vary on-call availability rosters. Counsel's submissions proceeded on the basis that rostered on-call hours constituted "work". He submitted: "The situation is similar to that of Mr Dickson in *Idea Services Ltd v Dickson*." Mr Meikle did not, however, refer to any particular passage in the *Idea Services* case in support of his contention nor did he purport to rely on any other authority on the subject.

[34] Mr Davenport in response noted that the full Court in *Idea Services Ltd v Dickson (No 1)* had dealt with the on-call issue in these terms:[18]

> [68] Overall, we regard the responsibilities of community service workers such as Mr Dickson during sleepovers as relatively weighty. The fact that those responsibilities are continuous is of particular importance. *In this regard, Mr Dickson's situation is readily distinguishable from a person who is at home or in the community on-call. Such a person will usually have no tasks to perform or responsibilities to discharge unless and until he or she is called.*
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> (Emphasis added)

Mr Davenport noted that the statement by the full Court was not disturbed by the Court of Appeal's decision.[19]

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[18] [2009] ERNZ 116.
[19] [2011] NZCA 14, [2011] 2 NZLR 522.

[35] I respectfully agree with the observation made by the full Court and I accept that it has equal application to the facts of the present case. I do not accept that rostered on-call hours constitute work in the way sleepovers did in *Idea Services*.

[36] Mr Meikle also submitted that the interpretation contended for by the Fire Service is contrary to s 11B(2) of the Minimum Wage Act 1983. That provision states:

> ...
>
> (2) The maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.
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> ...

As counsel expressed it: "Clause 4.3.4 mirrors the mandatory requirements of s 11B(2) in that the agreement of the employee is required if more than 40 hours per week is to be worked. The [Fire Service's] understanding of the clause is contrary to the section." This submission is partly based again on the premise that rostered on-call hours constitutes "work".

[37] In response, Mr Davenport made a number of points but the thrust of his submissions on the issue was that s 11B(2) of the Minimum Wage Act 1983 had no application because "being "on call" is not being at work." In this regard reliance was placed on *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd*,[20] *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd (No 2)*[21] and the passage cited above from the full Court decision in *Idea Services*. Mr Davenport further submitted "for completeness" that in cl 4.3.4 of the collective agreement, the parties have "expressly agreed to working in excess of 40 hours per week, via an availability roster" and he highlighted the evidence that if a Fire Safety Officer is called out on a job he receives compensation in the form of either time and a half or time in lieu (at his or her choice). I accept Mr Davenport's submissions on these points.

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[20] [1995] 2 ERNZ 170.
[21] [2008] ERNZ 62.

[38] Again, I have not been persuaded that this issue or any of the other issues canvassed by Mr Meikle in his submissions relating to contextual interpretation, require me to alter my provisional view as to the meaning and interpretation of the clause in question.

Conclusions

[39] I reiterate that, in my view the meaning of cl 4.3.4 is clear and unambiguous. The Fire Service is entitled to place Fire Safety Officers on an on-call roster and to amend that roster from time to time for operational reasons, as they have done in the past in the Southern Region, without first obtaining the employees' agreement.

[40] For completeness, I record that, notwithstanding my conclusions that agreement is not required, the Fire Service readily accepted that before amending a roster it had an obligation to consult. It is well accepted, however, that a requirement to consult does not mean or imply that an agreement must be reached. The Authority concluded that the Fire Service had done "everything it reasonably could to actively engage with the union and the two affected staff members". That finding was not at issue in the case before me.

[41] The plaintiffs have failed in their challenge and the claim is dismissed. If costs are sought and cannot be agreed upon, Mr Davenport is to file a memorandum within 21 days and Mr Meikle is to have a like period in which to respond.

A D Ford
Judge

Judgment signed at 10.30 am on 21 November 2011