

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AT AUCKLAND**

[2013] NZERA Auckland 165
5398939

BETWEEN WAYNE DOUGLAS BAIRD
Applicant

A N D AUCKLAND COUNCIL
Respondent

Member of Authority: Rachel Larmer

Representatives: Gemma Mayes, Counsel for Applicant
Katherine Burson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 05 March 2013 from Applicant
19 March 2013 from Respondent
25 March 2013 from Applicant

Date of Determination: 03 May 2013

DETERMINATION OF THE AUTHORITY

- A. Clause 2 c) of Mr Baird’s employment agreement allows Auckland Council (the Council) to change his motor vehicle commuting rights arrangement subject to consulting him about the proposed changes.**
- B. Mr Baird is not entitled to compensation if the Council changes his current motor vehicle commuting rights arrangement.**
- C. The Council did not comply with its consultation obligations before issuing Mr Baird with notice changing his motor vehicle commuting rights arrangement.**
- D. The Council unjustifiably disadvantaged Mr Baird in his employment by failing to consult with him before it issued notice that his motor vehicle commuting rights arrangement was to cease.**

Employment relationship problem

[1] Mr Baird was initially employed by Auckland City Council (one of Auckland Council's predecessor organisations) as a Client Services Officer under a written employment agreement dated 10 August 1995. Mr Baird's original employment agreement remains in force together with certain variations that have been agreed over time which relate to Mr Baird being redeployed to different positions.

[2] Clause 2 c) of the employment agreement records:

“2. RENUMERATION

[...]

(c) Motor vehicle

This position is provided for the time being with a motor vehicle with commuting rights. During office hours this vehicle is to be available as a pool vehicle. No private use is permitted. You will be consulted regarding any proposal to change this arrangement.”

[3] A motor vehicle with commuting rights is a designated Council vehicle that may be driven to and from work every day. This includes directly to and from locations where Mr Baird is required to perform duties away from the primary workplace, such as off site meetings at the beginning or end of the day. This arrangement avoids the need for a Council pool car to be booked and picked up from, or returned to, the workplace.

[4] Mr Baird's motor vehicle commuting rights does not include any private use of the vehicle. His designated vehicle becomes a pool vehicle during office hours so it is available for use by any Council staff.

[5] In the 17 years Mr Baird has been employed by the Council (and its predecessor organisation) he has held the following positions; Client Services Officer,¹ Contract Coordinator², Streetscape Advisor³ and his current role of Parks Advisor.⁴

[6] None of the position descriptions for any of the roles Mr Baird has held make reference to a motor vehicle being provided, or required, for the role. His entitlement to commuting rights arises from clause 2 c) of his original 1995 employment agreement because this was one of the terms and conditions of employment which

¹ 10 August 1995 to December 1997.

² January 1998 – March 2007.

³ March 2007 – August 2011.

⁴ August 2011 to date.

was expressly reconfirmed by the Council in respect of each of his subsequent appointments.⁵

[7] When Mr Baird was offered the new role as Streetscape Advisor he wrote to the Council about the terms being offered.⁶ In a letter dated 27 July 2007 Mr Cameron Parr, the then Group Manager – Arts Community and Recreation Services, responded stating:

“On the subject of motor vehicle, my recent communication regarding the states that until the organisation-wide motor vehicle review is completed, that nothing changes in regard to motor vehicle usage. Once a review is completed, any proposed changes will be consulted on in the usual manner, and if the proposal was confirmed any resulting negotiations would occur at that time.”

[8] In July 2010 the Council⁷ commenced consultation with all staff about a review of its Fleet Policy. On 1 July the Council sent Mr Baird a letter notifying him of the proposal and advising:

“As you are allocated a Council vehicle for commuter use, or are taking one home for off-street storage, you are directly affected by the fleet review proposal.”

[9] This letter was accompanied by a communications brief dated 2 July which outlines the details of the proposed changes.

[10] Mr Baird replied by letter dated 19 July advising:

“I am opposed to the proposed changes as they will not only disadvantage me by reducing my terms and conditions [...]. I have had ongoing use of an allocated car since 1995. The impact of removing this condition of my employment will be immense.”

[11] Mr Baird does not seem to have received a reply to this letter.

[12] In May 2012 the Council published a new Fleet Policy which was to take effect from 01 June. Mr Baird’s manager, Mr Grant Muir, provided him with a copy of the policy for discussion. Mr Baird queried the impact the new Fleet Policy could

⁵ With the necessary adjustments being made to salary and position. Clause 2 c) remained unchanged.

⁶ I refer to “the Council” throughout to refer to Auckland Council and its predecessor Auckland City Council.

⁷ Via Auckland City Council in anticipation of the creation of Auckland Council on 1 November 2010.

have on his situation by exchanging two emails on 3 May with Ms Judy Ackery, Human Resources Advisor.

[13] In her first email Ms Ackery records that the new Fleet Policy was not a review of contractual commitments and that the Council would continue to meet its contractual obligations. She recommends Mr Baird discuss how the policy might affect his own circumstances with his manager who could then raise the matter at an upcoming managers' meeting. Her second email confirms she agreed with Mr Baird's comment that he did not believe there was any change to his circumstances.

[14] On 1 June Mr Baird had an email exchange with Mr Muir. Mr Baird in his email to Mr Muir advised HR had confirmed that the new Fleet Policy did not take precedence over existing Council contractual obligations so Mr Baird believed that the new policy did not change his commuting arrangement. Mr Muir responds that if what Mr Baird says is correct then he would not be required to attend the consultation meeting with staff because the new Fleet Policy would not apply to him.

[15] Mr Baird then provides Mr Muir with a copy of clause 2 c) of his original employment agreement and Mr Muir confirms Mr Baird did not need to attend the staff consultation meeting about the new policy. Mr Baird did not attend the staff meeting but he did meet with Mr Muir individually in early June to discuss the new policy and in particular Mr Baird's view he had an ongoing contractual right to a motor vehicle with commuting rights.

[16] On 21 June 2012 Mr Baird sent an email to Mr David Barker (his Acting Manager at that time) which refers to their discussions earlier that day about Mr Baird's view that the new Fleet Policy did not impact on his situation because he believes his commuting arrangement was part of his contractual remuneration package which could not be unilaterally removed from him when the new Fleet Policy came into effect on 01 July 2012.

[17] On 21 September Mr Baird receives written notice from Mr Muir advising that all commuter use should cease within one month and that it should have ceased when his position changed in 2007. Mr Baird responds to Mr Muir by letter dated 26 September and says his contractual commuting arrangements have continued unchanged since his initial appointment in 1995 so he considers the motor vehicle

with commuting rights arrangement is a personal contractual benefit that expressly forms part of his remuneration under his terms and conditions of employment.⁸

[18] Mr Baird claims he has a contractual entitlement to a motor vehicle with commuting rights which cannot be removed on notice by the Council, particularly without any compensation for what he claims would be a reduction in his remuneration package. Mr Baird also claims the Council unjustifiably disadvantaged him in his employment by giving him notice of termination of his motor vehicle commuting rights arrangement without first consulting with him.

[19] The Council says clause 2 c) of Mr Baird's employment agreement entitles it to remove his motor vehicle commuting rights subject to consultation with him, which it says did occur in this case.

[20] The parties jointly seek interpretation of Mr Baird's terms and conditions of employment, in particular clause 2 c) of his employment agreement in order to clarify the nature of his entitlement to motor vehicle with commuting rights arrangement and the validity of the notice of withdrawal of these which was issued by the Council on 21 September 2012.

[21] The parties also seek determination of Mr Baird's claim he has been unjustifiably disadvantaged by the Council notifying him of the withdrawal of his motor vehicle commuting rights arrangement.

[22] The parties have agreed that the issue of any remedies should be reserved and that Mr Baird's motor vehicle commuting arrangement will continue unchanged pending the Authority's determination.

Issues

[23] The following issues are to be determined.

1. Is the Council entitled to change Mr Baird's motor vehicle commuting rights arrangement?
2. Is the Council required to compensate Mr Baird if it changes his motor vehicle commuting rights arrangement?

⁸ And has done for the preceding 17 years.

3. Is the Council able to withdraw or terminate Mr Baird's motor vehicle commuting rights arrangement entirely?
4. Is the Council estopped from withdrawing Mr Baird's motor vehicle commuting rights arrangement?
5. Did the Council consult with Mr Baird before issuing him with notice of changes to of his motor vehicle commuting rights arrangement?
6. Did the Council unjustifiably disadvantage Mr Baird in his employment?

Is the Council entitled to change Mr Baird's motor vehicle commuting rights?

[24] Mr Baird says a motor vehicle with commuting rights is an express part of his remuneration package. He submits the parties' conduct throughout his 17 years of employment replaced the original term "*for the time being*" with an ongoing contractual right and entitlement to commuting rights. He says his commuting rights could not reasonably be regarded by the Council as a temporary privilege.

[25] Mr Baird essentially argues that the words "*for the time being*" as seen within the context of his overall employment relationship should lead the Authority to conclude that the initial arrangement regarding his motor vehicle commuter rights had been varied or converted to a permanent right through the parties' subsequent conduct.

What does clause 2 c) mean?

[26] The leading authority on contract interpretation is the Supreme Court decision in *Vector Gas Ltd v Bay of Plenty Energy Ltd*⁹. The Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trade Unions*¹⁰ makes it clear that *Vector* also applies to the interpretation of employment agreements.

[27] The Authority is required to take a principled approach to the interpretation of employment agreements and the current dispute regarding the interpretation of clause 2 c) of Mr Baird's employment agreement must be objectively determined. The starting point is always the plain words of the clause, namely:

⁹ [2010] NZSC 5.

¹⁰ [2010] NZCA 317.

“This position is provided for the time being with a motor vehicle with commuting rights. During office hours this vehicle is to be available as a pool vehicle. No private use is permitted. You will be consulted regarding any proposal to change this arrangement.” (my emphasis)

[28] I find that the words used by the parties are not on their face ambiguous. The starting point for interpreting their meaning is therefore to determine the natural and ordinary meaning of the language used by the parties.¹¹ This requires the Authority to inquire into what a reasonable and properly informed third party would consider the parties intended the words they used to mean.

[29] Clause 2 c) includes the words “*for the time being*,” “*change*” and “*consultation*”. A reasonable person would consider that each of these words is intended to have a meaning. I consider these words all relate to possible or potential change. The use of these words is inconsistent with an intention to create a permanent arrangement.

[30] Mr Baird’s interpretation that he had an ongoing right that could not be changed is inconsistent with the actual words used by the parties. It strains the reading of the clause because it requires a number of the words used to have no meaning.

[31] A more natural reading of the clause is that the words used indicate the parties anticipated and agreed on the potential need for change at some unspecified time in the future. I do not accept that the parties’ subsequent conduct contradicts the plain meaning of the actual words used. The mere passing of time does not make any of the actual words used in the clause obsolete.

[32] Likewise the fact the commuting arrangement was not actually changed until 21 September 2012 does not alter the plain meaning of the words used. Nor does that fact that the current arrangement remained unchanged for 17 years alter the ordinary meaning of the words used by the parties.

[33] Mr Baird’s employment agreement contains a completeness clause¹² which says “*[T]his Contract represents a full record of the agreement entered into by you*

¹¹ *New Zealand Professional Firefighters Union & Ors v The New Zealand Fire Service Commission* [2011] NZEmpC 149.

¹² Clause 6 IEA.

and the Employer.” This restriction undermines Mr Baird’s submission that the parties’ subsequent conduct changed the original meaning of clause 2 c).

[34] Whilst it was open to the parties during the course of Mr Baird’s employment to amend clause 2 c) to reflect a mutual intention to create an ongoing permanent entitlement, they did not do so. Each new position accepted by Mr Baird was on the basis that “*all other terms and conditions of your employment, as specified in your employment agreement, remain unchanged.*”

[35] Clause 2 c) has continued to apply unchanged throughout the employment relationship. All the words used in clause 2 c) should be read as if they have some meaning. The words “*for the time being*” “*change*” and “*consultation*” would all have to be read as having no meaning if the clause does not allow the Council to make changes to the arrangement.

[36] The effect of Mr Baird’s submission is that the mere passage of time can contradict the plain meaning of the actual words used. I consider that is contrary to well established principles of contract interpretation. The mere passing of time cannot prevent the Council from relying on an express contractual provision which provides changes could be made to Mr Baird’s commuting arrangement.

[37] I consider that a reasonable person, properly informed of the circumstances at the time the parties entered into the relevant clause, would objectively consider clause 2 c) allows the Council to change the commuting arrangement.

Is the Council required to compensate Mr Baird if it changes his motor vehicle commuting rights arrangement?

[38] Mr Baird says he should be compensated for any removal of his private use of motor vehicle commuting rights because he has always had a designated vehicle to which his commuting rights were attached. Under the Fleet Policy he would be required to use a pool vehicle.

[39] Mr Baird also says he would incur the cost of arranging his own transport to and from work on days when he did not have a business need to use a Council vehicle to commute. He says he should be compensated because the commuting rights formed part of his remuneration, so a change to that arrangement reduces his remuneration.

[40] I find that clause 2 c) does not provide for Mr Baird to be compensated for any changes to the arrangement entered into in 1995. Although it was open to the parties to address compensation for any changes they did not do so. No value was prescribed to the commuting rights.

[41] The Authority is not permitted to set terms and conditions of employment. I consider imposing a requirement on the Council to compensate Mr Baird would amount to setting a term the parties had not contractually agreed to.

[42] I do not accept that the inclusion of the commuting arrangement within the remuneration section of the employment agreement creates a contractual right to compensation. The remuneration clause addresses salary, telephone rental and toll calls reimbursement and the private commuting arrangement. I consider the reference to remuneration is a convenient heading only. Appendix 2 is the “*salary and benefits schedule*” which expressly refers to salary, performance bonus and superannuation subsidy.

Is the Council able to withdraw or terminate Mr Baird’s motor vehicle commuting rights arrangement?

[43] Mr Baird submits the words “*proposal to change this arrangement*” does not allow the Council to withdraw his commuting rights because the verb “*to change*” does not mean “*to remove, to revoke, to withdraw, to extinguish, to cancel or to terminate*”. He says his commuting rights could only potentially be changed for another arrangement, they could not simply be cancelled or withdrawn.

[44] Mr Baird submits the Council had no right to terminate his commuting arrangement because clause 2 c) did not refer to termination, unlike his telephone usage clause which did.

[45] The Council notified Mr Baird his contractual commuting arrangement was to be replaced with the commuting arrangement set out in its new Fleet Policy. This enables Mr Baird to request and book a pool vehicle to get to and from work if there is a business need for him to commute.¹³

¹³ For example if he has to attend an early or late work related meeting away from the workplace he could take the pool car home overnight to enable him to go directly from his meeting to home and vice versa.

[46] I find that is a “*change*” because it replaces the current arrangement with a new and different arrangement. Mr Baird continues to have commuting rights, subject to certain criteria in the Fleet Policy being met. Therefore the right has not been entirely removed, it has just been restricted to ensure there is a business need for it and that the commuting is to enable Mr Baird to attend a late/early work related meeting.

[47] I also find that the use of the words “*for the time being*” in conjunction with “*change*” must logically include the removal or termination of the contractual arrangement. I do not agree that “*change*” should be read as restrictively as Mr Baird suggests.

[48] I do not accept Mr Baird’s commuting rights could only be withdraw if the Council had used the word “*terminate*” in clause 2 c) because I consider that introduces a significant restriction on the actually words used by the parties. It also strains the ordinary meaning of the words used.

[49] The telephone usage clause was stated to be an entitlement which the Council could terminate because it was an ongoing entitlement. That is distinct from the commuting arrangement which was “*for the time being*” only and subject to “*change*”.

[50] The parties’ use of the word “*consultation*” connotes discussion or an exchange of views, but it does not require there to be agreement between the parties about the change. I consider this indicates that the parties intended there may be a change which Mr Baird was not required to agree to in order for it to implemented.

[51] I also note that the FBT form Mr Baird completed from 2004 regarding his commuter rights arrangement records he retains “*Take Home Privileges*” not a contractual right to ongoing commuter use.

[52] I find that the Council may change Mr Baird’s motor vehicle commuting rights arrangement, subject to first consulting with him about the proposed change.

Is the Council estopped from withdrawing Mr Baird's motor vehicle commuting arrangement?

[53] Mr Baird submits the Council should be estopped from replacing his contractual commuting rights with the commuting rights provided under the Fleet Policy because he says it represented to him that the policy did not apply to his situation, and he acted on representation that by not attending a staff consultation meeting about the new policy.

[54] I consider Mr Baird has not established the requirements for an estoppel to arise, namely, that there is a clear and unambiguous representation and reliance on that by him to such an extent that it would be inequitable to allow the Council to resile from that representation. I find the Council is not estopped from changing Mr Baird's commuting rights arrangement to that provided for under the Fleet Policy.

Did the Council consult with Mr Baird before it issued him with notice withdrawing his contractual commuting arrangement?

[55] The Employment Court in *Communication and Energy Workers Union Inc. v Telecom New Zealand Ltd*¹⁴ outlined the key principles of consultation which are so well established I do not need to set them out here.

[56] The Council says it consulted with Mr Baird about the change to his commuting rights arrangement. It says Mr Baird had known since 2010 that changes were planned. It says that although he did not attend the staff consultation meeting on the proposed new Fleet Policy he did meet with his manager around that time so would have had an opportunity to provide feedback on the proposal and whether or not it should affect him.

[57] I find the Council did not individually consult with Mr Baird about the change to his commuter rights arrangement before it issued notice that the current arrangement would cease. This was contrary to the contractual requirement to consult with him about any proposal to change the arrangement.

[58] In July 2010 Mr Baird raised a query about the proposed new Fleet Policy that purported to impact on his commuting rights, but did not receive any reply. In May 2012 the Council published the new Fleet Policy which was to take effect in June

¹⁴ [1993] 2 ERNZ 429 at pp 455-456.

2012. On 3 May Mr Baird queried the application of the policy to his situation and was advised that the Council would continue to meet its contractual obligations. That satisfied Mr Baird he would not be affected because he believed (incorrectly) his commuting rights arrangement was an ongoing contractual entitlement.

[59] On 1 June Mr Baird again queried the application of the Fleet Policy with his manager and provided a copy of clause 2 c). His manager responded that Mr Baird did not need to go to the staff consultation meeting because the new policy did not apply to him.

[60] Mr Baird wrote to Mr Barker on 21 June, after the new Fleet Policy came into effect saying he would not be surrendering his commuting rights because he considered they were a contractual entitlement. The Council does not appear to have responded to this communication.

[61] It was not until three months later, on 21 September, that Mr Baird received notice from the Council that his contractual commuting rights arrangement was to cease within one month.

[62] The process leading up to the Council issuing notice involved exchanges about whether or not the Fleet Policy applied to Mr Baird. That was the focus of his attention and of the communications between the parties. This was insufficient. The Council was required to advise Mr Baird what changes it proposed making to his individual arrangement and to give him an opportunity to provide his before his arrangement was changed. Consultation with staff over the new Fleet Policy was a separate issue.

[63] I find the Council has not complied with its consultation obligation in clause 2 c) of the employment agreement. This means that if the Council implements the change to Mr Baird's current commuting arrangement without first individually consulting him about the proposed change it will be in breach of contract.

Was Mr Baird unjustifiably disadvantaged in his employment?

[64] Mr Baird claims his conditions of employment have been affected to his disadvantage by the Council's unjustified action by giving him notice of the cancellation of his contractual commuter rights arrangement. He says the Council;

- a. failed to follow the required procedural steps before issuing notice of the revocation of his commuting arrangement; and
- b. failed to genuinely consult about the proposal to change his commuting arrangement.

[65] Justification is to be determined in light of a new justification test in section 103A of the Employment Relations Act 2000 (the Act).

[66] I find that the Council's actions in unilaterally issuing Mr Baird with notice of cancellation of the arrangement in clause 2 c) was not what a fair and reasonable employer could have done in all the circumstances. A fair and reasonable employer would have complied with its contractual consultation obligations and I find the Council did not.

[67] The Council's failure to meet the minimum standards of consultation made its action unjustified. I find that Mr Baird was disadvantaged by this unjustified action because he did not have an opportunity to engage with the Council over the impact the proposed new commuting arrangements would have on him.

Remedies

[68] The parties have jointly requested that remedies be reserved pending the outcome of this determination on the basis that further evidence is likely to be required including evidence regarding a potential disparity of treatment with the approach the Council has taken to negotiating regarding commuting rights with other employees, which Mr Baird says has just come to his attention.

[69] The Authority will liaise with the parties directly to discuss the process to be adopted in relation to remedies for the disadvantage grievance and costs.

Costs

[70] Costs are reserved.

Rachael Larmer
Member of the Employment Relations Authority