

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 196/08
5140397

BETWEEN DUNEDIN CITY COUNCIL
 Applicant

AND NEIL JOHN BROWN
 Respondent

Member of Authority: Philip Cheyne

Representatives: Lesley Brook, Counsel for Applicant
 Jenny Beck, Counsel for Respondent

Investigation meeting: 10 December 2008 at Dunedin

Determination: 19 December 2008

DETERMINATION OF THE AUTHORITY

[1] This is an important issue for the parties which involves consideration of current contractual rights and obligations against the background of their lengthy employment relationship. The matter has been accorded priority because of its significance. Short time frames put pressure on counsel to assemble a substantial number of documents and present the respective cases to the Authority effectively. Because they did so I have reached a clear view about this dispute quite quickly. Counsels' efforts are appreciated.

[2] Neil Brown started work in a civil defence role with the Dunedin City Council in 1980. His work was transferred to the Otago Regional Council between 1988 and 1990 and thereafter he resumed employment with DCC performing essentially the same work. The 1990 DCC job description applicable to Mr Brown required him to *Be prepared at all times to receive and respond to emergency warnings or occurrences and, as necessary, act as civil defence advisor* To fulfil this obligation Mr Brown was contactable outside his normal hours of work and

responded appropriately when contacted. Except for periods of leave, he continued to do so without that being an issue until recently. Now Mr Brown says that he is not contractually bound to be available personally at all times to receive warnings. However he has continued to do so pending resolution of this dispute. DCC says on the other hand that Mr Brown is contractually bound to perform the on call role.

[3] To resolve this problem I will review the employment agreement and job description applicable between DCC and Mr Brown before interpreting and applying those provisions.

Employment Agreement

[4] There is no dispute about the applicable document. In early 1999 Mr Brown and the Chief Executive signed a six page contract. The relevant parts are as follows:

a. PURPOSE

This contract, the position description as from time to time altered and the documents set out in clause 7.1 constitute the entire agreement between the manager and the employer.

...

4. DUTIES

The duties of the manager have been set out in a position description and a copy of this has been provided to the manager. ...

The duties of the manager may be altered at any time by the Group manager to meet the needs of the Council.

...

7. CONDITIONS OF EMPLOYMENT

...

7.2(b) hours of work will generally be 8.30 am – 5.00 pm, Monday to Friday. Longer hours may frequently be necessary for which no additional remuneration or compensation is payable;

...

12. CONTRACT NEGOTIATIONS

...

This contract supersedes any other agreement for the employment of the manager, either express or implied, and any such agreements are cancelled as at the coming into force of the contract.

...

[5] This agreement was for a fixed term of five years from 1 April 1999 to 31 March 2004. Despite the expiry date Mr Brown's employment continued in the same position and on the same terms and conditions.

[6] There is a job description dated June 1994 for the position *Manager, Civil Defence & Rural Fires*. It is not clear from the evidence whether this document was agreed to then or formed part of the employment agreement signed in 1999. Either way it is common ground that this job description is currently applicable. It is organised under the headings *1. Position Objectives, 2. Key Tasks, 3. Key Result Areas* and there are several other sections. The clause most closely connected with the disputed task is 2(k) under the heading *KEY TASKS* which reads *Maintain systems and procedures to continuously enable the receipt of warnings or monitoring of events, and the activation of personnel and organisations appropriate to the nature of the warning or event.*

The disputed task

[7] The DCC civil defence office received and processed 330 civil defence warnings and alerts (excluding rural fires) in the 2007/2008 financial year. It is not suggested that this was untypical. Mr Brown could not (without research) give me the precise number received outside his ordinary working hours but certainly the number so received would not be insignificant. Each warning or alert must be assessed in terms of protocols. Some require an active response.

[8] Since 1990 Mr Brown has been on call outside his ordinary working hours to receive and respond appropriately to warnings and alerts. Occasionally Mr Brown has been unavailable such as when on leave and this task has been covered by one of the staff who report to Mr Brown. The job description for that position says *Process and action as required warnings received, at Civil Defence Headquarters and after-hours when on call in the absence of the Manager, Civil Defence & Rural Fires.*

How the dispute arose

[9] On 31 January 1992 Mr Brown received a memorandum from DCC saying he would be supplied with a suitably equipped vehicle to enable him to receive and action warning messages and respond appropriately. Presumably beforehand and certainly afterwards Mr Brown used a DCC vehicle to commute to and from work and for other private use.

[10] In 1992 Mr Brown agreed to an individual employment contract and became a member of DCC corporate management team. In common with the contracts applicable to other members of the CMT, Mr Brown agreed to a total remuneration approach to his remuneration package. In other words his use of a DCC vehicle was ascribed a cash value which was added to the salary actually paid to him for the purpose of expressing the total value of his remuneration package. The package included other items which are not relevant for present purposes.

[11] The applicable 1999 contract permits the manager to take the ascribed value of a vehicle either as a cash allowance or by use of a DCC vehicle. Mr Brown continued to use a DCC vehicle so did not receive the cash allowance. More recently, DCC increased the value ascribed to use of vehicles without similarly inflating the total remuneration figure applicable to Mr Brown and other managers. That impacted on the salary paid in money. Eventually Mr Brown gave notice that from 1 September 2008 he was exercising his contractual option to take the vehicle allowance in money rather than as use of the vehicle. Alongside that Mr Brown said in the memo that the Council had two options for the continuation of on call coverage for civil defence warnings and alerts. Either he would continue to provide that coverage in return for full private use of a vehicle within Otago; or there could be a roster with the on-call role shared between Mr Brown's two staff members.

[12] DCC implemented the change to Mr Brown's salary payments but required him to continue to provide on-call coverage after hours on the basis that he was contractually obliged to do so. That also required DCC to provide the suitably equipped vehicle to Mr Brown including private use within the Dunedin City boundary. Mr Brown complied with this direction but does not accept that he is contractually obliged to personally provide the on-call coverage.

[13] There is much more history of negotiations between Mr Brown and DCC about his salary that provides a wider context for this dispute arising but it is not necessary to canvass that in order to resolve this dispute.

The terms of employment

[14] The 1999 employment contract and the job description were agreed under the Employment Contracts Act 1991 as an individual employment contract. That individual employment contract continued in force according to its tenor despite the repeal of the statute: see s.242 of the Employment Relations Act 2000. The contract included an expiry date of 31 March 2004 but the employment continued and it is common ground that there have been no changes to the applicable terms and conditions of employment since 1999.

[15] It was agreed that one of Mr Brown's *KEY TASKS* was to *Maintain systems and procedures to continuously enable the receipt of warnings* The wording in the job description does not stipulate the *systems and procedures* so there is some ambiguity about whether Mr Brown was personally obliged to be on call, as he had been hitherto. It is permissible to have regard to the surrounding factual matrix at the time to help resolve the ambiguity. One part of the matrix is that Mr Brown had personally been on-call to the point of agreement without dispute. Another part of the matrix is that Mr Brown could not of his own volition establish other *systems and procedures* that did not include him personally being the main on-call person. That would have involved contractual changes to the duties of others and additional costs which were outside his delegated authority.

[16] Counsel for DCC submitted that there was an implicit agreement that Mr Brown would continue to perform the on-call duty. I agree that Mr Brown is contractually obliged to perform the on-call duty function as has always been the case. I prefer to express this as an obligation deduced by implication or interpretation from the express terms of the contract: see *Vickery v Waitaki International Ltd* [1992] 2 NZLR 58. In addition to the key task mentioned above, Mr Brown's position objectives include ensuring that Council meets its statutory obligations under the Civil Defence Act and ensuring that Council is capable of providing appropriate support and assistance to citizens in time of minor emergency. The job description also sets out *KEY RESULT AREAS*. A measure of whether the duties are being carried out to a satisfactory standard is when the civil defence activation systems operate effectively

and are tested to ensure the ability to respond to warnings within 30 minutes of their receipt. When one looks at the job description overall it is clear that clause 2(k) includes rather than excludes the obligation for Mr Brown to personally perform the on-call duty as he has been doing.

[17] An argument for Mr Brown is that the language of clause 2(k) creates the obligation to manage *systems and procedures* but not the obligation to personally perform the on call duty. A comparison is made with other clauses which variously use language suggesting personal performance or managerial responsibility. I do not accept that clause 2(k) can be read in this way. As noted above, one other employee is contractually obliged to be on call in the absence of Mr Brown but not otherwise. No-one else is contractually obliged to be on call. There just are no *systems and procedures* to manage. The clause can only refer to Mr Brown's personal obligation to be on call and to ensure cover in his absence.

[18] Properly, DCC provides use of an appropriately equipped vehicle when Mr Brown is on-call. There would be no point in having a person on call if they were not properly equipped. However when Mr Brown is not on call, he will not have use of the vehicle. That is the natural consequence of his election to take the vehicle allowance in cash.

Conclusion

[19] One of the terms of Mr Brown's employment is that he is the primary person on call for Civil Defence warnings in the relevant area.

[20] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority