

Officer and manager of AFIS. The Manager of the Fingerprint Office, her boss, is Mr Eugene Wall. Mr Wall is not only the manager of this area, but also the offices of overseas fingerprints and fingerprints destruction. In addition, he has just taken over responsibility for the prisoner photograph database. He is also closely involved in initiatives by Corrections and Immigration to advance biometric data screening methods. Mr Wall reports to Inspector John Walker, the National Forensic Services Adviser.

[3] In early 2006, Ms Leslie had her first child and commenced a year's parental leave. On her return in 2007, she had her application approved, under the FEO policy, to work four days a week. In October 2007, Ms Leslie had her second child and commenced a second period of parental leave. By the time she returned to work in October 2008, the Police had made it clear to her that it did not want her to continue working four days a week and that she would be required to work five days a week. Ms Leslie believes she is entitled to continue to work four days per week.

Issues

The issues for determination are:

- Have the Police breached the Parental Leave and Employment Protection Act 1987 by failing to honour, on her return to work, rights and entitlements applying to Ms Leslie's ordinary position (noting that this is not a flexible work arrangement request under Part 6AA of the Employment Relations Act 2000)?
- An assessment is therefore required of what Ms Leslie's rights and entitlements to flexible working hours were; whether the Police breached those rights and entitlements; and if so, what remedies should be available to her.

Ms Leslie's 'Rights and Entitlements' to Flexible Working Hours

[4] The FEO policy is Police-wide. Its purpose is to *support greater flexibility in the workplace and to support staff achieve work/life balance while addressing the key considerations of organisational interests and police operational requirements*. One of its principles is that *flexible employment opportunities will be considered at all levels, functions and locations within the Police, provided New Zealand Police operational requirements are not adversely affected*. *It is acknowledged that FEO may be more difficult to accommodate in executive and supervisory roles*.

[5] Clearly FEO is discretionary. The decision to grant or refuse an application is to be made by the District Human Resources Manager on behalf of the District Commander.

[6] The policy provides that, at the completion of the FEO period, wherever possible staff will revert to their position as a *full time worker*. Ms Leslie's position is *full time*.

[7] Approved FEO arrangements should not be cancelled without a full review unless the staff member wishes to return to full time work. The policy provides:

An approved FEO arrangement can be cancelled if it:

- *Expires*
 - *Ceases or needs to be changed due to operational or workload requirements ...*
 - *Is considered not to be working satisfactorily at annual review.*
- Upon cancellation the employee is to return to full time duties in their position.*

[8] On 26 April 2007, Ms Leslie's application to work four days a week under FEO was retrospectively approved under the following conditions:

- *The new working hours arrangement began with effect from 12 February 2007. In accordance with general instruction C493 your application is approved for an initial period of 12 months to 12 February 2008. The approval will be reviewed at least one month prior to that date and a new application for further FEO may be submitted for approval at that time.*

[9] This condition may be seen as ambiguous because of the words *approved for an initial period of 12 months* and *reviewed at least one month prior* to the end of the 12 month period. Such a review did not happen, perhaps because Ms Leslie was by then on parental leave with her second child. Ms Leslie contends, amongst other things, that the approval for FEO continued because there was no review.

[10] I find that the better interpretation is that there was a fixed term for the FEO, being to 12 February 2008. While that was expressed as an initial period, it was clear that there would only be a subsequent period of FEO following review and a new application for further FEO. That subsequent wording colours the meaning of the words *initial period* and means that the initial period could not be expected to necessarily continue. It therefore follows that, in the absence of a review and/or a new application, Ms Leslie's right to reduced working hours expired on 12 February 2008.

Legitimate Expectation

[11] Even given the ambiguity of the words *initial period*, I conclude that Ms Leslie could have had no legitimate expectation that she would return to four days a week work under the FEO upon her return in October 2008. When she applied for parental leave on 20 August 2007, she filled in a form about leave dates. While I accept that she was simply completing a pre-printed form and the words were not her own, the form provides the following:

I anticipate the following (delete non applicable item)

1. *Returning to full duties.*
2. *Exploring flexible employment options.*

[12] Ms Leslie deleted *returning to full duties* and added to the term *exploring flexible employment options* the words *four days a week as currently*. Therefore, at the time of completing that form, Ms Leslie's expectation could have been no more than that she anticipated exploring flexible employment options with the Police on her return.

[13] Then, as part of her performance appraisal process (completed the day before she left for her second period of parental leave), Ms Leslie was told by Mr Wall that he did not consider that the FEO was working. Ms Leslie questioned Mr Wall on his reasons, which related to problems with effectively having him function as a dual supervisor for her staff for much of the time, and a backlog of work in her office. While Ms Leslie disputed Mr Wall's perceptions at the time, the fact remains that she was aware of them.

[14] During the course of Ms Leslie's parental leave, the rights and entitlements applying to her position were in suspension. During that period, Mr Wall did indicate, at a social event, that he thought that Ms Leslie could return on FEO. No formal commitment was ever made.

[15] Things had changed by July 2008, however. At that point, Mr Wall informed Ms Leslie by email that she could not have FEO and that she would have to return to work five days a week. Ms Leslie was understandably upset about this news, which came out of the blue. She went to her Union, the Police Association, and a meeting was subsequently arranged, albeit not until September. While the Police, represented by Mr Wall, Inspector Walker and a Human Resources Manager, Ms Kaye Ryan, were prepared to consider Ms Leslie working reduced hours of 30 per week, it insisted that she be available to work each day. Ms Leslie wanted to work as she had done before, Monday and Tuesday, then Thursday and Friday.

[16] While Ms Leslie was advised that a formal application under the FEO policy would not make any difference, I am satisfied that at no point between July and her return to work in October could she have had any expectation that the Police had agreed to FEO by their conduct or otherwise. I therefore conclude that Ms Leslie had no legitimate expectation to return to work four days per week.

Unreasonable Exercise of a Discretion?

[17] The FEO policy provides that the ultimate discretion and decision-making power resides with the District Human Resources Manager, on behalf of the District Commander. In making decisions on behalf of the Police, the District Human Resources Manager, in this case Ms Ryan, is required to act in good faith.

[18] In terms of the evidence before the Authority, I have no reason to doubt the genuineness of the views of either of the key protagonists, Ms Leslie or Mr Wall. Mr Wall gave several reasons (backed by Inspector Walker) as to why he needed Ms Leslie at work five days a week. Essentially he wanted her to pick up more work and decrease the burden on him, due to his expanding responsibilities. In particular, he raised the need for Ms Leslie to become more proficient in the technical aspects of AFIS (which is no criticism of her as she had been on parental leave during much of its development and implementation), and that her presence was required each day in order to ensure that backlogs did not build up (in his opinion this had been starting to occur since Ms Leslie's return). Equally, Ms Leslie gave heartfelt reasons as to why she was able to do her job in effectively 80% of the time, given her availability by cellphone, the freshness being away one day gives to her work on the other four days, the professionalism of her staff and their ability for hard work, none of which is doubted.

[19] I note, however, that Ms Leslie stated that staff had more technical expertise in many areas than her. This was something that Mr Wall saw as needing remedying through training and more time on the job.

[20] Therefore, while there are differing and strongly held views on the issue of whether or not the office can operate effectively with Ms Leslie only there as supervisor four days per week, that is a decision for the Police to make.

[21] I am satisfied from the evidence that there is sufficient evidence to support the Police's claim that Ms Leslie should be required to meet the conditions of her employment,

i.e. work five days a week. It therefore follows that the Police have not unreasonably failed to exercise its discretion in Ms Leslie's favour.

[22] I therefore dismiss Ms Leslie's claim. She is, of course, entitled to make a fresh FEO application at any time and the Police must address it in good faith, in accordance with its policies.

Costs

[23] Costs are reserved.

G J Wood
Member of the Employment Relations Authority