

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 21
5373261

BETWEEN

ALLAN SWANSON
Applicant

A N D

NEW ZEALAND FIRE
SERVICE COMMISSION
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Peter Cranney, Counsel for Applicant
Geoff Davenport, Counsel for Respondent

Investigation Meeting: 18 December 2012 at Auckland

Date of Determination: 23 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Fire safety and prevention throughout New Zealand is the responsibility of the New Zealand Fire Service (the Fire Service). The Fire Service employs about 2,300 staff and has about 8,000 volunteer firefighters spread throughout New Zealand. The Fire Service is controlled by the respondent, the New Zealand Fire Service Commission (the Commission), a Crown entity, responsible to the Minister of Internal Affairs. The Fire Service and the Commission are established under the Fire Service Act 1975.

[2] Mr Allan Swanson, the applicant, trains volunteer firefighters and has been employed by the Commission since 1999. Prior to his employment by the Commission, Mr Swanson was a volunteer firefighter since 1975 and has given a total of 37 years service to the Fire Service.

[3] For the purposes of carrying out its duties under the Act, the Fire Service is divided in to regions throughout New Zealand. In 2011, the number of regions throughout New Zealand within which the Fire Service operated was reduced from eight to five. Following the reduction in regions, the Commission developed proposals regarding how each of the five new regions would be structured. It is this event which has led to the current employment relationship problem.

[4] The proposals developed by the Commission, if implemented, meant changes to the positions of many of the Commission's employees, including Mr Swanson's position. Mr Swanson was offered a "new" position or in the alternative, redundancy compensation. Mr Swanson says the proposed "new" position is the same as his current position and says the Commission is attempting to impose terms and conditions of employment on him which are inconsistent with his employment agreement. Mr Swanson does not want to accept the "new" position on this basis, nor does he wish his employment to terminate on the grounds of redundancy.

[5] The Commission says it is entitled to review the structure of the Fire Service and following consultation with those affected, to implement changes which will improve the efficiency of the Fire Service. The new regional structure will mean changes to Mr Swanson's position which the Commission says are fundamental changes. The new role if implemented will not be the same as Mr Swanson's current role. The Commission says in the event Mr Swanson does not wish to accept the new role, it is entitled to make his current position redundant.

Issues

[6] The Authority must determine the following issues:

- (a) Has the restructuring undertaken by the Commission resulted in a fundamental change to Mr Swanson's current role of Regional Trainer?
- (b) If yes, is it a change to which Mr Swanson must agree?
- (c) If Mr Swanson does not agree to the change, can the Commission impose the changes on him?

- (d) If the Commission cannot impose the changes on him, can the Commission terminate Mr Swanson's employment on the grounds of redundancy?
- (e) Did the correspondence from the Commission to Mr Swanson on 23 July 2012 contain a threat to Mr Swanson's employment which was "unconscionable and oppressive" and therefore an "unjustifiable action"?

First Issue

Has the restructuring undertaken by the Commission resulted in a fundamental change to Mr Swanson's current role of Regional Trainer?

[7] Mr Swanson's terms and conditions of employment are contained in a collective agreement between the Fire Service and New Zealand Professional Firefighters' Union (the Collective). The term of the Collective is 5 January 2012 to 31 December 2012.

[8] Mr Swanson's role is to deliver training to volunteers. He currently works 40 hours per week, Monday to Friday from 8am to 4.30pm with half an hour for lunch. These hours of work have been described by Mr Swanson and the Commission as "core" hours of work. Mr Swanson often works over and above his 40 core hours of work a week, performing training in the evenings and during the weekends. Such work is paid at the rate of time and a half (T1.5) of Mr Swanson's hourly rate.

[9] As part of its review of the regional structures, the Commission proposed a new more flexible trainer role. Ms Janine Hearn, Director of Human Resources for the Commission, says the role of trainer is a very important one for the Commission in that it involves the training of volunteer firefighters. She says:

"Those volunteers are regularly involved in emergency response tasks. It is critically important that when doing so they have the skills required to deal appropriately and safely with the emergency situations they encounter, in often hazardous situations. Training volunteers to ensure they have the required skills is therefore a very important task."

[10] Ms Hearn says a significant number of the Commission's volunteers have their own paid employment, frequently Monday to Friday, during business hours. At paragraph 9 of her witness statement she says:

“In order to attract and retain volunteers, one of the issues the Fire Service has grappled with is seeking to structure its training of volunteers in a way which recognizes the other demands on volunteers particularly during business hours Monday- Friday inclusive. Thus, one of the significant decisions made as a result of this latest restructuring was to establish Trainer roles which would have their 40 core working hours able to be worked on any day of the week, including evenings. Not only does this better reflect the needs of those being trained, it is also far more cost effective for the Fire Service...”

[11] At paragraph 17 of her witness statement, Ms Hearn says:

“Because the Fire Service is running various training programmes, particularly for volunteers, at weekends, and in the evenings, if Mr Swanson’s role remains structured as it is now, then obviously the 40 hours a week are used up during the day on Monday to Friday inclusive, including during periods of the day where no training is needed, and therefore any work performed in evenings after 6pm, and any time at weekends, automatically attracts the time and a half payment (or the cost of time in lieu). The new role, will have the 40 core hours spread across seven days, and in evenings, and in periods during the week when work is not required to be performed, the role will commence later in the day. This will significantly impact on the level to which the penal rate of “T1.5” is payable”.

[12] It is this proposed change to Mr Swanson’s 40 core hours of work which is the nub of the matter between the parties.

[13] The Commission says the proposed change to Mr Swanson’s 40 core hours of work is a fundamental change to the role. Mr Swanson says the new trainer role is the same as his current role and that he is able to and does provide training to the volunteers in the evenings and at weekends as part of his trainer role. He says the Commission is trying to impose terms and conditions of employment on him which are inconsistent with the Collective and as such unlawful.

[14] During the course of the investigation meeting Mr Swanson accepted that the changes proposed by the Commission, which could mean his working week starting for example, on a Wednesday at 1pm rather than on Monday at 8am would be a fundamental change to his role. Mr Swanson also agreed in paragraph 60 of his witness statement that *“...the proposal which I am being asked to accept under threat of dismissal would cost me hundreds of dollars in income per week.”*

[15] Mr Swanson's representative from the New Zealand Professional Firefighters Union ("NZPFU") ("the Union"), Mr Derek Best, in an email dated 7 February 2012 to Mr Brian Butt, the Commission's Fire Safety Manager stated:

*"...You will appreciate changes to **core Conditions**, such as Hours of Work can and probably will have a major impact on Family Life/commitments and will consequently impact on other family members..."*

[16] Clearly the new trainer role if implemented, would mean changes to Mr Swanson's hours of work and remuneration. The proposed changes would mean Mr Swanson's current role would change from a 5 day a week role to a 7 day a week role. Mr Swanson could be required in the new role to work weekends and evenings as part of his 40 core hours of work. Mr Swanson would not receive penal rates as he does now, for such work. Such changes would (and this was accepted by Mr Swanson) affect Mr Swanson's remuneration and family life. These changes are significant changes to Mr Swanson's current role. It is my finding that these changes are fundamental. The answer to the first issue is "Yes".

Second Issue.

If yes, is it a change to which Mr Swanson must agree?

[17] During 2011, the Commission reviewed its regional structure, the process was known as the Regional Reduction and Realignment change programme. There was widespread consultation with employees and the Union before the Commission decided to reduce the number of its regions from 8 to 5. As a consequence of the reduction, many jobs were to be affected and many were to be disestablished. A Staff Transfer Process for the Regional Restructure and Realignment was developed which set out the process for employees potentially affected by the review.

[18] On 26 October 2011, Mr Swanson was informed that his position was one of those affected by the review and what the proposed changes to his position entailed. Mr Swanson was offered the new role of Trainer, Region 1. In the event Mr Swanson was not prepared to accept the new role, Mr Swanson was told he would be entitled to redundancy compensation in accordance with his terms and conditions of employment. Mr Swanson was offered the new role on a number of occasions but chose not to accept the role. The Commission communicated redundancy entitlements

to affected employees including Mr Swanson by way of the *Frequently Asked Questions (FAQ)* page on the Commission's intranet, known as "FireNet". One question and answer on the FAQ page is as follows:

"Question. I do not have a redundancy clause in my CEA/IEA. Will I be entitled to some form of redundancy/severance pay?."

Response. The Chief Executive has approved that the NZFS's standard entitlement applicable to all other employees in similar positions be applied to others that do not have provisions, that being:

- *6 weeks base salary for the first complete year of service: plus*
- *2 weeks base salary for each completed year of service thereafter, up to a maximum of 52 weeks base salary."*

[19] Mr Swanson does not accept reassignment to the new role nor does he accept the Commission can disestablish his current role because he says the differences in the roles are not significant. I have already found the proposed changes to Mr Swanson's current role to be fundamental.

[20] Part 4 of the Collective provides as follows:

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 in roles covered by this part of the Agreement may be employed on hours of work yet 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. An employee who is called out by the employer, in the event of an

emergency incident, after having ceased work for the day and left his/her place of employment, or before the normal time of starting work, shall be paid a minimum of three hours at the appropriate overtime rate, provided that, for the purposes of this minimum, more than one call-out completed within three consecutive hours shall be deemed to be one call-out.

4.3.5 *Additional hours worked beyond 40 hours a week may be compensated by time in lieu of payment of T1.5 of the hourly rate, calculated by dividing the remuneration rate by 2080, 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.*

[21] From the clear wording of clauses 4.3.2 and 4.3.3, there must be agreement between Mr Swanson and the Commission before Mr Swanson's hours of work are varied. The answer to the second issue is "Yes".

Third Issue

If Mr Swanson does not agree to the change, can the Commission impose the changes on him?

[22] It is trite law that an employer is not able to unilaterally vary an employment agreement: *Grant v Superstrike Bowling Centres Ltd*¹.

[23] Mr Swanson does not agree to the new role with the new core hours as proposed and the Commission is not able to impose the new hours of work on him. The answer to the third issue is "No".

Fourth Issue

If the Commission cannot impose the changes on him, can the Commission terminate Mr Swanson's employment on the grounds of redundancy?

[24] The Commission wishes to disestablish the current trainer roles, one of which is Mr Swanson's role, the rationale being that the current role is not flexible, does not reflect the needs of the volunteers being trained and is uneconomic. The new trainer role, the Commission says addresses these issues.

[25] The Court of Appeal in *GN Hale & Son Ltd v. Wellington Caretakers IUOW*² clarified that:

¹ [1992] 1 ERNZ 727

² [1991] 1 NZLR 151

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him....

A reasonable employer cannot be expected to surrender the right to organise his own business.

[26] Restructuring the days and hours over which a trainer provides training as proposed is an initiative by the Commission to make its regions operate more efficiently and cost-effectively.

[27] Mr Swanson is of the view that the restructured role of Trainer is the same as his current role, it is just the hours of work that have changed. Therefore, Mr Swanson says, in the absence of his agreement, his terms and conditions of employment cannot be varied. Mr Swanson points to clauses 4.3.1 and 4.3.2 of the Collective as prohibiting any changes without his agreement. During the investigation meeting Mr Swanson went further and said that in the absence of his agreement to the changes to his role, those clauses in effect prohibit the Commission from making his position redundant.

[28] I have found that the changes to Mr Swanson's role are fundamental. Mr Davenport for the Commission referred the Authority to a number of cases concerning changes to hours and days and whether such changes were sufficient to justify termination on the grounds of redundancy in circumstances when an employee failed to agree.

[29] In *Hyndman and Ors v Northland Cooperative Dairy Company Ltd*, a case involving hours of working and rostering, Judge Colgan, as he then was, referred to *Grant v Superstrike and Hale* (supra). On page 9, Judge Colgan observed;

It follows on the authority of Hale and the case law that has followed it in this Court and the Tribunal, that simply because an employee has a contract of employment that cannot be unilaterally varied by an employer, that protection does not per se extend to a prohibition upon termination of that contract for reasons of redundancy so long as that action is justified as employment law now knows that concept.

[30] The Employment Court in *Simpsons Farms Limited v Aberhart*³ observed that⁴:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make....

[31] I determine that the proposed changes to the way in which the 40 core hours are worked by a trainer is a step which the Commission is entitled to take in order to ensure the Fire Service runs more efficiently and cost-effectively. In the absence of Mr Swanson's agreement to vary his terms and conditions of employment and in the absence of Mr Swanson's agreement to reassignment to the new role, the Commission is entitled, following a fair procedure and having regard to s103A of the Employment Relations Act 2000, to determine whether Mr Swanson's employment is to be terminated on the grounds of redundancy.

Fifth Issue

Did the correspondence from the Commission to Mr Swanson on 23 July 2012 contain a threat to Mr Swanson's employment which was "unconscionable and oppressive" and therefore an "unjustifiable action"?

[32] I have considered the letter dated 23 July 2012 from Mr Davenport on behalf of the Commission to Mr Cranney on behalf of Mr Swanson. I do not accept the letter contains a threat to Mr Swanson's employment which was "unconscionable and oppressive" and constitutes unjustifiable action under s103(1)(b) of the Act.

[33] In the 9 month period from the time the Commission wrote to Mr Swanson on 26 October 2011, informing him of decisions about his role and offering him the new role, the parties had been communicating.

[34] On 23 July 2012, following the filing of proceedings in the Authority by Mr Swanson and various attempts at resolution, Mr Davenport wrote to Mr Cranney as follows:

7. *Filing proceedings as you have done on behalf of your client does not act as any stay on an employer's ability to proceed with its restructuring. The new structure has now commenced as from 1 July in other parts of the country, in respect of 14 other new Trainer roles. The NZFS now wishes to move forward with the implementation of the new position previously offered to Mr Swanson.*

³ [2006] ERNZ 825

⁴ Ibid at para [67]

8. *So that there can be no question at any later date that the NZFS has not given Mr Swanson every reasonable opportunity to agree to the offer of reassignment, and to take up the Trainer role, we re-state the offer of reassignment as set out in the letter dated 26 October, and record that this offer of reassignment remains open for acceptance by Mr Swanson until 5pm Monday 30 July 2012. If this offer of reassignment is not accepted by that time, Mr Swanson will be entitled to redundancy compensation (as per his employment agreement), and our client would be issuing notice of termination to Mr Swanson pursuant to the applicable collective agreement(in this regard we note that clause 4.9.1 provides for one month's notice of payment in lieu).*

[35] Mr Davenport's letter is summarising the position from the Commission's point of view and offering Mr Swanson another opportunity to accept the new role. The Commission was drawing a line in the sand after months of discussions, and setting out clearly Mr Swanson's entitlement to redundancy in the event he did not wish to accept reassignment to the new role. Mr Swanson may not have liked the contents of the letter but in my view that did not make the Commission's letter a "threat" and therefore action which was "unconscionable and oppressive." There was no unjustified action as claimed.

[36] Mr Swanson's claims are dismissed.

Costs

[37] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so the respondent has 14 days from the date of this determination in which to file and serve a memorandum on the matter. The applicant has a further 14 days in which to file and serve a reply.

Anna Fitzgibbon
Member of the Employment Relations Authority