IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2020] NZEmpC 197
EMPC 156/2020

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND PROFESSIONAL FIRE FIGHTERS UNION Plaintiff
AND	FIRE AND EMERGENCY NEW ZEALAND Defendant

Hearing:	19-20 August 2020 (Heard at Wellington)
Appearances:	C Carruthers QC and P Cranney, counsel for plaintiff G Davenport, counsel for defendant
Judgment:	17 November 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] These proceedings, which were removed by special leave from the Employment Relations Authority to this Court for decision,[1] raise an important issue as to the interrelationship between a statutory provision and clauses in a collective agreement and associated policy documents.

---

[1] *New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2020] NZEmpC 68.

[2] The issue arises in the context of a restructuring exercise being conducted by Fire and Emergency New Zealand (FENZ). The plaintiff Union does not represent any employee who has been classified as an "affected" employee for the purposes of the restructuring. Rather, it says that FENZ's approach to the restructuring exercise will negatively impact on its members.

[3] The collective agreement and associated policy documents make provision for vacancies, an appointments and review process, and the requirement to appoint the person "best suited" to a position. The Fire and Emergency New Zealand Act 2017 (the Act) also contains provisions relating to appointments on merit and review mechanisms but contains a caveat, namely that those provisions do not apply where certain preconditions have been met, including where an employee has received notice of redundancy and been offered and subsequently accepted another role. The issue in these proceedings is how these provisions knit together, if at all.

[4] The parties approach the interpretation issue from two different starting points – the Union using the collective agreement as the springboard for analysis, essentially submitting that the statute is permissive in its effect and that the parties contracted against the background that they knew s 30 was in force but chose to adopt a different procedure. FENZ largely concentrates on the statutory provision, essentially submitting that the collective agreement must be read subject to the statute.

[5] In order to put the parties' positions into context it is necessary to set out the provisions (statutory; collective agreement; policy) that are engaged.

The statutory framework for appointments

[6] Fire and Emergency New Zealand came into existence following the enactment of the Fire and Emergency New Zealand Act 2017. It essentially brought a number of disparate fire service organisations together under one umbrella. As s 3 of the Act makes clear, its purpose was to reform the law relating to fire services, including by unifying fire services by establishing FENZ. Subpart 6 of the Act deals with appointments, vacancies and the requirement to leave FENZ due to incapacity.

[7] Under s 25 the Board may make appointments within FENZ but may only appoint a FENZ employee or FENZ volunteer. Appointments are required to be on merit, s 26 providing that: "The board, in making an appointment to FENZ under this Act, must give preference to the person who is best suited to the position."

[8] Section 27 requires the Board to notify (if practicable) any position that is vacant or is to become vacant, and that is to be done in a manner sufficient to enable suitably qualified persons to apply. The Board is also required to notify FENZ personnel of every appointment (other than that of an acting, temporary, or casual employee) made by the Board to a role, rank, or level of position in FENZ (s 28) and must put in place for FENZ a procedure for reviewing appointments that are the subject of any complaint by FENZ personnel (s 29).

[9] These provisions, on their face, provide a very clear roadmap or checklist that must be worked through by the Board in dealing with vacancies as and when they arise. However, s 30 of the Act (which is pivotal to determination of the key issue in this case) provides that ss 26 to 29 do not apply to appointments of FENZ employees in certain circumstances. Those circumstances relate to redundancy. Section 30 is expressed in the following terms:

> **30 Sections 26 to 29 do not apply to appointments of FENZ employees in certain circumstances**
>
> Sections 26 to 29 (which relate to *standard procedural steps in relation to appointments to FENZ) do not apply to the appointment of a person* as a FENZ employee if—
>
> (a) the person is a current employee of FENZ; and
>
> (b) that FENZ employee has received a notice of redundancy; and
>
> (c) before that FENZ employee's employment has ended, the employee—
>
> (i) is offered and accepts another position in FENZ that—
>
> (A) begins before, on, or immediately after the date on which the employee's current employment ends; and
>
> (B) is on terms and conditions of employment (including redundancy and superannuation conditions) that are no less favourable to the employee; and
>
> (C) is on terms that treat service within FENZ as if it were continuous service; or
>
> (ii) is offered an alternative position in FENZ that—
>
> (A) begins before, on, or immediately after the date on which the employee's current employment ends; and

(B) is a position with comparable duties and responsibilities to those of the employee's current position; and

(C) is in substantially the same general locality or a locality within reasonable commuting distance; and

(D) is on terms and conditions of employment (including redundancy and superannuation conditions) that are no less favourable to the employee; and

(E) is on terms that treat service within FENZ as if it were continuous service.

The collective agreement framework for appointments for uniformed and communications centre employees

[10] The collective agreement for uniformed and communications centre employees post-dated the Act and applies from 1 July 2018 to 30 June 2021. There is only one clause in the agreement which is said to be relevant, namely cl 1.21.8 (vacancies). It provides:

> Whenever vacancies or any new positions occur in the Service, not less than 14 days' notice shall be posted inviting applications from the workers for the filling of such vacancies and such applications shall receive full consideration.

Policy document framework for appointments and review

[11] The collective agreement annexes a number of policies which are described (at Part 6) as "core employment policies" developed in consultation with the Union. These policies include an appointments policy and a review of appointments policy.

[12] The appointment policy pre-dates the Act. It refers to s 65 of the Fire Service Act 1975 (repealed) which provided that the Chief Executive, in making an appointment must give preference to the person best suited to the position. The policy reflects a merits-based approach, using selection practices enabling suitably qualified persons to apply and be considered. The merits-based approach is expressed to be subject to two exceptions; persons without a legal right to work in New Zealand and persons with convictions.

[13] The review of appointments policy also predated the Act. It too refers to the Fire Service Act and s 67, which required that the organisation have a process for reviewing appointments. It provides that any employee has the right to request a

review of appointment unless the appointment is a temporary or acting appointment, or to one of four stated positions.

What is the role of s 30?

[14] The key question which arises is how s 30 fits together with the provisions of the collective agreement and the two policy documents insofar as the appointments/review process is concerned. And while the dispute currently before the Court is between the Union and FENZ, resolution of the key question will inevitably impact on other employees, who are not members of the Union.

[15] The Union submits that s 30 applies in narrow circumstances, namely when FENZ has given notice of redundancy and has taken the other steps set out in s 30. There is, it is said, no obligation for FENZ to complete those steps in a redundancy situation – having issued a notice of redundancy it can proceed to make the affected employee redundant without more. There is, for example, no need for FENZ to offer the affected employee an alternative position. Rather it was open to FENZ and the Union to agree a different process for appointments in circumstances involving notice of redundancy and that, it is submitted, is precisely what they did in the collective agreement. It was further said that, having agreed to the alternative process contained within the collective agreement and the policy documents appended to it, FENZ could not now depart from the agreement and seek to follow a different process with affected employees, namely offering another position within FENZ on terms no less favourable without going through a merits-based selection process. It will be immediately apparent that the Union's approach would render s 30 otiose, drawing back in standard procedural steps which mirror those in ss 26-29 which s 30 expressly disapplies.

[16] Parliament is the supreme law maker,[2] not parties to collective agreements. Whether what Parliament enacts is consistent with their agreement or core policy documents is largely irrelevant. Parliament can set the course if it wishes to do so. In enacting s 30, Parliament was clearly carving out, and rendering inoperative, the

---

[2] Ross Carter, *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis,Wellington, 2015) at 19.

procedural steps which would otherwise apply to appointments within FENZ in certain stated circumstances.

[17] Relevantly, and as s 30 makes clear, ss 26 to 29 cover the standard procedural steps for appointments to FENZ. As it happens those standard procedural steps (relating to advertising, selection, merit-based appointments and review) are reflected in cl 1.21.8 (advertising; full consideration); the appointment policy (preference to be given to the person best suited to the position) and the review of appointments policy (review). The introductory wording to s 30 could not be plainer - those three procedural steps (relating to advertising, selection and review) do not apply in the circumstances cumulatively set out s 30(a), (b) and (c), where the person is a current employee of FENZ; has received a notice of redundancy; and (before their employment has ended) has been offered and accepted another position in FENZ or an alternative position in FENZ.

[18] As counsel for FENZ, Mr Davenport, pointed out, the wording of s 30 is significant for what it does not incorporate, namely any sort of caveat in relation to the terms of an applicable collective agreement or policy document. This can be contrasted with, for example, the Public Service Act 2020.[3] Section 86 of that Act expressly provides that the power to transfer employees between public service agencies is subject to the relevant employment agreements. Similarly, s 61A of the State Sector Act 1988 (which repealed s 66) was described by former Chief Judge Goddard in *Pilgrim v Director-General New Zealand Department of Health* as follows:[4]

> It is clear from this section [s 61A] that the employment contract is paramount. The right to transfer employees is to be determined by the contract if it prohibits, modifies, or controls that right. The almost absolute right in redundancy cases to reassign and redeploy staff previously contained in s 66 State Sector Act 1988 was repealed in 1989. In its place it was left to individual contracts to define the rights and duties of the parties.

[19] I agree with Mr Davenport, too, that the focus of s 30 tells against the interpretation advanced on behalf of the Union, in particular, the front and centre focus on the affected employee (reflected, for example, in references to the FENZ

---

3 Public Service Act 2020, ss 72, 86, 88, 89 and sch 8, cls 1, 5.

4 *Pilgrim v Director-General, New Zealand Department of Health* [1992] 3 ERNZ 190 (EmpC).

employee's employment having ended and the s 30(c)(i)(B) reference to "no less favourable to *the* employee"). Redeployment is the legislative main aim. As Mr Davenport pointed out, the benefits Parliament intended to confer on affected employees in terms of a redundancy situation are clear, including:

- not to have to be best suited for the position in order to be redeployed;
- not to have to compete for a new role with all comers who may apply;
- not to have to go through the stress and anxiety of a contestable process in order to retain employment; and
- not to have to go through the stress and anxiety of a review process, especially when such a process could result in the appointment being withdrawn; not to have to face applying for less and less relevant jobs.

[20] Also relevant to the interpretative exercise are the circumstances in which s 30 was enacted. It was part of a new Act which was designed to revolutionise the way in which fire services were organised within New Zealand. As Mr Davenport pointed out, many transitioned to the newly formed organisation aware that a restructuring was on the near horizon. They were not, and could not be, covered by the collective agreement at issue in these proceedings, or have moved through the progression pathway within the collective agreement. Section 30, which is at its heart a protective provision, was enacted against the backdrop of all of this.

[21] It would be odd if a proper interpretation of s 30 resulted in the statutory protections that would otherwise flow from it to any affected employee not applying because of the terms agreed with one Union, representing a limited number of employees within the newly formed organisation. The collective agreement's effect is wide ranging as it applies to any vacancy which arises within the organisation. It effectively covers the whole organisation, insofar as it enunciates the appointment and review processes, required by the legislation, in the event of a vacancy. For the most part, there is little difficulty with this as it essentially benefits all employees by detailing the processes to be followed. However, in the case of s 30, it would mean

that the collective agreement, to which an affected employee was not a party, applied to diminish the rights and benefits otherwise conferred by statute. If Parliament had intended such a result, I think it highly likely it would have worded s 30 differently.

[22] It remained largely unexplained why the collective agreement, which post-dated the enactment of the new legislation, appended policy documents modelled by way of reference to the previous statutory framework and the requirements relating to appointments set out in the Fire Service Act. It may reflect that no agreement was possible. A note was included to deal with any issues created by obsolete or outdated terms and references; it was agreed such terms would be applied "sensibly and logically" according to their intent. The collective agreement is framed in the note as "a living agreement applying to an ongoing relationship."

[23] In any event, the Union's argument effectively boiled down to an assertion that the policies which referred to repealed legislative provisions should nevertheless continue to be faithfully applied, in order to respect the parties' agreement. The argument is a difficult one to run in light of the legislative history – the new Act was clearly designed to effect major change, including in relation to the process to be followed in a redundancy situation. There was no equivalent provision to s 30 in the repealed legislation. It is notable too that the enactment of s 30, and the way in which the provision is formulated, reflected developments in the common law in respect of redeployment obligations, seen in cases such as *Wang* and *Jinkinson*.[5] It can safely be inferred that Parliament was alive to the particular employment context which existed within the Fire Service and the common law surrounding redundancy and redeployment at the time it decided to overhaul the legislation.

[24] I pause to note that much was made in the Union's evidence of safety concerns. I understood the suggestion to be that an interpretation which supported a merits-based approach to appointments in circumstances involving employees affected by a redundancy would be consistent with the safety objectives of the legislation. I do not think the point materially advances the analysis. The reality is that Parliament can be taken to have been aware that it was enacting s 30 into a safety-focussed piece of

---

5 *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [2010] ERNZ 468; *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2009] ERNZ 225.

legislation and having regard to the safety imperatives of FENZ (as reflected in s 11, for example). Nor does there appear to be any authority for the proposition that the common law obligations of redeployment should not apply, or more weakly apply, in safety sensitive industries. The concern that an unqualified employee could be redeployed into a position where they are substantially out of their depth is one that would be present in any form of organisation. Redundancy may be the outcome where redeployment is inappropriate.

[25] The Union's expansive reading of cl 1.21.8 and the two policy documents and very narrow reading of s 30 sits uncomfortably with s 54(3)(b)(i) of the Employment Relations Act 2000, which provides that a collective agreement must not contain anything "contrary to law". Rather, it is clear that cl 1.21.8 (the obligation to notify vacancies) must be read as applying in situations other than where the preconditions set out in s 30 have been met. In this sense the provisions can be read together, but the reference in cl 1.21.8 to "whenever vacancies arise" must be read subject to s 30.

[26] The interpretation I have arrived at on the plain wording of s 30, when read within its statutory context, is supported by broader contextual material. While the Act was said to herald a significant change to the way in which fire services were organised and delivered in New Zealand, there is surprisingly little parliamentary comment on the proposed new statutory provisions. However, a Supplementary Order Paper does shed some light on the underlying purpose of what was to become s 30. The Supplementary Order Paper (which refers to cl 27A which was later to become s 30) states:[6]

> New clause 27A is inserted into the Bill. The effect of this clause is to disapply certain provisions relating to standard procedural steps in relation to appointments to FENZ in certain circumstances where a FENZ employee is subject to redundancy and is offered and accepts another position or is offered an alternative position in FENZ as a FENZ employee. *This provision is inserted for the benefit of any FENZ employees who may be affected by redundancy and may be given preference over others for appointment to any other relevant position in FENZ.*
>
> (my emphasis)

---

6 Supplementary Order Paper 2017 Fire and Emergency New Zealand Bill (262) (explanatory note) at 3.

[27] The Supplementary Order Paper makes it clear that in inserting the provision, Parliament intended to confer a benefit on FENZ employees, namely, that they enjoy preference for redeployment in the case of redundancy. The provision ensures the Act is in harmony with the current common law principles. The collective agreement would then abrogate that benefit by immediately reinstating all of the standard procedural steps in relation to appointments, steps which touch all employees and not just members of the Union. FENZ and the Union cannot contract in a way which removes this benefit from all employees. This runs contrary to the express intention of Parliament and the underlying purpose of s 30.

[28] The short point is that while the Union's narrow reading of s 30 would present a number of benefits to its members, it would significantly erode the protections that Parliament has deliberately put in place for *any* affected employees of FENZ, against the backdrop of a major reorganisation of fire services. That would be inconsistent with the intent of the legislation and undermine the legitimate rights and interests of non-Union members.

[29] For the foregoing reasons, I decline the Union's application for declarations and the claim is dismissed. I do not need to deal with the alternative arguments advanced on behalf of FENZ in light of the conclusions I have reached on the correct interpretation and application point.

[30] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 3:10pm on 17 November 2020