IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2021] NZEmpC 8
EMPC 339/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	COMMISSIONER OF POLICE Plaintiff
AND	NEW ZEALAND POLICE ASSOCIATION INCORPORATED Defendant

Hearing:	28, 29 and 30 September 2020 (Heard at Wellington)
Appearances:	H Kynaston and L Grey, counsel for plaintiff S Hornsby-Geluk and H Dwyer, counsel for defendant
Judgment:	11 February 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

Background

[1] At issue is the interpretation of a longstanding term of collective employment agreements relating to Police Constables of the New Zealand Police (Police). Since 2006, the material clause has stipulated a motor vehicle reimbursement allowance is to be paid to Police employees if they are required to travel to an alternative place of work which requires them to travel a greater distance than they would normally travel to their normal place of work.

[2] In 2012-2013, Police initiated a phase of significant change, which included widespread restructuring. Police says it needed a less rigid structure, more flexibility, and more choice for individual employees. It says the Policing Act 2008 (PA) confers special powers on Police to appoint and move employees as and where needed. Police says it is meeting these objectives by rotating staff, by providing opportunities to them through the use of an Expression of Interest (EOI) process, and by employees agreeing to work in districts where there are movements between multiple stations and workplaces.

[3] A dispute has developed between the parties as to the interpretation of the clause relating to motor vehicle expenses, in light of those changed circumstances. Police assert that its interpretation of the clause has not altered, even though its requirements for mobility have. The New Zealand Police Association Inc (the Association) says that in the changed environment, Police altered its approach to the application of the motor vehicle reimbursement (MVR) provision.

[4] The clause which the Court is required to interpret is cl 4.9 of the 2015-2018 *New Zealand Police Constabulary Collective Employment Agreement* (CEA) which provides:

> **4.9 <u>Work Related Motor Vehicle Reimbursement</u>**
>
> 4.9.1 Employees of Police will be reimbursed at the rates below provided they meet the following criteria:
>
> (i) They are required to use their personal motor vehicle (including motorcycle) to perform police duties for which reimbursement will be for the actual work related travel; or
>
> (ii) They are required to travel to an alternative place of work that requires them to travel a greater distance than they would normally travel to their normal place of work. Reimbursement to be for the excess distance travelled only. Provided, however, where employees are unable to get to an alternative place of work they should discuss options with their supervisor. The employee can choose to report to their normal place of work and will be provided travel by Police to the alternative place of work; or
>
> (iii) They are required to use their personal motor vehicle when called back to work outside of normal duty. Reimbursement is for actual distance travelled to and from work; or
>
> (iv) They travel in their private motor vehicle on transfer. Reimbursement is for a maximum of two vehicles and by the shortest route.

4.9.2 Reimbursement rates ...

The position before the Authority

[5] When the problem came before the Employment Relations Authority, the particular questions the Association asked it to determine were as follows:[1]

> (a) In what circumstances would an employee be regarded as being "required to travel to an alternative place of work"?
>
> (i) Is this limited to situations where "a movement or change is required by Police due to operational or resourcing requirements" and that are "ad hoc, temporary and out of the ordinary"?
>
> (ii) Does this apply where the movement occurs as a result of an expression of interest process?
>
> (b) What constitutes an employee's "normal place of work"?
>
> (c) Where an employee is "rotated" pursuant to s 65 Policing Act, what is their "normal" place of work?
>
> (d) Does clause 4.9.1 apply where a rotated employee is required to work from a station or workplace other than the station or workplace to which their substantive position relates?
>
> (e) Does a "district" constitute a "place of work" in terms of clause 4.9.1(ii), or does this refer to the station or workplace that the employee has been appointed to work at?
>
> (f) Is the respondent able to impose time constraints on the applicability of the motor vehicle reimbursement allowance?

[6] In its determination, the Authority declined to make declarations, preferring to resolve the questions before it by way of findings which were as follows:[2]

> (a) The circumstances in which an employee would be regarded as being "required to travel to an alternative place of work" are not limited to "ad hoc, temporary and out of the ordinary" situations. This was conceded by Police.
>
> (b) This does not exclude situations where the movement occurs as a result of an expression of interest process.
>
> (c) Where an employee is rotated their normal place of work is the station at which their substantive position is located within the district in which they may be rotated.

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1 *New Zealand Police Association Inc v Commissioner of New Zealand Police* [2019] NZERA 505 at [6] (Member MacKinnon).

2 At [50].

(d) Clause 4.9.1(ii) applies where a rotated employee is required to work from a station or workplace other than the station or workplace to which their substantive position relates.

(e) A station or workplace that the employee has been appointed to work at, not a district, constitutes a "place of work".

(f) The respondent accepts it cannot place time limits on MVR in the CEA.

The challenge and the issues which arise

[7] Police then brought a de novo challenge to the Court which focused on three interpretation issues only. The issues are:

a) Does cl 4.9.1(ii) apply to a rotation made in accordance with s 65 of the PA, where the employee is rotated to a new place of work?

b) What is the position following an EOI process, where an employee is appointed to a temporary role based at a place of work other than the place of work at which the employee's permanent role is based?

c) What is the position where the employee has agreed with Police that the employee's role will be based at more than one station or workplace within a district, and the movements are between those stations or workplaces?

[8] Declarations are sought as to the effect of the clause with regard to several types of movement. It is accordingly necessary to set out the use of the clause in recent years, in a range of circumstances which demonstrate those movements.

Key facts

Background

[9] Between 1 July 1991 and 30 June 2006, MVR arrangements were different to those which were agreed in CEAs from mid-2006 onwards. Originally, the reference was to mileage allowance rates for private motor vehicles used on Police business. The uncontested evidence is the clause was intended to reimburse employees for using

their own vehicle when attending to Police business, and it was prescriptive in terms of the conditions that were required to be fulfilled for it to be paid.

[10] The agreement which first contained a clause in almost identical terms to that which appears in the 2015-2018 CEA, took effect on 1 July 2006.

[11] At that time, the relevant legislative instruments were the Police Act 1958 and the Police Regulations 1992. The PA repealed the 1958 statute with effect from 1 October 2008.[3]

The position from 2011

[12] The focus of this proceeding is on developments which occurred from about 2011. At that time, Police directed districts to look at ways to cut costs and manage resourcing more efficiently.

[13] As a result of that directive, a phase of substantial change occurred, which included widespread restructuring. Police believed, as an aspect of this exercise, that its human resources (HR) information system provided a limited understanding of employee movements, and the substantive positions held by those persons. Police employees changed reporting lines, moved teams, were assigned on projects and were externally seconded; yet information about these events was often not recorded in the relevant information systems.

[14] In the context of the directive, District Commanders discussed how allowances were to be dealt with when requiring staff to undertake these responsibilities. In a document they produced in June 2011, it was noted a mileage allowance "should be the last option as it is extremely expensive and should only be paid with prior approval". The primary option would involve "a rental car or equivalent bus fare".

[15] Superintendent Johnson told the Court that this reference related to all forms of MVR under the CEA, and not just those which are covered by the clause in dispute in this case.

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[3] Policing Act 2008, s 2.

The Movements Policy

[16] Superintendent Johnson said that Police implemented a policy called "Movement within/outside Police" (the Movements Policy), which was to provide guidance as to types of movements within Police. This occurred in 2013-2014 and followed consultation with the Association.

[17] The various types of movement of Police employees explained in the document included internal assignments, rotations, relocations, or external movements via secondments. It expressly stated it was subject to employment agreements, and the provisions of the PA.

[18] The introduction to the policy stated:

> Assignments, rotations and secondments relate to employees who are temporarily performing a specified role or duty away from their substantive position and/or business group.

[19] Each of these concepts were described in more detail. "Relocation" was described in this way:

> An employee moving to another position at their existing level of position ... to meet Police requirements which may require considering the:
>
> - Employee's circumstances, and
> - merit of all employees who have submitted an expression of interest in the position.
>
> ...

[20] "Rotation" was described as:

> ... a form of relocation. It is when an employee moves usually within the district in which the employee is stationed, and at their existing level of position, for training and development purposes and a change in duties.

[21] In describing factors which were to be considered before approving a movement, the document stated:

> Consider these factors when deciding whether a temporary movement such as an assignment, rotation or secondment will be approved or not:
>
> - benefits to the host business group (external and internal)
> - benefits to the home business group

- benefits to NZ Police as well as the employee (in both career and personal development)
- the employee should not be disadvantaged for making their skills available when and where the Police need them
- implications for Police and how the resulting vacancy arising from the movement will be managed; the home business group manager is responsible for ensuring their group is adequately resourced to cover a movement opportunity

For secondments ...

- the employee will generally return to their home position on completion of the assignment or secondment
- the employee may commence in a different role on completion of a rotation
- other agreed opportunities for placement of the employee upon completion of the movement period.

[22] Then the document described "rotations". Relevant aspects of the description were:

Purpose of rotation

The purpose of staff rotation is to achieve one or more of the following:

- enable the aspirations of employees to be met
- provide appropriate training to employees
- provide changes of duty for employees
- enable positive career development and planning, and
- meet the needs of the organisation.

Specific guidelines relating to the rotation of employees on undercover, drug, vice, surveillance and team policing duties may over-ride these rotation guidelines.

Positions suitable for rotation

The types of positions that may be subject to rotation should be generic enough that any employee at that remuneration band and/or level of position could undertake the duties of the position.

Rotation also:

- includes the process of rostering a movement between:
  - CIB, general duties and Road Policing
  - squads, sections and units.
- provides a mechanism for moving employees through different work groups to experience a range of generic duties (such as, GDB, Traffic, etc). An example is the rotation of probationary constables from traffic duty to watch-house to GDB.

- applies within CIB to provide CIB members with experience in a range of generic CIB duties. An example is the rotation of Detective Constables on Trial between groups such as CPT, property, fraud and drug.
- enables employees up to and including the position level of superintendent to gain experience in both the Criminal Investigation and Uniform Branches.

Permanent appointment during rotation

Where the intention is to make a permanent appointment and the position offers career development or promotion opportunities and/or is likely to be of interest to a number of employees, the position must be notified as a vacancy.

[23] Finally, the document stated:

> Employees may be rotated between stations where this can be achieved without impairment to effectiveness and efficiency.

The Association's concerns

[24] The Association became concerned about MVR issues. Its concerns were recorded, for example, in a letter contained in an email sent by a Field Officer, Mr Kerry Ansell, to Police HR Manager, Ms Lynne Harrison, on 31 March 2014. Mr Ansell referred to a message which had been provided to Hawkes Bay members about voluntary secondments, which stated vehicle reimbursement would not be payable if a secondment resulted in additional expenses. Mr Ansell said that the MVR clause specifically covered the situation where members were required to travel to an alternative place of work for the purpose of carrying out their duties. Police were not permitted to circumvent the clause by stating that a voluntary secondment was different from other secondments.

[25] On 1 September 2014, the then Acting National Secretary of the Association, Mr Greg Fleming, wrote to Superintendent Richard Chambers, Acting Deputy Chief Executive: People, noting that the practice of rotating employees had increased to such an extent that it had become the norm rather than the exception. The Association had concerns which were outlined in detail.

[26] It was emphasised that a rotation was a "non-permanent move from the employee's normal role". The Association's concern was that the Movements Policy

was contradictory, because on the one hand it suggested a rotation involved a specified role or duty away from a substantive position and/or business group, but on the other hand an employee could commence in a different role on completion of a rotation.

[27] Mr Fleming said that a generic district-based role did not give an indication as to what career development might be included in the rotation, so an applicant could not make a truly informed decision as to the benefits of a particular role if they were to be rotated. The rotation was heavily slanted towards Police needs, with little consideration of individual members' circumstances.

[28] He went on to say that another problem arising from the generic rotation model was that there was no substantive position belonging to the member. Such a practice would mean that it was difficult to determine who was affected by a restructure.

[29] Mr Fleming also said rotation was emerging as a mechanism to circumvent the appointments process. It was evolving into a practice of advertising entry level positions, then rotating existing staff from within a district to all other vacant positions via EOIs. This had the effect of stagnating inter-district movement, operating outside of the appointments process, and denying the opportunity for the best person to obtain a role.

[30] Summarising the position, Mr Fleming stated that s 65 of the PA was being breached. The section governed temporary shifts. Moreover, if a member did not have a substantive position then he or she was forever in a state of flux, moving from one temporary position to another, which was not what was intended by the Act. Nor did the current Movements Policy reflect the purposes of the PA; it was necessary to develop policy to provide a framework which respected the intent of that statute.

[31] Subsequently, Police established a working party and a reference group, containing members of Police and the Association. A draft policy and toolkit were developed which described two types of rotation which it said could be used, dependant on the business context and types of roles.

[32] A "position rotation" was one where a staff member held a substantive position, which was subject to rotation; they could then be rotated to another position for a period of time. That person could return to their substantive role after the rotation. This type could be used in workgroups with smaller groups of "like" roles, of a specialist nature.

[33] A "portfolio rotation" was one where a staff member held a "generic substantive position", subject to rotation. That person would rotate through various portfolios, continuously. This type could be used in workgroups with larger groups of similar roles, such as constable, sergeant, senior sergeant and inspector.

[34] Ms Leeann Peden, Senior Employment Advisor with the Association, said agreement on the terms of the discussion document stalled, because agreement could not be reached on a number of points, including the issue of whether a member subject to rotation should or should not have a substantive position. She said this was particularly important as Police had been engaged in significant restructuring initiatives over several years since about 2010-2011. If a member did not "own" a position, then there was an issue as to whether such a person could be regarded as being affected by restructuring, which would otherwise entitle them to be consulted for the purposes of any applicable entitlements. Another sticking point related to the availability of allowances under the MVR clause.

[35] As a result, the rotation policy was unable to be confirmed. The topic was left for bargaining.

[36] The term of the CEA was 1 July 2015 to 30 June 2018. During the bargaining, detailed understandings about rotation were again unable to be agreed. However, the parties did include cl 1.7, which stated:

> ***1.7 <u>Rotation</u>***
>
> Subject to this Agreement, the Policing Act 2008 and any applicable Police rotation policy, the Commissioner can rotate, relocate, second, assign and temporarily assign employees and other persons within Police.
>
> Both Police and the Association recognise the need to provide effective policing services as efficiently as possible while providing a work environment that encourages the growth of employee's skills and experience.

Transport assistance – Hawke's Bay Area

[37] In September 2015, Ms Harrison circulated a document entitled "Transport Assistance – Travel Around Hawke's Bay", which pertained to two areas within Eastern District.

[38] The document distinguished between employees appointed prior to 1 July 2012, and those appointed after that date; the significance of the date was that it marked a merger of the Napier and Hastings Areas, which become the Hawke's Bay Area.

[39] The document stated that travel assistance would not generally apply to staff employed to Hawke's Bay Area following the merger date. Such persons could be expected to work in either the Napier or Hastings area, since they had been employed into "Hawke's Bay" as their normal place of work. The view was taken that travel between them was a "reasonable commute". This policy was to apply to recruits, staff transferring for welfare reasons, staff returning from leave without pay (excluding parental leave without pay) and those appointed to locally and nationally advertised vacancies of a permanent nature since the date of merger, unless the appointment was specifically to Napier or Hastings. Further, travel assistance would not apply to staff employed prior to the date who had voluntarily responded to an EOI and were assigned temporarily to another position for a defined period of time.

[40] Mr Fleming wrote to Ms Harrison on 6 November 2015 raising an objection to this proposal. He said that the Association had previously challenged the interpretation which was being adopted; and that the parties had attended mediation on 18 June 2014, but the dispute had not been resolved. He said the Association's view was that the proposal disadvantaged members, and that it was contrary to the correct interpretation of the CEA.

Further developments from 2016

[41] In February 2016, a further Rotation Discussion Document was forwarded to the Association. It stated that rotation was a form of planned movement within Police from one position to another at the same band/grade within a district, and was allowed

for under s 65(1)(d)(v) of the PA. Examples of rotation with regard to "substantive positions" and with regard to "generic positions with portfolios", were given. The content of this document was not agreed between the parties.

[42] Evidence was given as to the practices concerning rotation in several districts. Each district operates differently, because of their different circumstances and geographical locations. Superintendent Johnson told the Court that the practice in Eastern District had been contentious. Following a restructuring in 2016, employees were reassigned to positions that were expressly subject to rotation within the Hawkes Bay based positions covered by the same position description. He said Police considers it can rotate these employees and move them to different stations in the Hawke's Bay area without changing their substantive position or paying MVR.

[43] The evidence is that Police has applied this practice to all appointments in Eastern District, except for some specialist positions such as dog handlers. Superintendent Johnson said that this allowed Police to be dynamic and nimble in organising its workforce, taking into account an employee's development. The Association disagrees that the practice is legitimate, because it means that an employee has no right to a substantive position and can be rotated through a succession of fixed-term appointments.

[44] In April 2017, Police introduced a new HR information system, "MyPolice". Superintendent Johnson said this allows Police to apply a "[one-to-one] person to position" management framework, which is linked directly to pay and to deployment. Each employee must be recorded in MyPolice as occupying a single, identified position within a formal structure, in order to ensure they are paid correctly and can be deployed.

[45] For present purposes, this means that the different types of movement are now recorded formally in MyPolice. Thus, there is now data for the last three financial years, 2017-2020. Superintendent Johnson said there have been approximately 29,000 total movements in that period, with increases year on year. Of these, approximately 48 per cent were rotations. Not all of these movements give rise to MVR issues.

[46] In May 2017, Ms Harrison produced a document entitled "Work Related Motor Vehicle Reimbursement". Superintendent Johnson confirmed that it described Police's interpretation of the MVR provision as adopted nationally.

[47] In it, Ms Harrison referred to the MVR clause that had been included in Police agreements for many years. She said Police were continuously evolving, with regard to the flexibility and mobility of its operations. As the structures and demands of the organisation changed, it could become challenging to apply older provisions that were implemented when the organisation operated differently.

[48] She stated that in summary, the MVR provision applied in the event that a movement or change was required by Police due to "operational or resourcing requirements that are ad hoc, temporary and out of the ordinary".

[49] A key consideration would be whether Police was requiring or directing an employee to work from another location while those tasks are carried out. The provision would not apply where the movement was initiated or requested by the employee via such mechanisms as a recruitment or an EOI process in which an employee had an option to participate.

[50] Nor would it apply to a movement that is part of an employee's agreed terms and conditions of employment such as a rotation. She said that when employees are on a genuine rotation, Police considered that the role and location became the staff member's "normal" place of work. The normal place of work would update each time the staff member rotated to a new location. The clause would apply to an ad hoc or temporary move where the employee was required to help out in a position or place that was out of the ordinary.

[51] This approach would not prevent particular situations being looked at on a case by case basis in terms of what is reasonable for Police to expect when it requires an employee to rotate to a new location.

[52] The production of this document led to the filing of the Association's statement of problem in the Authority on 9 March 2018.

Events which followed the filing of the statement of problem

[53] The 2015-2018 CEA expired on 1 July 2018, and was replaced by the current CEA, which runs to 2021. The Court was advised it contains an MVR clause which is essentially the same as that which is under consideration in the present challenge.

[54] In May 2019, Police and the Association formed a Tamaki Makaurau Retention Working Group, which Superintendent Johnson said was in response to concerns about an apparent high rate of attrition in Waitemata District, Auckland City District and Counties Manakau District. The intention is that while all three districts will retain their existing leadership structures and responsibilities, they will work more closely together.

[55] The parties worked together to develop a new Employment Movements Policy, to replace the policy which had first been introduced in 2013-2014.[4]

[56] That policy took effect on 31 August 2020. There was some controversy with regard to the appropriate designation of Tamaki Makaurau and whether it would be regarded as one district. Police says that one of the concerns raised by the Association via the working group was that rotations generally only occur within a district and their members wanted more flexibility to be able to take up opportunities in the other two districts within Tamaki Makaurau.

[57] It was in that context that Ms Peden proposed, for the purposes of the new Movements Policy, that Tamaki Makaurau would be treated as one district in the application of a policy where any of the following situations occurred:

- where an opportunity is offered for an employee to work closer to home;
- where an employee initiates a step to facilitate career development; and
- where an employee expressly agrees.

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4 Above at [16].

[58] The new policy as released stated that for the purposes of the policy, Tamaki Makaurau was to be treated as one district. Police considered that the wording in the policy was very similar to the Association's suggested language and achieved the same result.

[59] Significantly, for present purposes, the definition of "rotation" in the Movements Policy was based on s 65(1)(d)(v) of the PA. It was described as a process whereby employees rotate to different positions for a specified period of time within their district at their existing job level and remuneration. Such a movement was considered to be a type of relocation. This Policy also stated that a planned series of employee movements was one of the major workforce planning processes used at Police.

[60] The description of the concept went on to state that rotation also includes "interchange opportunities" which provide for employees, by mutual agreement, to exchange roles at the same level within the same district or service centre. The purpose of this "job swap" was to allow an employee to gain experience in a different role over a short period of time, ranging from a minimum of three months to a maximum of six months. Employees would return to their previous role at the conclusion of the agreed period. It could also include a temporary move to another position at the same level for an agreed period of time, where there is a specified intention that the employee will return to their substantive position.

[61] Later in the document, further information was provided as to how the rotation system was to operate so as to achieve a nationally consistent approach whilst ensuring districts had the flexibility to meet specific operational needs. Included in that information was a section on location which stated employees could only be rotated to positions at their existing pay band and within the district in which they were stationed.

Illustrative examples

[62] Many examples of individual circumstances were introduced in evidence. These have been useful for illustrating how the parties have viewed the application of the MVR clause, and I will refer to some where appropriate. However, on this

particular interpretation exercise, it is not appropriate for the Court to delve into those examples in detail especially as in many instances the Court does not have the full picture.

Submissions

[63] For Police, Mr Kynaston submitted in summary:

a) The present case is not about the lawfulness of Police's rotation or EOI processes, whether they comply with the PA, or the justifiability of particular rotations. The issue is whether Police are obliged to pay MVR in particular scenarios.

b) The Police constabulary workforce is a special workforce, in the sense that Police cannot fill vacancies temporarily or permanently from external sources. It has to appoint, promote and move people into positions from within its ranks. It also needs the ability to respond to community need quickly and decisively. Thus, the PA confers special powers on Police to appoint and move people as and where needed. The statute, however, provides a backdrop, but it does not have any useful bearing on the interpretation of the MVR clause.

c) Mr Fleming gave evidence as to discussions he recalls in the leadup to the introduction of the current MVR clause in 2006, this evidence should be disregarded. It was evidence of his subjective impression of the discussions at the time.

d) Police consider that MVR is payable following a change in location only where the move is *required* by Police in the sense of it being Police's direction or imperative, rather than at the employee's choice. By contrast, the Association says that even when the employee chooses to move, they are required to travel to the alternate place of work because that is what they need to do in order to do the job. This interpretation would have Police provide a complete indemnity wherever there is a work movement.

e) The word "required" as used in cl 4.9.1(ii) of the CEA denotes an external imperative or directive – that is the ordinary and natural meaning of the word. That meaning is reinforced when the language of the subclause is read in context with the remainder of the clause. Thus, the word "required" as used in cls 4.9.1(ii) and (iii) refers in each case to a Police direction. An analysis of other clauses in pt 4 dealing with transfers of location or higher duty allowances, supports the same conclusion.

f) Under Police's EOI processes, the relevant position is advertised within the particular workgroup, district or service centre, with the terms and conditions on offer specified; in that context, expressions of interests are sought. Candidates volunteer by submitting a detailed expression of interest and the successful candidates are selected on merit.

g) Since the introduction of the Movements Policy in 2014, EOI processes have become increasingly common as a means by which employees move within Police.

h) It was submitted EOIs should be treated for MVR purposes in the same way as permanent appointments are treated. The employee chooses to apply for, and then accepts, the role. In such an instance, there is no obligation to pay MVR.

i) On the issue of rotation, counsel emphasised there were two types. The first is where the employee holds a generic "rotational" position and rotates through various portfolios, business or workgroups. The second is where the employee holds a substantive position but is moved temporarily to another one at the same rank and level of remuneration. MVR is not payable in the first instance, because the rotation is not to an alternative place of work. It is payable in the second instance, if rotation is required and it is not via an EOI.

j) Turning to the plain meaning of the word "rotation", when an employee's role is rotational, there is an expectation that the employee will rotate periodically into different workgroups, and that changes in the workplace will occur as a result where the relevant workgroups are located at different workplaces. Rotation in these roles is normal and expected; employees move from their "old normal" place of work to their "new normal" place of work accordingly. "Normal" does not in the clause mean a "first" place of employment. Nor does "alternative" mean "temporary".

k) Rotational roles have been a longstanding and consistent practice in the CIB, since before the MVR was introduced. CIB employees are informed when applying for such a role that it is subject to rotation and agree to this when appointed. Whilst it is not always the case, CIB rotations sometimes result in a change of workplace. Police do not pay MVR in this instance according to longstanding practice. The same practice has applied to other roles since 2014. The CIB example illustrates the application and the interpretation of the MVR clause, and its application to rotational roles generally. This is an instance of subsequent conduct providing clear consistent and objective evidence of the parties' intention.

l) To facilitate movements within a district, Police developed a practice for appointing employees in some positions and in some districts on the basis they will work at multiple workplaces within that area. In this instance, the movement is not to an alternative place of work, but to the employee's "new normal" place of work, as is the case for rotations and permanent moves.

m) The Association's view that there must be a single home station for the purposes of the MVR clause is inflexible, unrealistic, and inconsistent with longstanding CIB rotation practice. Nor is it supported by any statutory or contractual provision. It cuts across the modern employment environment; it was also to be noted that s 18(4) of the PA provides that

Police as an employer, has all the rights, duties and powers of an employer in respect of its employees.

n) There are a range of provisions in the CEA referring to an employee's station or home, but those provisions do not use the term "normal place of work". Nor do they preclude Police from agreeing an employee might move his or her normal place of work from time to time. They simply recognise that, at a given point of time, there is a workplace at which the employee is based for the purposes of those particular provisions.

[64] Mx Hornsby-Geluk, counsel for the Association, submitted in summary:

a) Beginning with the proper interpretation of the language used in the MVR clause, the term "required to travel" should be interpreted as meaning a situation where it is necessary for the employee to travel a greater distance as a result of a change in their usual place of work. It should not be read down, as Police submitted.

b) This is consistent with the evidence given by Mr Fleming as to the context when the clause was introduced, and its intended purpose; the intention was to ensure employees were not out of pocket when they were required to perform duties from a temporary or alternative place of work. There was no discussion about limiting its application to situations where Police directed an employee to transfer. This would have been a significant restriction which, if intended, would have been clearly set out in the clause.

c) A review of the various provisions in s 4 of the CEA titled "Allowances and Expenses" supports this interpretation.

d) Police's interpretation is strained and requires additional words to be read in, that is: "required *by Police*". The Association's interpretation does not. The word "required" must be interpreted in a very limited way to mean "directed".

e) An “alternative” place of work is one which is different to the place of work associated with an employee’s substantive position, that is, their “normal” place of work. A “place of work” is a physical place to which the employee can go to attend work. Police’s practice of appointing employees to “districts” is an attempt to deny them a normal place of work; it is not supported by language used in the CEA, or in s 65 of the PA, which clearly draws a distinction between a “district” and a “station”.

f) Turning to the application of the clause, Police policies, when read together with s 65 of the PA make it clear that:

- Rotation is a form of relocation within the district within which an employee is stationed.

- Rotations are temporary assignments, at the conclusion of which an employee will return to their substantive position.

- The purpose of rotation is to meet organisational resourcing needs as well as to provide upskilling to employees.

g) There is no provision in ss 18 or 65 of the PA for roles to be designated “rotational”; nor could any policy bestow rights or powers which the legislation does not.

h) The practice of declaring roles to be “rotational” should not be used to deny contractual entitlements.

i) The evidence is Police now fills most roles through the EOI process. This includes roles that until 2014 were deemed permanent and filled by a proper merit-based appointment process. Employees have no option but to participate in EOIs if they want to advance. The fact is that Police initiate EOI requests, because there is an operational need to be fulfilled. The Movements Policy states that this is “to meet Police requirements”.

Employees have no choice but to participate in the process because, from a practical point of view, that is the only way they can progress.

j) The process of appointment to districts is a further attempt to circumvent the requirement to pay allowances, including MVR. A "district" is not a place of work. There is a fundamental contradiction in Police's argument that it can avoid payment of MVR by appointment to a district, and its claim that when an employee rotates, the new station becomes their new normal place of work. A district is either a place of work, or it is not.

k) There appears to be little dispute that from 2014 Police implemented a different approach to filling roles. But a change in Police's practice does not change the purpose of the MVR clause or mean that it should now take on a different meaning. Police, by changing its approach to appointments, and requiring employees to move more, has expanded the number of situations in which the MVR may apply. Police have dealt with this by imposing restrictions on the interpretation and application of the clause which are not justified, and which undermine its intent.

Interpretation principles

[65] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the Supreme Court summarised applicable interpretation principles as follows:[5]

> [60] ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a

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5 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

> significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
>
> ...
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[66] The same court has confirmed that these principles apply to employment agreements.[6]

[67] It is clear from the authorities that context may be established by both pre-contract and post-contract evidence. So, in *Silver Fern Farms Ltd v New Zealand Meat Workers Union*, it was confirmed the parties' consistent conduct in the application of prior instruments may reflect their common contractual intention and thus inform interpretation.[7]

[68] In *Vector Gas Ltd v Bay of Plenty Energy Ltd*, Tipping J held that the pre-contract evidence of the parties' contractual evidence includes the circumstances in which the contract was entered into, and "... any objectively apparent consensus as to meaning operating between the parties".[8] In the same decision, he also stated that the evidence of subsequent conduct should be admissible if it is capable of providing objective guidance as to intended meaning. He summarised the position thus:

> [31] There is no logical reason why the same approach should not be taken to both post-contract and pre-contract evidence. The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. ...

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6 *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

7 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [41]–[44].

8 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [27].

Issue one: rotation

[69] The first issue is whether cl 4.9.1(ii) applies to a rotation made in accordance with s 65 of the PA, where the employee is rotated to a new place of work. In support of its challenge, Police submit the employee is "required" to travel, but not to an "alternative place of work". As elaborated, it is submitted there are two types of rotation within Police. The first is where the employee holds a generic "rotational" position, and rotates through various portfolios, business or work groups. The second is where the employee holds a substantive position but is moved temporarily into another position at the same rank and level of remuneration. Police says MVR is payable in the second instance (if rotation is required), but not the first, because the rotation is not to an alternative place of work. For rotational positions, the new place of work becomes the "new normal" place of work with each rotation.

[70] The Association says s 65 of the PA allows for rotation of employees, but neither the PA nor the CEA allows for positions to be declared "rotational", or for the appointment of generic roles.

[71] The issue of rotation involves consideration not only of cl 4.9.1, where the dispute as to interpretation lies, but also cl 1.7, headed "Rotation".

[72] As noted earlier, in cl 1.7 the parties agreed that the possibility of the Commissioner rotating, relocating, seconding, assigning or temporarily assigning employees or persons would be subject to the provisions of the CEA itself, to the PA, and to any applicable Police rotation policy.[9]

[73] The parties thereby acknowledged that these sources provide the framework for the concept of a rotation. Each must be considered.

[74] Accordingly, for the purposes of this issue I shall first consider the provisions of the PA, since it must be the starting point. Then, I will construe the relevant provision of the CEA, the MVR clause, in light of the statutory context. Finally, I will consider whether there are any relevant rotation policies.

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[9] Above at [36].

Policing Act 2008

[75] Part 2 of the PA provides for organisation and governance. Included is s 18, which provides:

> **18 Commissioner may appoint Police employees**
>
> (1) The Commissioner may from time to time appoint the people that the Commissioner thinks necessary for the efficient exercise and performance of the powers, functions, and duties of the Police.
>
> (2) The power conferred by subsection (1) includes power to appoint people on an acting, temporary, or casual basis or for any period that the Commissioner and the employee agree.
>
> (3) The Commissioner may assign to a Police employee any level of position that the Commissioner considers appropriate.
>
> (4) Unless expressly provided to the contrary in this Act, the Commissioner has all of the rights, duties, and powers of an employer in respect of Police employees.

[76] In s 4, the interpretation section of pt 1 of the PA, the following definition is included:

> **Police employee** means a person employed under section 18 and, except in Part 4, includes a person seconded to the Police

[77] Part 4 of the PA contains the machinery provisions which regulate the engagement of "employees" or "persons". The material sections for present purposes are as follows:

> **59 Appointments on merit**
>
> (1) In making an appointment under section 18, the Commissioner must give preference to the person who is best suited to the position.
>
> (2) This section is subject to sections 64 and 65.
>
> **60 Obligation to notify vacancies**
>
> (1) If the Commissioner intends to fill a position that is vacant or is to become vacant in the Police, the Commissioner must, wherever practicable, notify the vacancy or prospective vacancy in a manner sufficient to enable suitably qualified people to apply for the position.
>
> (2) This section is subject to sections 64 and 65.

61 Obligation to notify appointments

The Commissioner must notify Police employees of every appointment (other than that of an acting, temporary, or casual employee) to a vacant position in the Police.

62 Review of appointments

Section of the State Sector Act 1988 (which relates to review of appointments) applies in respect of any appointment made by the Commissioner under section 18 as if the Police were a Department and the Commissioner were the chief executive of that Department.[10]

63 Acting appointments

(1) In the case of the absence from duty for any reason of a Police employee or in the case of a vacancy for any reason and from time to time while the absence or vacancy continues, or for any other special purpose, the Commissioner may—

(a) appoint an employee temporarily to any higher level of position; or

(b) authorise an employee to exercise or perform all or any of the powers and duties under this Act or any other enactment, of any level of position higher than that employee's own level of position.

(2) Any appointment or authority under this section may be given or made before the occasion arises or while it continues.

(3) No appointment or authority under this section, and nothing done by any employee acting pursuant to the appointment or authority, may be questioned in any proceedings on the ground that—

(a) the occasion has not arisen or had ceased; or

(b) the employee had not been appointed to any level of position to which the authority relates.

(4) The Commissioner may at any time revoke any appointment made or authority given under this section.

64 Power to transfer employees within Police

(1) This section applies if the Commissioner at any time finds in respect of any duties being carried out by the Police—

(a) that those duties are no longer to be carried out by the Police; or

(b) that a greater number of employees is employed at a location on those duties than the Commissioner considers to be necessary for the efficient carrying out of those duties.

(2) The Commissioner may, subject to any applicable employment agreement, but without complying with sections 59(1) and 60(1),

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[10] The reference to s 65 of the State Sector Act 1988 was amended last year to refer to cl 5 of sch 8 of the Public Service Act 2020.

appoint to other positions in the Police any or all of the employees who are carrying out those duties.

(3) Before making an appointment under this section, the Commissioner must consult with the employee about the proposed appointment.

(4) Nothing in section 62 applies in relation to any appointment made under this section.

65 Power to temporarily assign, second, and locate employees and other persons within Police

(1) The Commissioner may, subject to any applicable employment agreement, but without complying with sections 59(1) and 60(1)—

(a) assign a Police employee to a temporary position in the Police:

(b) assign a person to a position in the Police:

(c) second a Police employee to a position with another employer:

(d) relocate a Police employee—

(i) on the graduation of that person from initial recruit training; or

(ii) within the district in which the employee is stationed, and at the employee's existing level of position, to meet Police requirements, after considering the employee's circumstances and the merit of all employees who have indicated an interest in the position; or

(iii) on the return of that person to duty from an overseas assignment, leave without pay, parental leave, or other special leave; or

(iv) to fill a vacancy in a temporary international assignment, after considering all employees who have indicated an interest in the position; or

(v) in order to rotate an employee within the district in which he or she is stationed; or

(vi) for substantial welfare or personal reasons:

(e) locate a person who is rejoining the Police as an employee.

(2) Subsection (3) applies if—

(a) the Commissioner assigns a person to a temporary position under subsection (1)(a) or assigns a person to a position under subsection (1)(b) without complying with sections 59(1) and 60(1); and

(b) the person has occupied that position or been on that secondment for a period of at least 14 months.

(3) The position occupied, or the secondment, must be considered to have been vacated by that person and, subject to any applicable employment agreement, any further assignment to or secondment of that position must be dealt with in compliance with sections 59(1) and 60(1).

[78] Section 18 appears in subpart 3; it is the only section which appears under the heading "Appointment of Police employees". It is an overarching governance provision which describes the core power of appointment held by the Commissioner. The power is broad. It includes the ability to appoint people on an acting, temporary, or casual basis for any period the parties may agree. Those appointments may be to any level of position the Commissioner thinks appropriate. The significance of the section is reinforced by the definition of "Police employee" in s 4, which makes an express reference to s 18.

[79] By contrast, pt 4 is entitled "Provisions relating to employment of Police employees". It contains a range of provisions which describe the mechanics of particular types of appointment.

[80] Sections 59 and 62 contain provisions for appointment under s 18, that is, by giving preference to the person best suited to the position, and for the review of appointments. Under s 60, the Commissioner must, wherever practical, notify the vacancy.

[81] Sections 59 and 60 are subject to ss 64 and 65. The latter sections provide that certain movements may be effected by the Commissioner without having to comply with the appointment on merit process, or notification process.

[82] Drawing these threads together, the following conclusions are relevant for present purposes:

a) The fundamental power of appointment is contained in the governance provision, s 18. Its prominence is reinforced by the further reference to that section in three other provisions: s 4 definition of Police employee, in s 59 which provides for appointments on merit, and in s 62 which relates to review of appointments. These are well recognised state sector processes.

b) The Commissioner is not, however, required to meet these obligations in two defined instances, that is, when acting under ss 64 and 65.

[83] The relevant provision for present purposes is s 65, which deals with particular types of movement, including rotations. The processes described in the section can be summarised as follows:

a) Section 65(1)(a) deals with the assignment of a Police employee to a temporary position; s 65(1)(b) deals with an assignment of a person to a Police position.

However, both such assignments are subject to s 65(2) and (3), the effect of which is that if the assignment or secondment has been made without complying with the appointment on merit and notification sections, and the position has been occupied for at least 14 months, then any further assignment or secondment of that position must be dealt with in compliance with those provisions. In short, the assignment provisions are time limited. These subsections reinforce the normalcy of the appointment on merit and notification processes.

b) Section 65(1)(c) deals with secondment of a Police employee to a position with another employer; in its ordinary meaning, secondment involves a temporary movement.

c) Section 65(1)(d) deals with various forms of location, each of which are different.

d) The final power relates to the locating of a person re-joining Police as an employee.

[84] I interpolate a matter of legislative history. The Explanatory Note for the Policing Bill 2007[11] stated in respect of the clause that was to become s 65 that it contained matters which had been provided for in regs 4 and 6 of the Police Regulations 1992, though the concept of secondment was new. Regulation 4 had provided that the Commissioner was not required to notify the intention to fill a

[11] Policing Bill 2007 (195-1).

vacancy under special circumstances. "Special circumstances" were deemed to include events of the kind now incorporated in s 65.

[85] Although the language of "special circumstances" was then dropped, the scheme of the replacement provisions in s 65 when read together, suggest that, as before, its provisions are an exception to the other processes of engagement of Police employees. Such a movement is not one which is notified or required to be assessed under merit considerations.

[86] Provisions of this kind are of longstanding in the State Sector.[12] At the time of the events with which this judgment deals, such provisions appeared in ss 60 and 61 of the State Sector Act 1988.

[87] As noted by the Court of Appeal in *Principal of Auckland College of Education v Hagg*, the object of such provisions is obvious enough:[13]

> ... It is to ensure that such appointments are made openly and on merit. The requirements cannot be waived by employer or employee. They cannot contract out ... There are two public interests involved. One is the interest of the public at large in securing and ensuring an open system of appointments on merit to a major part of the public sector [in that case the Education Service]. The other is the interest of other potential applicants who might have applied when the ... appointment was advertised ...

[88] In my view, when enacting parallel provisions in the PA – s 59 and s 60 – Parliament intended that such public interest factors would apply to appointments made by the Commissioner.

[89] That said, Parliament considered it appropriate to permit the Commissioner to temporarily assign, second and relocate employees and other persons within Police without being required to consider the merits under s 59 or to notify a vacancy under s 60. The section provides a carve out of obligations that would usually apply to a Police appointment. In my view, given the importance of these provisions, the exceptions could not have been intended to be the norm.

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12 See for example State Services Act 1962, s 28; State Sector Act 1988, ss 60, 61; and now the Public Service Act 2020, s 72 and cl 1, sch 8.

13 *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537 at 548, [1997] 1 ERNZ 116 at 125; followed in *Draper v New Zealand Fire Service Commission* [2001] ERNZ 277 at 288–289.

[90] Dealing with s 65(1)(d)(v) more fully, the word "rotate" is not defined in the PA. In the subparagraph, however, the word is qualified by its surrounding language. The Commissioner may rotate an *employee* within the district in which he or she is stationed. The rotation can only take place within the district in which the employee is stationed.

[91] The plain and ordinary meaning of the word "rotate" is to "move or cause to move in a circle round an axis".[14]

[92] The process of rotation in s 65(1)(d)(v) is to be contrasted with the process of relocation as described in s 65(1)(d)(ii). Both subparagraphs describe movement within the district in which the employee is stationed. Rotation in s 65(1)(d)(v) implies movement more than once; relocation in s 65 (1)(d)(ii) does not. But in both instances, the movement is proscribed. The relocation may be made with reference to the employee's station, but only within the district of the station.

[93] It is also useful to compare the concept of "transfer", as described in s 64. That is the process of movement from one place to another, or an outright change of location. A "rotation" as described in s 65(1)(d)(v) is not a "transfer" as described in s 64. These are two different types of movement.

[94] The word "stationed", as used in s 65(1)(d)(v), is not defined either. However, there is nothing to suggest that the word does not carry its plain and ordinary meaning of relating to a place "where a specified activity or service is based".[15]

[95] In short, rotation is a step taken with reference to the station at which the employee is based. There is nothing to suggest the station is to be rotated. It is a more confined form of movement than one which arises under s 65(1)(d)(ii).

[96] I also accept Mx Hornsby-Geluk's submission that the express reference to "employee" in the subparagraph means it is the employee who is rotated with reference

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14 Judy Pearsall (ed) *Concise Oxford Dictionary* (10th ed, Oxford University Press, Oxford, 1999) at 1245.

15 Above, n 14 at 1402.

to his or her station, not the position. That conclusion is readily reached by considering the plain and ordinary meaning of the language used.

[97] As noted earlier, Mr Kynaston submitted that s 18(4) allowed for generic rotational positions. What the subsection says is that the Commissioner has all of the rights, duties and powers of an employer in respect of employees, "Unless expressly provided to the contrary in this Act".

[98] The power of appointment or engagement of employees is spelt out in considerable detail in the various provisions I have reviewed. Parliament has defined the power of appointment with some specificity. I find s 65 is an example of a provision which falls within the proviso contained in s 18(4). It cannot be construed as allowing the Commissioner to engage employees in some other manner, as he or she might think fit. I do not agree that s 18(4) allows for "generic" rotational positions.

[99] The result is that, as the parties agreed in the framing of issue one, the process of rotation should comply with the limitations of s 65(1)(d)(v). In my view, the subsection clearly indicates *employees* may be rotated within the district in which that person is stationed.

Clause 4.9.1 – "normal place of work"/"alternative place of work"

[100] I turn next to consider the clause itself for the purposes of issue one. Police says that under the MVR clause, a "generic" rotation is not an "alternative" place of work, but to a "new normal" place of work.

[101] There is some common ground between the parties as to the ordinary meaning of the terms "normal place of work" and "alternative place of work".

[102] Both parties agree that according to the ordinary and natural meaning of these phrases, a "normal place of work" is where the employee usually works; and an employee's "alternative place of work" is a place of work other than that.

[103] In my judgement, the dictionary definition of "alternative" assists; this includes the circumstance where there are "one of two or more available possibilities".[16]

[104] I also accept the submission made by Mx Hornsby-Geluk that a "place of work" is a physical place an employee goes to attend work.

[105] This conclusion is supported by at least two other allied clauses in s 4 of the CEA.

[106] Clause 4.12 deals with travelling and relieving expenses. It defines "home" as "the place where the employee normally resides or is stationed". Reimbursement for certain expenses is provided for each day employees are absent from the city or town in which their station is situated, at specified rates. Entitlement commences from the time the employees depart from their station and terminates when they return. Subsequent clauses define entitlements with reference to the location of the employee's station (for example, cl 4.12.2(a), (f)(iv), (g)(i), and cl 4.12.3(a) and (f)).

[107] Clause 4.4.5 is also of assistance. Under the heading "Meals Away from Normal Work Place", a refund of meal expenses may be available in certain circumstances, where the employee is on duty, relieving duty or special duty. The clause relevantly states that the entitlement is available where such employees:

> ... in the city or town where their station is located are required to be away from the place where a meal is normally consumed during a rostered meal break, and the meal break cannot be altered to enable the employees to take a meal break either before going on or after returning from the assignment. ...

[108] These references tend to confirm that a workplace is a physical location and is one associated with the employee's station. The language used in this clause is specific. It does not suggest there would be an exception in relation to an appointment to a district, where the employee may be required to move between multiple locations or places of work.

[109] I find that an analysis of the plain and ordinary language used in the MVR clause leads to the conclusion that the parties intended a juxtaposition between a

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16 Above, n 14 at 39.

"normal place of work" and an "alternative place of work", and that the two are connected.

[110] It is apt to describe the first of these terms as relating to the physical location of the employee's substantive position.

[111] The second of these was intended to be associated with the first. If this were not the case, it would not have been necessary to include the reference to the second formulation as an alternative.

[112] Considered in the context of a provision dealing with "rotation", as construed earlier,[17] it is appropriate to conclude that the normal place of work is the location of the employee's substantive employment. A rotation does not involve the possibility of an employee transferring to a new normal place of work, but to an alternative place of work for the period of the rotation.

[113] The provisional meaning derived from the language of the clause under consideration should be cross-checked against contractual context.[18]

[114] The only witness to give evidence about the facts pertaining to the circumstances relating to the settling of the clause was Mr Fleming. He said that he specifically recalled discussions in the lead up to the settlement of the 2006 CEA with the then Chief Executive and National Secretary of the Association, Police's General Manager of Human Resources, Mr Wayne Annand, and himself in which there was discussion as to the clause and the reasons behind it.

[115] Mr Fleming said the discussions focused on ensuring that employees were not out of pocket when they were required to perform duties at a temporary or alternative place of work. He recalled the parties drawing diagrams on a whiteboard to illustrate that the clause was intended to cover extra travel costs, in the form of a mileage reimbursement for the commutable distance between the members' homes and

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17 Above at [90]–[99].

18 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 8, at [5]–[6] per Blanchard J, [22] per Tipping J and [57] per McGrath J.

temporary place of work, less the commutable distance from their homes and normal places of work.

[116] In his recollection, the purpose of the clause was to compensate members who would have to travel a greater distance to work than they would have otherwise travelled, were it not for the temporary position. This was important, because where an employee works dictates where they may buy or rent their home, and, for example, where they decide to enrol their children in school or day care. The clause was relatively simple as to when the allowance was payable because at the time it was introduced the appointment process was simple.

[117] Mr Fleming also stated that at the time the MVR clause was introduced, there was no discussion about limiting its application to situations where Police directed an employee to transfer.

[118] Mr Fleming also confirmed that the clause had been adopted in subsequent CEAs, unchanged.

[119] Police called no evidence with regard to the bargaining. Moreover, Superintendent Johnson acknowledged that the purpose of the MVR clause was to compensate employees where they were required to travel a greater distance in order to perform a temporary role. He said it was to make sure employees were not disadvantaged.

[120] Mr Kynaston submitted that Mr Fleming's evidence was irrelevant when assessed against the dicta of the authorities, because it merely demonstrated what the Association intended the words used to mean; he argued that the evidence was nothing more than a subjective impression of the discussions at the time.

[121] I do not agree. I find that Mr Fleming's evidence records the consensus position of the parties during their bargaining. A potential prejudice was identified, and a relatively simple formula was created to resolve it. Where it was necessary for employees to travel to fulfil a temporary role, they would be reimbursed for the additional mileage involved.

[122] In short, the cross check does not suggest the parties intended the clause would apply to some, but not all, instances of rotation.

The Movements Policy

[123] Finally, I consider the issue of relevant policies. At the time the CEA was settled in 2015, the Movements Policy was being used by Police.

[124] Police had, as noted earlier, established a working party and a reference group which amongst other things discussed the concept of position rotations and portfolio rotations.[19] Agreement was not, however, reached between the parties as to these concepts.

[125] Accordingly, the Movements Policy remained the operative document that a reasonable person would consider was Police policy for the purposes of cl 1.7.

[126] The policy reflected the provisions of s 65 of the PA. It stated that a rotation was a form of relocation and occurred "usually within the district in which the employee is stationed", and at their existing level of position for training, development purposes and a change in duties.

[127] The introductory section of the policy, again reflecting the provisions of the PA, noted that assignments, rotations and secondments related to employees who were temporarily performing a specified role or duty away from their substantive position and/or business group.

[128] In my view, these statements are consistent with the interpretation of the clause I have outlined.

Conclusion on issue one

[129] I conclude on the basis of the sources referred to in cl 1.7 that the parties intended when agreeing the MVR clause that a rotation made in accordance with s 65 of the PA where the employee is rotated to a new place of work is indeed one where

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[19] Above at [31]–[35].

that person is required to travel to an alternative place of work. It was not intended that the fact an employee may be required to move to diverse places of work under a process described as rotation would relieve Police from the obligations of the clause.

Issue two: EOI process

[130] The second issue relates to the position following an EOI process, where an employee is appointed to a temporary role based at a place of work other than the place of work at which the employee's permanent role is based.

[131] As noted earlier, Police says the travel is to an "alternative place of work" but the employee is not "required" to travel.

[132] The Association says whether the appointment was applied for, initiated or requested by an employee, is irrelevant.

[133] I begin my consideration of this issue by assessing the plain meaning of the word "required" as used in cl 4.9.1(ii):

> They are required to travel to an alternative place of work that requires them to travel a greater distance than they would normally travel to their normal place of work.

[134] The language used begs the question, "required by what"?

[135] Police submit the term should be understood as meaning the employee is required by an external imperative or directive to travel. The Association submits that the term should be understood as meaning the employee is required by the terms of the position, which requires the employee to travel to perform his or her job.

[136] The word "required" is also used in subclauses 4.9.1(i) and (iii). The same question arises: "required by what"? Police submit that the clear answer is "required by a Police directive or imperative" to travel. Again, the Association submits that in each of those instances, it is necessary for the employee to use their own vehicle.

[137] I agree that the word carries the same meaning in each of the subclauses. The interpretation advocated for Police is narrower than that argued for the Association. Clause 4.9.1 defines the "criteria" for reimbursement. The circumstances are not qualified. The word "required" has not been restricted to those circumstances where there is a "Police directive or imperative".

[138] In each of the instances described by the three subclauses, there may well be a direction or instruction; but any such step could only be taken if it was allowed for in the employee's terms and conditions of employment, as agreed by the parties. I find that the ordinary construction of the word "required" is more likely to be referable to the obligations arising from the terms and conditions of employment.

[139] The term "required" is also used elsewhere in s 4 of the CEA, which deals with a range of allowances and expenses. Both counsel pointed to examples where it was contended that their preferred interpretation also applied in those other instances.

[140] For instance, Mr Kynaston referred to the use of the word in a range of subclauses in cl 4.3; this clause deals with refund of transfer expenses and transfer grants. He cited the reimbursement of expenses of house sale and purchase where an employee is "transferred to another locality to which he or she is required to shift household". He also submitted that the provisions relating to the payment of higher duties allowances were similarly instructive.

[141] In response, Mx Hornsby-Geluk submitted that the use of the word "required" in those contexts again involved the concept of necessity. So, in cl 4.1.1, a lesser rate of the allowance would be payable where "an employee is required to undertake only some of the duties and responsibilities of a higher remuneration band position".

[142] It is of course the case that the use of the term "required" depends on context. The word does not necessarily carry the same meaning wherever it is used.

[143] That all said, on the face of it the other examples given tend to refer to the fact that a given allowance is payable where it is necessary for the employee to take the step referred to. I consider that in the absence of any words qualifying the concept,

the employee is entitled to reimbursement if required to undertake the movement as an aspect of his or her terms of employment.

[144] Cross-checking the language of the provision against contractual context, I am not persuaded that the distinction of the kind now advanced for Police in respect of EOIs was one that was discussed, acknowledged or agreed between the parties when the MVR clause was negotiated; or that a reasonable person appraised of the background would consider that such a distinction was intended by the parties.

[145] I find there is no evidence of any understanding that the clause would only be invoked where Police directed the movement. I accept the submission that if this had been the intent, it would have amounted to a significant restriction and one which would have been clearly set out in the clause.

[146] Accordingly, the answer in respect of issue two is that the MVR clause must be interpreted so as to include a situation where an employee is appointed to a temporary role at a place of work other than that at which the employee's permanent role is based, notwithstanding an EOI process.

Issue three: work at more than one station or workplace within a district.

[147] The third issue relates to the situation where the employee has agreed with Police that his or her role will be based at more than one station or workplace within a district, and the movements are between those stations and workplaces.

[148] As noted earlier, Police says the employee is "required" to travel, but not to an "alternative place of work".

[149] The Association says the practice of appointing an employee to multiple locations or places of work within a district is not mandated by the CEA, because an employee is thereby denied multiple rights that flow from appointment to a place of work.

[150] Again, Police rely on the proposition that when an employee works at multiple workplaces within an area within a district, that person is not moving to an alternative place of work, but to a "new normal" place of work, as is the case for rotations and permanent moves.

[151] The MVR clause, properly construed as above, does not allow for an exception of this kind. The clause does not distinguish between working at an alternative place of work, or at a "new normal" place of work.

[152] The former characterisation aptly describes what occurs when an employee is required to work at multiple workplaces within a district.

[153] As also noted earlier, I accept Mx Hornsby-Geluk's submission that "place of work" is a physical location at which work occurs and cannot be understood as referring to a broad description of a location such as an area or district.

[154] A cross-check of the factual background when the MVR clause was negotiated does not suggest a different interpretation. There is nothing in the evidence of the negotiations which would suggest that the parties intended the MVR clause would not apply to circumstances where the employee is based at more than one station or workplace.

[155] A further consideration with regard to this issue relates to the Association's point that to reach a contrary conclusion would be to deny an employee multiple rights that flow from appointment to a particular place of work, such as those which might arise in the case of a restructuring.

[156] This is, however, subject to one longstanding exception relating to the rotation of CIB employees. This precedent was, the Court was told, in place from at least 1996, when Superintendent Johnson was appointed to Police. Ms Peden agreed that CIB roles had been rotational for a very long time, although she said this was often because CIB roles were located in one physical location, that is, a single building.

[157] A reasonable person appraised of this background fact would consider it likely that the parties intended the longstanding practice concerning CIB roles would continue.

[158] In my view, this particular circumstance is not an aid to interpretation of the clause in respect of other movements.

[159] I conclude that where an employee has agreed with Police that his or her role will be based at more than one station or workplace within a district, involving movements between those locations, the MVR clause applies. It will apply to each rotation after the initial appointment to a particular station or place of work.

Disposition

[160] The challenge to the Authority's determination has not succeeded.

[161] In those circumstances, there is a question as to whether the Court should or should not simply confirm the findings made by the Authority, there being no cross-challenge.

[162] Mx Hornsby-Geluk submitted the Court should make a range of declarations. Whilst Mr Kynaston addressed these to some extent in his closing submissions, he primarily focused on the outcomes which Police were seeking; he did, however, make the point that the Association was seeking declarations which were beyond the scope of the challenge.

[163] In the circumstances, it will be preferable for counsel to confer as to the form of any formal declarations the Court should make in light of its conclusions, having regard to the extent of the challenge.

[164] I request counsel to file memoranda within 14 days on this topic, having conferred. If there is disagreement, their separate memoranda should give sufficient particulars of each party's position as to allow the Court to finalise the challenge on the papers.

[165] I will also then issue directions as to costs.

B A Corkill
Judge

Judgment signed at 3.40 pm on 11 February 2021