CA 19/04
Determination Number: CA 19/04
File Number: CEA 225/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN John Griffiths (Applicant)

AND New Zealand Fire Service (Respondent)

REPRESENTATIVES Jenny Beck, Counsel for Applicant
Steven Fraser, Advocate for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 17 February 2004

DATE OF DETERMINATION 20 February 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem
[1] John Griffiths is a firefighter employed by the New Zealand Fire Service (NZFS) with approximately 20years' service. He says he has a personal grievance based on an unjustifiable disadvantage and/or discrimination. The New Zealand Fire Service denies that there is any valid grievance.
[2] Despite mediation the parties were not able to resolve this problem. The investigation meeting was very brief because there is no relevant dispute as to the facts which I will outline shortly. The positions of the respective parties are clearly set out in the statement of problem and statement in reply.
Background
[3] Mr Griffiths is a member of the New Zealand Professional Firefighters Union. There is a collective employment agreement between the NZFS and the union that applies to MrGriffiths.
[4] Some years ago, as with other firefighters in his position, MrGriffiths was offered the opportunity to join the New Zealand Fire Service Superannuation Scheme. If he had joined, his employer would have made a regular contribution to the scheme to his credit at a specified ratio of MrGriffiths' own contributions. This employer subsidised superannuation scheme is of a type that was once quite common and which still exists for many employees. MrGriffiths' decided not to join the scheme so he did not receive the employer's contribution. That decision made no difference to the salary he was actually paid.
[5] Some years ago the fire service recruited new employees called Community Safety Team workers (CST workers). This occurred when the Employment Contracts Act 1991 was

in force and the CST workers were engaged on terms and conditions that were quite different from those of the existing fire fighters. The CST workers generally were not members of the Union as opposed to the existing fire fighters who generally were members of the Union.

[6] Under their contracts, the CST workers were entitled to receive an enhanced salary if they did not belong to the employer subsidised superannuation scheme. The enhancement was roughly equivalent to the value of the employer's superannuation contribution made for other workers. Hence the CST workers were treated differently to the other fire fighters such as Mr Griffiths.

[7] About three years ago, the Union and the Fire Service negotiated a collective employment agreement to cover CST workers who belong to the Union as well as fire fighters such as Mr Griffiths. It specifically provided that workers who at the date of the agreement were not members of the superannuation scheme and who received an enhanced salary in lieu of the employer's superannuation contributions could continue to receive that enhanced salary. That agreement expired but has now been replaced by another collective agreement with essentially the same transitional provision. There is nothing unusual in the use of a savings provision to avoid what might otherwise have been a drastic salary reduction for CST workers.

[8] The result, as MrGriffiths accurately depicted in a diagram, is that there are three categories of fire fighters. The first category like MrGriffiths receive a salary and no employer superannuation contribution, the second category receive the same salary and also the employers superannuation contribution and the third category (the former CST workers) receive an enhanced salary. The essence of MrGriffiths' problem is his claim that he is disadvantaged or discriminated against because of the difference between his position and that of the CST workers. The difference is now more a source of rancour because the former CST workers can belong to the Union and are covered by the same collective agreement.

[9] MrGriffiths has made persistent attempts to get his problem resolved both through the Union and directly with management without resolution.

The Legal Position

[10] While the statement of problem indicated that the personal grievance claim was based upon an unjustifiable disadvantage, the claim was not put that way during the investigation meeting. That presumably reflects the definition of a disadvantage grievance in the Employment Relations Act 2000 which specifically excludes any action deriving solely from the interpretation, application or operation of any provision of an employment agreement: See sections 103(1)(a) and 103 (3). A similar definition is set out in the collective agreement. There is no doubt that the action by the Fire Service in paying the different salaries derives solely from the application or operation of the current collective agreement, and previously relevant employment agreements/contracts.

[11] The statement of problem also referred to discrimination and that is the way the matter was put during the investigation meeting. It was argued that the collective employment agreement contains a specific definition of discrimination that is wider than that contained in the Employment Relations Act 2000. The argument is based on the layout of clause 8 (c). It is said that subclause (c) (i) stands on its own and is not subject to the words that follow the dash in (c) (iii). Only subclause (iii) that deals with retiring an employee is limited by reference to the listed grounds such as colour, race and so on. The following replicates the layout of the clause as printed in the collective agreement:

PART 1 – CLAUSE 8 – PERSONAL GRIEVANCES

…

(c) For the purposes of Subclause 1.8(a)(iii) an employee is discriminated against in employment if the employer or a representative of the employer –

(i) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
(ii) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
(iii) Retires that employee, or requires or causes that employee to retire or resign –
by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief, or age of that employee or by reason of that employee's involvement in the activities of an employees' organisation.

[12] I disagree with the contended interpretation for two reasons. First, it ignores the punctuation used in the agreement. The dash immediately before subclause (i) and immediately after … retire or resign … indicates that the three roman-numbered alternatives between those dashes are controlled by the words before the first dash and after the second dash. That is the natural meaning of the punctuation and it is not displaced by the different alignment of the text.

[13] Secondly, the contended interpretation might lead to absurd outcomes. If I accepted that interpretation, any different terms/conditions/opportunities of employment between employees of similar qualifications, skills and experience would be unlawful discrimination. It would be unlawful discrimination to pay employees with similar qualifications, skills and experience at a different rate based on their responsibilities.

[14] While the Employment Relations Act 2000 permits parties to an employment agreement to extend the definition of a personal grievance, all these parties did was express the statutory definition of discrimination in rearranged words.

Conclusion

[15] I agree that the recruitment of CST workers and their introduction to the collective agreement has brought about an anomalous situation that affects Mr Griffiths but it is not a personal grievance as defined. Hence, I am not able to make any of the orders sought by Mr Griffiths.

[16] The anomaly is the outcome of negotiations between the Union and the Fire Service. The Authority has little role in the fixing of those terms and none on the present facts.

[17] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority