

5. The applicant/s require the Authority to interpret the relevant provision/s of the employment agreement and to address the unreasonable demands of the employer in seeking to vary Baden Robinson's hours of work without his agreement.

- [2] In that statement the applicants asked that the Authority
- a. Order Transfield Services (New Zealand) Ltd (TSNZ) to discontinue attempting to alter Mr Robinson's hours of work without his agreement,
 - b. Order TSNZ to comply with (Mr Robinson's) employment agreement and secure (his) agreement to any proposed variation to the hours of work, and
 - c. Make an award to Mr Robinson for pain and suffering and humiliation caused to him, and
 - d. Make a recommendation to TSNZ concerning the action they should take to prevent similar employment relationship problems occurring.

The amended statement of problem

[3] The parties attended mediation in August 2009 but unfortunately were unable to settle their dispute. However following the mediation TSNZ suggested to the Union and to Mr Robinson that the parties make a joint application to the Authority seeking a determination on TSNZ's ability to implement the planned roster changes. The Company also offered to suspend any disciplinary process against Mr Robinson until a determination was given by the Authority.

[4] The applicants accepted TSNZ's proposal and in October 2009 the parties cited in this determination filed a joint statement of problem seeking a determination from the Authority regarding:

(a) Mr Robinson's terms and conditions of employment;

(b) whether Transfield Services is able to require Mr Robinson to work the hours of the alternative roster; and

(c) what Mr Robinson should be paid

The substantive determination

[5] In my substantive determination, issued on 2 July 2010 (AA312/10) I said:

[23] After carefully considering all of the submissions from the parties and working methodically through the various documents, I have reached the following conclusions in respect to the questions posed by the parties.

*1. As at the end of June 2009 (i.e. after his resignation from the EPMU) **Mr Robinson's terms and conditions were based on the applicable CEA and included the provision's set out and his letter of appointment of February 2005 regarding his hours of work.** In this respect I accept Transfield's argument that, as there is no written agreement to amend the conditions set out in the letter of employment, any verbal understanding Mr Robinson may have had did not constitute such an amendment.*

2. There is a consistent provision running through all of the various employment agreements applicable to Mr Robinson throughout his employment, providing that individual employees could and did agree specific conditions of employment and these were set out in a personal letter. In particular:

Page 2 of Mr Robinson's original individual employment agreement says your personal letter records your normal work schedule.

Mr Robinson's letter of appointment of 17 February 2005 says that the proposed terms of employment comprise the AREVA (standard IEA) and the following additional terms.... That letter specified that Mr Robinson will also be required to work on weekends and on a roster basis covering seven days a week.

Mr Robinson subsequently became a party to a series of collective agreements all of which include reference to written terms and conditions personal to the employee. In my finding this reference was intended to preserve those specific, individual, conditions previously agreed by individual employees and contained in such documents as their letters of appointment.

*3. In accordance with clause 10.1 of the applicable CEA **Mr Robinson's contractual hours of work could not be changed without his individual agreement.** I do not accept Transfield submission that the union was authorized by its individual members to agree to vary their individual hours of work. Had the parties intended such an interpretation of clause 10.1 the wording would not have included the reference to individual employees. On the contrary the wording is consistent with previous agreements between the parties and the acceptance that individual employees have agreed personal arrangements as set out in their personal letters.*

However:

*4. Mr Robinson's hours of work, as set out in his letter of appointment, included a provision that he could also be required to work on weekends and on a roster basis covering seven days of the week. **Subject only to a reasonable consultation process, carried out in good faith, Transfield could require Mr Robinson to work weekends as part of a 7 day roster.***

5. As and when Mr Robinson was required to work weekends, as part of a roster, he would be entitled to be paid in accordance with the relevant clauses of the applicable CEA.

[6] In that determination I reserved the question of costs and requested that parties attempt to settle the matter between themselves. They have been unable to do so and TSNZ has filed a submission seeking an order for costs of \$4000.00. Mr Yukich, for Mr Robinson, opposes that submission and suggests that costs should lie where they fall.

The submissions in respect to costs

[7] In her submissions on behalf of TSNZ Ms Service argues that TSNZ were the successful party in this a matter and that, in accord with the principle that *costs should follow the event*, they are entitled to receive a reasonable contribution to the \$15,000.00 costs they incurred. She submits that Mr Robinson chose *to litigate an historical (and relatively technical issue ...and to seek an outcome of little practical effect* despite no longer being employed by TSNZ and that the costs sort by TSNZ are reasonable given that the matter progressed through to an Authority investigation meeting. She points out that the arguments put forward by Mr Robinson required *significant amounts of additional documentation* to be produced followed by nine pages of comprehensive initial submissions and a further 3 pages of supplementary submissions.

[8] For Mr Robinson, Mr Yukich argues that the substantive determination favoured Mr Robinson but that in any event there can be no winners or losers as a result of what was a joint application and that costs should lie where they fall. While Ms Service argues that TSNZ *did not acquiesce as to the matter of costs lying where they fall*, Mr Yukich points to a letter he wrote to TSNZ on 17 August 2009, in response to the Company's suggestion of a joint application, in which he said:

Assuming we correctly understand your letter Mr Robinson is, in principle, agreeable to a joint application ... subject to; agreement on the substance of a statement of problem, a joint memorandum of facts and an agreement as to costs.

Mr Yukich says that following this letter Mr Robinson was provided with a draft joint statement of problem which, following several drafts, was agreed. He argues that it is therefore correct to say that TSNZ *acquiesced* on the matter of costs.

Determination

[9] While I cannot agree with Mr Yukich's suggestion that Mr Robinson was the successful party in this application he is correct in saying that, in a joint application there can be no winners or losers. The joint statement of problem lists both TSNZ and Mr Robinson as joint applicants. It seeks a determination on the questions raised by the joint parties and makes no mention of an award of costs. I applaud TSNZ attempt to avoid confrontation and minimize the costs for all concerned and I have some sympathy for the high level costs incurred by TSNZ for an outcome which in Ms Service's words *had little practical effect*. However I am also conscious that it was TSNZ who suggested a joint application, with the implications for costs that that implied. Mr Robinson, through Mr Yukich, accepted that proposal with the express proviso that that included an agreement on costs.

[10] **Under all the circumstances the fairest outcome is that costs lie where they fall and I so order.**

James Wilson

Member of the Employment Relations Authority