

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 554
3309680

BETWEEN

JOSHUA STRAUSS
First Applicant

NEW ZEALAND PROFESSIONAL
FIREFIGHTERS' UNION
Second Applicant

AND

FIRE AND EMERGENCY NEW
ZEALAND
Respondent

Member of Authority: Peter van Keulen

Representatives: Kathryn Dalziel, counsel for the Applicant
Tanya Kennedy, counsel for the Respondent

Investigation Meeting: 6 September 2024 by AVL

Submissions Received: 4 and 6 September 2024 from the Applicant
4 and 6 September 2024 from the Respondent

Date of Determination: 16 September 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joshua Strauss is employed by Fire and Emergency New Zealand (FENZ) as a senior firefighter in the Christchurch Brigade.

[2] In the course of Mr Strauss's work FENZ became concerned about what appeared to be the use by him of a FENZ allowance and other firefighters' money for personal benefit,

such that these actions were potentially a breach of the FENZ Code of Behaviour and Standards of Conduct. FENZ commenced disciplinary action against Mr Strauss.

[3] Mr Strauss and New Zealand Professional Firefighters' Union (the Union) told FENZ that it had no authority, under the relevant provisions in the applicable collective agreement, to pursue enquiries into the transactions in question and therefore it could not take disciplinary action against him.

[4] Further, Mr Strauss and the Union say there is now a dispute as to the relevant terms of the applicable collective agreement and they say the dispute needs to be resolved before any disciplinary action is continued.

[5] FENZ does not accept this position and is continuing with the disciplinary action against Mr Strauss.

[6] As a result, Mr Strauss and the Union have lodged a statement of problem in the Authority, based on an alleged dispute, seeking determinations that FENZ has no authority to act as it has.

[7] In the interim, pending the outcome of the substantive claim, Mr Strauss and the Union seek an interim injunction restraining FENZ from continuing with the disciplinary process against Mr Strauss.

[8] FENZ opposes Mr Strauss and the Union's claim and the application for an interim injunction. It says there is no dispute and, in any event, it could act as it has and wishes to, in relation to the allegations against Mr Strauss.

[9] It is Mr Strauss and the Union's application for an interim injunction that I have investigated and this determination resolves.

The Authority's investigation

[10] Mr Strauss lodged two affidavits in support of his application for an interim injunction.

[11] Brad Mosby, Region Manager Ti Ihu for FENZ, and David Stackhouse, Canterbury District Manager/Commander for FENZ, lodged affidavits in support of FENZ's opposition to the application for an interim injunction.

[12] Counsel for both parties lodged written submissions on 4 September 2024 and made oral submissions at the Investigation Meeting on 6 September 2024.

[13] As permitted by s174E of the Employment Relations Act 2000, my determination has not recorded all of the evidence and submissions received. I have stated relevant findings of fact, insofar as I have been able to establish them based on the untested affidavit evidence. I have also stated the relevant principles of law. Based on this I have reached a conclusion on whether the interim injunction should be granted or declined.

The law relating to interim injunction applications

[14] The interim injunction sought by Mr Strauss is a quia timet injunction; an injunction to restrain a wrongful act that is threatened. The Authority has jurisdiction to grant quia timet injunctions.¹ However, granting an injunction that prevents an employer from proceeding with a disciplinary process will be rare.²

[15] The issues to be determined for an application for an interim injunction are:³

- (a) Is there a serious question to be tried in respect of the claim?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of the claim?
- (c) Where does the overall justice lie from now until the completion of the substantive investigation and issuing of a final determination?

[16] I will proceed to determine this matter on the basis of these issues. First, I will set out the relevant facts as I can discern them from the affidavit evidence.

¹ *Kumar v Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61; and *Ports of Auckland Ltd v Carl Findlay* [2017] NZEmpC 45.

² *Ports of Auckland Ltd v Carl Findlay* [2017] NZEmpC 45.

³ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

What happened?

The Mess Allowance

[17] FENZ and the Union are parties to a collective agreement covering the period 1 June 2021 to 30 June 2024 (the Collective Agreement).

[18] Part 1, Clause 15 of the Collective Agreement provides:

Mess Allowance

1.15.1 Fire and Emergency New Zealand shall pay to each brigade (and each Communication Centre) a “Mess Allowance” for each worker under this Agreement of the amount specified in Table 1 of Part 5 of this Agreement.

1.15.1.1 Such allowance shall be used for the purchase of tea, coffee, sugar, milk and biscuits and/or to pay all or part of the wages of a cook.

1.15.1.2 Where there is no agreement among the workers regarding the mess allowance, the matter shall be decided by Management.

[19] Pursuant to Part 1, Clause 15 of the Collective Agreement, FENZ pays the Mess Allowance, which is calculated per firefighter, to each Brigade. In this case the relevant Brigade is Christchurch.

[20] The Christchurch Brigade then distributes the Mess Allowance to each of the seven Stations in the Christchurch Brigade (also calculated per firefighter). In this case the relevant Station is Wigram.

[21] Wigram Station uses the Mess Allowance to buy common supplies of tea, coffee, sugar, milk and biscuits. A portion of the Mess Allowance, after communal supplies are purchased, is provided to each of the Watches in that Station for additional purchases. There are four Watches in Wigram: Red, Green, Brown and Blue.

[22] It appears that the way the Mess Allowance is used and distributed in the Christchurch Brigade and Wigram Station is reasonably common across Brigades and Stations in New Zealand. It is not clear from the affidavit evidence if it is common for all Stations to then distribute part of the Mess Allowance to each Watch. And there is considerable dispute in the

affidavit evidence about the status of the Mess Allowance payments paid to Watches in terms of what can be purchased.

[23] Where Watches do receive part of the Mess Allowance it is common for the members of a Watch to hold the Mess Allowance monies either in a bank account or as cash in a container at their Station.

[24] In addition to the Mess Allowance money received by a Watch, some Watches also pool personal money to buy food and cook meals together when members of the watch are working.

Mr Strauss opens a bank account for Wigram Blue Watch money

[25] Mr Strauss is a member of the Wigram Fire Station and is currently an active reliever from that Station. Mr Strauss was previously, and for most of the relevant time relating to this matter, a member of the Blue Watch at Wigram.

[26] When Mr Strauss joined the Wigram Blue Watch, he says their pooled money was simply sitting in a container in the Station. So, with agreement of the other members of Wigram Blue Watch, Mr Strauss opened a personal bank account for this money (the Account). Mr Strauss set up the Account at the credit union where he held other accounts. The Account was in his name using his account number and credit union identification. This was the same as his other accounts at the credit union, but he labelled it "Blue Watch Mess - Station". Regan Blogg, also a firefighter and member of Wigram Blue Watch at the time had some limited authority for the Account that enabled him to have an eftpos card for it.

[27] In addition to the money collected in the container at Wigram Station, Wigram Blue Watch members contributed regular payments to the Account. After the Account was set up, there were also two payments made totalling \$1250 that appear to be from the Wigram Station Mess Account. All other payments into the Account appear to be made by Wigram Blue Watch members.

[28] The money that was pooled in the Account was used by Wigram Blue Watch members to buy biscuits, food items for cooking meals, and a fridge for use at the Station, which one

other Wigram Watch contributed to. Members of the Wigram Blue Watch were able to use the eftpos card for the Account or were reimbursed for items they purchased.

FENZ seeks to access the Account

[29] From 13 November 2023 until 19 December 2023 Mr Strauss was absent from work on leave. During this time other members of Wigram Blue Watch were unable to withdraw money from the Account as they only had a new eftpos card that Mr Blogg had, which he had been unable to activate.

[30] Mr Blogg attempted to resolve this problem directly with the credit union, requesting to have the new eftpos card for the Account activated, explaining to the credit union that the Wigram Blue Watch used the account for purchases for their meals. There is an email exchange between Mr Blogg and the credit union on 24 November 2023 where the credit union advised that without an approval by Mr Strauss, they could not activate the eftpos card or release funds.

[31] On 2 January 2024 there was another attempt made by members of Wigram Blue Watch to gain access to the money in the Account. The Senior Station Officer at Wigram Station (ABT)⁴ who was also a member of Wigram Blue Watch and had contributed to the Account, wrote to the credit union and advised:⁵

I am writing to confirm that Joshua Struss (sic) is currently on Military Leave from Fire and Emergency New Zealand and has effectively left Blue Watch Wigram.

I can confirm my new staff member to replace Josh is [IEZ] and he is now stationed at Wigram Station on the blue watch.

As the manager (Senior Station Officer) of Wigram Station blue watch I confirm that I am giving authority to [IEZ] to oversea (sic) this account.

Account number ...

⁴ This individual did not provide any affidavit evidence in this matter and as part of my determination can be seen as critical of steps he took, I have decided that it is appropriate not to name him. I will refer to him by the letters ABT.

⁵ In this letter ABT names a new member of the Wigram Blue Watch to take control of the Account. This firefighter did not provide any evidence in my investigation so I have decided to not identify him and will refer to him by the letters IEZ.

[IEZ] will be in touch to arrange ID verification and request a replacement card and access to previous statements so we can get abreast of the account and pay parties that are owed money.

[32] ABT then emailed this letter to the credit union stating that it was an authority letter for IEZ to take over the operation of “Wigram Blue Watch Mess Account”.

[33] From this letter and email it is clear that ABT was requesting that the credit union provide more than access to funds in the Account by authorising the new eftpos card; rather ABT was requesting that a member of Wigram Blue Watch take over the operation of the Account.

[34] On 4 January 2024 the credit union sent an email to IEZ stating “we want to give authority on the Wigram Blue watch Mess Account but I need to complete biometric ID verification and require you (sic) mobile number – can you please advise?”

[35] It appears that IEZ did not provide the requested verification at the time – the affidavit evidence does not address this so I have no explanation for it. What is apparent from the affidavit of Mr Stackhouse is that Mr Strauss was not on leave at this time. After returning from leave in December 2023 Mr Strauss went on leave again 16 January 2024. Perhaps this had some bearing on IEZ’s decision not to access the Account.

[36] On 7 January 2024 Mr Strauss was contacted by IEZ who asked him to transfer the money in the Account to a new account that he had set up for the pooling of Wigram Blue Watch members’ money. By January 2024 Mr Strauss was no longer a member of the Wigram Blue Watch and other firefighters had recently left the Watch and had been replaced by new firefighters.

[37] After discussing the request for transfer with some of the Wigram Blue Watch members, including those who had recently left the Watch, Mr Strauss transferred what that group believed to be the current members of Wigram Blue Watch’s share of personal contributions; with the balance retained representing amounts contributed by now ex-members of the Watch that had not been used by the Watch. There was a reasonably significant amount of money in the Account at the time as up until leaving the Wigram Blue Watch, members had been pooling extra amounts of money in order to have an end of year

function (which presumably did not happen at the end of 2023 with many of the contributing members having left).

[38] So, by 7 January 2024 the current members of Wigram Blue Watch had access to pooled money to purchase biscuits and supplies for meals. It appears to me, based on the affidavit evidence, that what had been transferred by Mr Strauss to the then current members of Wigram Blue Watch was any Mess Allowance money remaining in the Account and the current members' share of the unused contributions of personal money up to that point.

FENZ uses access to the Account to review the transaction history

[39] At this time despite having been granted authorisation to take over control of the Account IEZ had not accessed the Account, activated the eftpos card or withdrawn any money. It appears to me that at this time there was no longer any need for IEZ to access the Account or withdraw money as Mr Strauss had paid the balance of Wigram Blue Watch members' pooled money onto the new account.

[40] On 16 January 2024 the credit union sent an email to IEZ advising him that it still wanted to give him authority on the Account but it needed to complete the biometric verification and receive his mobile phone number.

[41] IEZ must have then completed the biometric verification and provided his mobile phone number, as on 17 January 2024 he gained access to the Account via internet banking and received copies of bank statements.

[42] On 17 January 2024 IEZ undertook a review of the Account. He then asked ABT to come to his computer to view some of the transactions in the Account. ABT viewed the transactions and decided there were "discrepancies" with some of them so he took over access to the Account via internet banking, changing the passwords to the Account and then he contacted Area Management to advise them of concerns he had.

[43] The correspondence indicates that ABT then undertook a detailed analysis of the Account and the transactions. He provided a summary of events in connection with the Account to the Group Manager/Assistant District Commander. ABT identified what he believed to be amounts owed by previous Wigram Blue Watch members based on his

understanding of the agreed contributions that would be made by members, this included an amount owed by him. ABT then summarised his view that there were some discrepancies with transactions.

FENZ commences a disciplinary process

[44] FENZ then carried out an investigation into Mr Strauss's operation of the Account. It appears that ABT assisted this investigation as there is email correspondence between him and the credit union in connection with further information he requested about the operation of the Account.

[45] Through its investigation FENZ identified five transactions in the Account that were of concern to it. FENZ believed these transactions were made by Mr Strauss as no one else had access to the Account, particularly internet banking.

[46] FENZ then decided it would commence a disciplinary process with Mr Strauss. On 26 February 2024 FENZ wrote to Mr Strauss outlining its concerns. In this letter FENZ raised its concern that it appeared that Mr Strauss had not transferred all of the money in the account to the new account. FENZ then identified five transactions made by Mr Strauss that appeared to be for personal reasons. FENZ then stated:

The specific allegations against you are:

- You have accessed money that belongs to the Blue Mess (from contributions from Blue Mess members and Fire and Emergency).
- The money that you have accessed has been used for personal use in a manner which is not intended for.

[47] FENZ also advised that it considered the behaviour to potentially be serious misconduct and that dismissal or a final written warning were possible outcomes of the process.

The disciplinary process

[48] On 9 March 2024 Mr Strauss raised a personal grievance through the Union for unjustified action causing disadvantage as FENZ had used information obtained unlawfully to level allegations against him. In raising this grievance, the Union:

- (a) Asserted that FENZ had accessed a private bank account and that appeared to have been by misuse of FENZ authority.
- (b) Advised FENZ that Mr Strauss would be laying a complaint with Financial Services Complaints (the financial ombudsman service) and potentially filing a complaint with the Privacy Commissioner.
- (c) Advised FENZ that it had made a complaint to the Ombudsman regarding FENZ using personal information that it had obtained unlawfully.
- (d) Requested, amongst other things, that FENZ immediately cease the process underway regarding the allegations against Mr Strauss.
- (e) Requested that FENZ provide copies of all documents used to obtain Mr Strauss's financial information and records of all bank transactions FENZ had for the Account that had been obtained without Mr Strauss's consent.

[49] On 25 March 2024 FENZ responded to Mr Strauss's personal grievance asserting that it had not obtained the information unlawfully and whilst it was prepared to meet to discuss Mr Strauss's personal grievance, it still wanted to meet separately with Mr Strauss as part of the disciplinary process.

[50] On 4 April 2024 FENZ provided Mr Strauss with information he had requested regarding the disciplinary process and his personal grievance.

[51] From 4 April 2024 through to 3 May 2024 correspondence was exchanged between the parties regarding the various allegations, complaints, document requests and possible meeting times.

[52] This exchange included a letter of 15 April 2024 from counsel for the Union and Mr Strauss advising that they had been instructed and advising of availability for a meeting. A meeting was agreed for 3 May 2024.

[53] In the meeting of 3 May 2024, and a letter of the same day, counsel set out Mr Strauss's position in respect of the disciplinary process. Counsel explained:

- (a) The Account is a private bank account which has nothing to do with FENZ. They provided support for this proposition by setting out how and why the Account was established and how it was operated.
- (b) That FENZ had no right either generally or under the Collective Agreement to insert itself into long established arrangements between firefighters for pooling money.
- (c) The FENZ investigation and disciplinary process was flawed for many reasons, which were set out.
- (d) There had been privacy breaches by FENZ and the credit union, with the basis of these breaches set out.
- (e) Mr Strauss was not obliged to explain the transaction in the Account to FENZ but, in any event, Mr Strauss had accessed money given to him by contributing Wigram Blue Watch members for lawful and approved purposes.

[54] On 31 May 2024 FENZ responded, setting out:

- (a) The basis for the provision of the Mess Allowance under the Collective Agreement and how the Mess Allowance was used, including amounts being paid to a Watch.
- (b) That the part of the Mess Allowance paid to a Watch was to be used only for specified purposes, buying "tea, coffee, sugar, milk and biscuits and/or to pay all or part of the wages of a cook." And, if agreement cannot be reached over

the use of the Mess Allowance, Management can become involved and make a decision.

(c) That any personal monies were mixed in with the Mess Allowance, which FENZ had an interest in.

(d) That if the Mess Allowance was not used for the specified purposes, then FENZ are entitled to investigate. And Part 1, Clause 15 of the Collective Agreement does not prevent FENZ from dealing with the allegations against Mr Strauss.

[55] On 5 June 2024 the Union formally raised a dispute with FENZ over Part 1 Clause 15 of the Collective Agreement. The Union invoked the “Peace Obligations” under Part 1, Clause 9 of the Collective Agreement, which they said required preservation of the status quo pending the resolution of the dispute.

[56] On 7 June 2024 FENZ responded acknowledging the dispute but advising the basis of the dispute was not clear and it was happy to discuss the interpretation of Part 1, Clause 15 of the Collective Agreement, but in the interim the Peace Obligation did not prevent FENZ from proceeding with the disciplinary process with Mr Strauss.

[57] The Union responded to this explaining the basis for the dispute and asserting that continuing any process with Mr Strauss was a breach of the Collective Agreement.

[58] In a letter of 10 June 2024 counsel responded to the FENZ letter of 31 May 2024, advising that a dispute had been raised and the disciplinary process with Mr Strauss could not proceed until the dispute had been resolved.

[59] On 12 June 2024 in a letter to counsel FENZ restated its position in respect of Part 1, Clause 15 of the Collective Agreement, the alleged dispute in connection with that clause and the effect of the Peace Obligation; it then concluded it could proceed with the disciplinary process with Mr Strauss and it sought a response from Mr Strauss to the allegations.

[60] On 17 June 2024 counsel put FENZ on notice that if it continued with the disciplinary process with Mr Strauss, they would lodge a claim in the Authority based on the dispute and

they would seek an interim injunction restraining the disciplinary process pending determination of the claim.

[61] On 9 July 2024 FENZ set out its preliminary views in the disciplinary process with Mr Strauss. In short FENZ had concluded that Mr Strauss had “accessed money that belongs to members of the Wigram Blue Watch Mess, and includes contributions from [FENZ]” and had undertaken transactions that were not authorised; this amounted to serious misconduct and dismissal was the appropriate disciplinary outcome.

Mr Strauss and the Union lodge a statement of problem in the Authority

[62] On 19 July 2024 Mr Strauss and FENZ lodged a statement of problem in the Authority; this was based on a dispute over Part 1, Clause 15 of the Collective Agreement.

[63] In the statement of problem Mr Strauss and the Union seek:

- (a) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to assert authority over a private bank account set up by workers for the pooling of the portion of the Mess Allowance distributed to them by FENZ.
- (a) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to investigate the use of the proportion of the mess allowance distributed to workers in the absence of any dispute or non-agreement under clause 15 (1.15.1.1); and in the absence of any evidence that there is any deficit in the purchase of tea, coffee, sugar, milk and biscuits and/or the payment of all or part of the wages of a cook.
- (b) A determination that under Part 1, Clause 15 of the Collective Agreement FENZ is not entitled to an explanation of transactions in a private bank account set up by the workers for the pooling of the portion of the Mess Allowance distributed to them by FENZ when it has been advised by the workers contributing to that private account that:

- i. not all the monies in the account are from the portion of the Mess Allowance distributed to workers;
- ii. all the transactions have been made with consent; and
- iii. no worker contributing to that account has raised any enquiry or dispute with the other workers in respect of the purchase of tea, coffee, sugar, milk and biscuits and/or the payment of all or part of the wages of a cook.

[64] In response, FENZ's position is:

- (a) The Mess Allowance can only be used for the specific, stated, purpose.
- (b) If the Mess Allowance is not being used for the specific, stated, purpose then FENZ is entitled to investigate and take disciplinary action.
- (c) If there is a disagreement between firefighters regarding the use of Mess Allowance then FENZ can investigate and determine the dispute.
- (d) Part 1, Clause 15 of the Collective Agreement does not prevent FENZ from taking steps (b) and (c) above.

Is there a serious question to be tried?

[65] I must assess if there is a serious question to be tried in respect of the employment relationship problems between Mr Strauss and FENZ and the Union and FENZ.

[66] The threshold for a serious question is that the claim is not frivolous or vexatious. In deciding if the claim is not frivolous or vexatious I must make a judicial assessment of the evidence and the submissions advanced.⁶

[67] So, in this case I must make a judicial assessment of the evidence and submissions to determine if the employment relationship problems between Mr Strauss and FENZ and the Union and FENZ are not frivolous or vexatious.

⁶ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

The employment relationship problems – a dispute and a personal grievance

[68] The statement of problem in this matter identifies the employment relationship problem as being a dispute; the dispute is over the interpretation and application of Part 1, Clause 15 of the Collective Agreement.

[69] The dispute to be resolved is whether Part 1, Clause 15 allows FENZ to:

- (a) Assert authority over a private bank account used by firefighters to pool any Mess Allowance paid to a Watch.
- (b) Investigate the use of the Mess Allowance paid to a Watch in the absence of any dispute about the use of that Mess Allowance by members of the Watch.
- (c) Require a firefighter to explain transactions relating to pooled money in specified circumstances.

[70] Mr Strauss and the Union have not sought a permanent injunction preventing FENZ from continuing the disciplinary process with Mr Strauss; they seek determinations to the effect that FENZ cannot do the three things listed above. I do not believe a permanent injunction is necessary because I accept what is inherently Mr Strauss and the Union's position, is that if FENZ cannot do these things by virtue of Part 1, Clause 15 of the Collective Agreement then they cannot proceed with the disciplinary process with Mr Strauss.

[71] There remains a residual problem though. FENZ may assert that even if it cannot act as it has and intends to do by virtue of Part 1, Clause 15 of the Collective Agreement, it can act as it has and intends to do anyway because Part 1, Clause 15 does not prevent that.

[72] In this respect Mr Strauss's employment relationship problem set out in his personal grievance is relevant. The personal grievance is that FENZ is using unlawfully gained information in a disciplinary process with him. From my perspective "unlawful" turns on more than whether the access is authorised by the Collective Agreement.

[73] Whilst this personal grievance is not part of the employment relationship problems lodged in the Authority, I have jurisdiction to consider it any event.⁷

[74] This means the questions for the employment relationship problems are:

- (a) Was FENZ authorised to access the Account by Part 1, Clause 15 of the Collective Agreement (the dispute) or otherwise (the personal grievance)?
- (b) If FENZ was not authorised to access the Account then is the information it has obtained from the Account unlawfully and/or improperly obtained information (the personal grievance)?
- (c) If the information from the Account was unlawfully and/or improperly obtained can FENZ continue with the disciplinary process relating to Mr Strauss (the personal grievance)?
- (d) Is FENZ allowed to investigate use of the Mess Allowance under Part 1, Clause 15 of the Collective Agreement (the dispute)?
- (e) Is FENZ entitled to require a firefighter to explain transactions relating to pooled money in specified circumstances pursuant to Part 1, Clause 15 of the Collective Agreement (the dispute)?

Is the employment relationship problem relating to the dispute a serious question to be tried?

[75] Whether Part 1, Clause 15 of the Collective Agreement empowers FENZ to access the Account, investigate the use of Mess Allowance and question Mr Strauss about the use of Wigram Blue Watch pooled money are legitimate and credible questions turning on the interpretation and application of the Part 1, Clause 15 of the Collective Agreement.

[76] Considering Part 1, Clause 15 of the Collective Agreement and the evidence relating to it, the interpretation and application of it is arguable. Whether the interpretation and application of the clause then extends to allow the specific actions by FENZ follows from that is also arguable.

⁷ *FMV v TSB* [2021] NZSC 102; and Employment Relations Act 2000, s 160 (3).

[77] There is a dispute and it is not a frivolous or vexatious. Further I conclude that the interpretation and application that the Union supports is more than merely arguable; on the Affidavit evidence it is a strong case.

Is the employment relationship problem relating to the Mr Strauss's personal grievance a serious question to be tried?

[78] The question of whether FENZ could access the Account is one of the key issues in the employment relationship problems. And, as I have already stated the question of accessing the Account is resolved by interpreting and applying Part 1, Clause 15 of the Collective Agreement. However, if the outcome of the dispute restricts FENZ's ability to access the Account and FENZ believes it can act contrary to that outcome then it is important that the question of accessing the Account by some other justification is answered.

[79] The starting point for me is that the Account was a personal account in Mr Strauss's name. This means no one was entitled to access the Account without authorisation from Mr Strauss.⁸

[80] Despite this FENZ not only gained access to the Account, it was also able to get control of the Account so that it could review the transaction history and then block Mr Strauss from accessing it. And once it had control of the Account FENZ used information from the Account to inform its disciplinary process with Mr Strauss.

[81] The question is, were FENZ's actions in gaining access to the Account legitimate and lawful.

[82] FENZ's reasons for gaining access to the Account are varied:

- (a) In the first instance Mr Blogg only sought access to the pooled money in the Account via the activation of the eftpos card that had been issued to him. This was because members of the Wigram Blue Watch wanted to use some of the money in the Account to purchase food.

⁸ Evidenced by the credit union's refusal to allow access to Mr Blogg and the refusal to activate the new eftpos card, without authorisation from Mr Strauss.

- (b) Then ABT in his capacity as Manager (Senior Station Officer) of Wigram Blue Watch sought to have IEZ oversee the Account so that IEZ could get a replacement eftpos card and get access to previous statements so that Wigram Blue Watch could “get abreast of the Account and pay parties that are owed money”.
- (c) In the course of the FENZ investigation into the Account ABT advised the credit union that it was carrying out an investigation, including making reference to misappropriation of funds, and he obtained further information about the operation of the Account.

[83] FENZ has subsequently justified accessing information from the Account because:

- (a) This was information that belonged to the Wigram Blue Watch.
- (b) Any personal monies were mixed with the Mess Allowance, which FENZ has an interest in.
- (c) If the Mess Allowance is not being used for the purposes in Part 1, Clause 15 of the Collective Agreement then FENZ is entitled to investigate this.
- (d) Part 1, Clause 15 of the Collective Agreement does not prevent FENZ dealing with the allegations put to Mr Strauss about use of the Mess Allowance.

[84] From my perspective none of these explanations provide a compelling basis for gaining access to the Account. There is clearly, in my view, a serious question to be tried about whether FENZ could access the Account or authorise access by Wigram Blue Watch.

[85] It follows that if FENZ was not able to access the Account or authorise access for Wigram Blue Watch members then any information gained from the access could have been unlawfully and/or improperly obtained. There is also a serious question to be tried on this point.

[86] Finally, the last question, whether the disciplinary process can proceed if the information was unlawfully and/or improperly obtained is a serious question to be tried.

[87] There are significant concerns about the way in which FENZ accessed the Account, including ABT acting in a dual capacity as a FENZ manager and a Wigram Blue Watch member, FENZ potentially misrepresenting the status of the Account and FENZ asserting the ability to authorise who could oversee the Account.

[88] The serious question to be tried over FENZ accessing the Account and using the information presents as a strong case for Mr Strauss.

Conclusion

[89] There are serious questions to be tried for the employment relationship problems. Both Mr Strauss and the Union have strong cases in respect of these questions.

The balance of convenience

[90] The balance of convenience is about weighing relevant competing factors, as they apply in this employment relationship problem, to ascertain if they weigh in favour of exercising my discretion to grant the interim injunction or not.⁹

[91] In this case my assessment of the balance of convenience turns on four aspects:

- (a) The strengths of each party's case.
- (b) The conduct of the parties.
- (c) The effect of granting the interim injunction or not granting it, on other firefighters.
- (d) The impact on each party of making the interim order or not, including assessing the adequacy of remedies.

Mr Strauss and the Union have strong cases

⁹ *Team Group Realty Limited Trading as Harcourts Paremata v Martin Cardno & Ors* [2024] NZHC 553 at [66].

[92] I have concluded that Mr Strauss and the Union have strong cases in terms of the dispute and the personal grievance and, importantly, in terms of an outcome, that means FENZ cannot proceed with the disciplinary process.

[93] These conclusions support granting the interim injunction.

The conduct of the parties

[94] I have already expressed concern over the way in which FENZ gained access to the Account and the information it is using.

[95] I am also concerned that FENZ wishes to proceed despite a dispute under the Collective Agreement, which informs its ability to act as it has and as it wishes to do. Also, FENZ proceeding with the disciplinary process appears to be contrary to the Peace Obligation in the Collective Agreement.

[96] In contrast it is difficult to see how Mr Strauss's conduct can be detrimental to granting the interim injunction. Mr Strauss's evidence clearly shows he acted in relation to the underlying transactions as he believed he was entitled to do based on how the Account and the pooled money had been treated by the majority of Wigram Blue Watch members.

[97] The conduct of the parties supports granting the interim injunction.

The effect of granting the interim injunction or not granting it, on other firefighters

[98] The affidavit evidence does not show any that there would be any hardship to other Wigram Blue Watch members if the interim injunction is granted – they have access to pooled money, and there is no evidence to show they have been unable to buy biscuits or food for their shared dinners.

[99] Overall, there is no evidence to conclude that any firefighters would be adversely impacted by granting the interim injunction.

[100] In contrast it would seem that establishing FENZ's rights in relation to firefighters' pooled money and/or amounts of Mess Allowance paid to a Watch before an employee is dismissed would benefit all firefighters. This is particularly so where the evidence suggests

firefighters across the country use personal bank accounts to pool money, including any Mess Allowance, and operate those accounts in the way Mr Strauss and Wigram Blue Watch have done. The evidence shows for example that Wigram Green Watch used pooled money to contribute to purchasing a fridge for use at Wigram Station.

[101] This factor supports granting the interim injunction.

The impact on each party of making the interim order or not

[102] If I do not grant the interim injunction:

- (a) Then it seems most likely that FENZ will dismiss Mr Strauss. That will have an impact on him and his reputation. However, this is an impact that could be compensated by remedies if I subsequently decide FENZ could not act as it has.
- (b) This will have an impact on the Union and potentially its members as it could undermine the Collective Agreement or at least the members' ability to hold FENZ to account for the obligations contained in the Collective Agreement.
- (c) It will support FENZ having the autonomy to deal with disciplinary matters as it sees fit.

[103] In contrast if I do grant the interim injunction:

- (a) I will be effectively preserving the status quo, maintaining Mr Strauss's employment and protecting the Union's rights in the Collective Agreement, pending the resolution of the dispute and the question of whether FENZ had obtained information unlawfully and/or improperly; and arguably I will be enforcing the Peace Obligation in the Collective Agreement.
- (b) I will be restraining FENZ's rights in term of its ability to investigate and take action over disciplinary concerns. This is limited and applies to this quite specific and probably unique set of circumstances. And, it is strongly arguably

that any restraint of FENZ is restraining it from acting in breach of the Collective Agreement.

[104] If I grant the interim injunction and subsequently decide that FENZ can act as it wants to then there has only been a delay in FENZ being able to complete its disciplinary process with Mr Strauss. As Mr Strauss is still actively working as a senior firefighter there does not appear to be any significant detriment with a delay in the process – FENZ seems to accept that the allegations against Mr Strauss do not mean he cannot continue to act in his role pending the outcome of the disciplinary process.

[105] Weighing up the impact of granting the interim injunction or not granting it, supports granting the interim injunction.

Conclusion

[106] The balance of convenience supports granting the interim injunction.

The overall justice

[107] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.¹⁰

[108] In this matter there are some key factors that impact on the overall justice.

[109] First, FENZ is potentially acting contrary to the Collective Agreement. There is a dispute that should be resolved before further steps are taken by FENZ. Also, FENZ is potentially using information that was illegally or improperly obtained and this too should be resolved before FENZ proceeds.

[110] Second, it appears that Mr Strauss has been singled out because, ironically, it was his bank account that the portion of the Mess Allowance was paid into. The affidavit evidence does not show that other members of Wigram Blue Watch have been asked to account for their involvement in the underlying transactions.

¹⁰ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[111] Third, and what I consider to be a vitally important factor to address, is that what weighs heavily against granting the interim injunction is the desire for employers to be able to take disciplinary action without the Authority intervening.¹¹ I accept this principle. However, the key aspect of this matter is that this is not about an intervention in an employer's process based on whether it is acting justifiably; that is a question for an employer to make and can be remedied by the personal grievance process. This matter, and the employment relationship problems, are about whether FENZ can act as it has, and intends to, or not. The issues are not about whether FENZ is justified in acting but whether as a matter of interpretation and application of the Collective Agreement it can act as it has and as it intends to and/or if FENZ can do so as a matter of law.

[112] This primary difference is key and means this factor is not enough to persuade me not to grant the interim injunction.

[113] The overall justice of this matter supports granting the interim injunction.

Conclusion

[114] Mr Strauss and the Union have established that there are serious questions to be tried for their employment relationship problems and that the balance of convenience and overall justice support granting the interim injunction they seek.

[115] In reliance on the undertaking as to damages provided by the Union, FENZ must suspend the investigation into the transactions in the Account and the disciplinary process with Mr Strauss regarding his actions in relation to the Account pending determination of the dispute over Part 1, Clause 15 of the Collective Agreement and Mr Strauss's personal grievance for unjustified action causing disadvantage.

Costs

[116] Costs in relation to this application are reserved. If the parties cannot agree costs then they will be assessed following investigation and determination of the substantive claims.

¹¹ *Ports of Auckland Ltd v Carl Findlay* [2017] NZEmpC 45.

Next steps

[117] A case management conference will be convened to discuss arrangements for, and establish necessary directions, for an Investigation Meeting to deal with Mr Strauss and the Union's employment relationship problems.

Peter van Keulen
Member of the Employment Relations Authority