

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA396/2017  
[2018] NZCA 268**

BETWEEN                      CORRECTIONS ASSOCIATION OF  
NEW ZEALAND INCORPORATED  
Appellant

AND                              CHIEF EXECUTIVE OF THE  
DEPARTMENT OF CORRECTIONS  
Respondent

Hearing:                      10 May 2018 (further material received 24 May 2018)

Court:                              French, Cooper and Williams JJ

Counsel:                      J G Miles QC and J M Roberts for Appellant  
S W Hughes QC and K F Radich for Respondent

Judgment:                      24 July 2018 at 11 am

---

**JUDGMENT OF THE COURT**

---

**A        We answer the question of law submitted for determination by this Court:**

**Did the Employment Court err in holding that the respondent's removal of a work category from the collective agreement did not amount to a variation, itself requiring further agreement?**

**No.**

**B        The appeal is dismissed.**

**C        The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.**

---

## REASONS OF THE COURT

(Given by French J)

### Introduction

[1] In 2015, the Chief Executive of the Department of Corrections (Corrections)<sup>1</sup> embarked on a restructuring of staff positions in prisons under his management. The restructuring involved the disestablishment of positions known as senior case manager.

[2] At the time of the restructuring, Corrections and the Corrections Assoc of New Zealand Inc (the union) were parties to a collective employment agreement called “Department of Corrections Frontline Staff (Prison Based) Collective Agreement CANZ 2015–2017.”<sup>2</sup>

[3] The union contended that implementing the restructuring required an agreed variation to the collective agreement. Therefore, the change could not be unilaterally imposed and for Corrections to purport do so amounted to a breach of the collective agreement.

[4] This contention was upheld by the Employment Relations Authority.<sup>3</sup> However, on appeal to the Employment Court, Judge Smith held that Corrections was entitled to make the change without first securing the union’s agreement.<sup>4</sup>

---

<sup>1</sup> In this judgment we refer to both the Chief Executive and the Department as “Corrections”.

<sup>2</sup> The collective agreement commenced on 20 March 2015.

<sup>3</sup> *Corrections Assoc of New Zealand Inc v Chief Executive of the Department of Corrections* [2016] NZERA Wellington 56.

<sup>4</sup> *Chief Executive of the Department of Corrections v Corrections Assoc of New Zealand Inc* [2017] NZEmpC 78 [EmpC decision].

[5] Dissatisfied with that outcome, the union then sought and obtained leave to appeal to this Court on a question of law under s 214 of the Employment Relations Act 2000.<sup>5</sup> The question this Court approved for determination was:<sup>6</sup>

[W]hether the Employment Court erred in holding that the respondent's removal of a work category from the collective agreement did not amount to a variation itself requiring further agreement[?]

[6] As the leave decision makes clear, the question was based on the Employment Court's alleged omission to consider relevant provisions of the collective agreement.

### **Background**

[7] According to an agreed statement of facts filed in the Employment Court, the purpose of case management roles is to provide specialist end to end case management of prisoners with the aim of supporting them to take responsibility for completing activities aimed at addressing their rehabilitation and reintegration needs.

[8] Before the restructuring, there were two case management roles in the organisational structure: case manager and senior case manager. Each of these roles carried out the same primary function as described above, being to undertake front line and hands on case management work with prisoners. Both reported to the same position.<sup>7</sup>

[9] On 9 April 2015, Corrections issued a consultation document entitled "Lifting Productivity & Performance in New Zealand's Prisons". The document contained a set of structural change proposals which it said were aimed to achieve clearer accountability for results in New Zealand's prisons and to reduce current inefficiency in the delivery of prison services.

---

<sup>5</sup> *Corrections Assoc of New Zealand Inc v Chief Executive of the Department of Corrections* [2017] NZCA 477.

<sup>6</sup> At [5]. At the hearing before us, the Chief Executive of the Department of Corrections challenged the use of the words "work category" in the question, submitting it was an obsolete and irrelevant concept which does not appear in the collective agreement, the pleadings or in the decision under appeal. However, in our view nothing turns on that. The agreement does use the phrase "occupational classification".

<sup>7</sup> The team leader position to which both reported was called principal case manager. The roles of senior case manager, case manager and principal case manager were new positions created in an earlier restructuring in 2010.

[10] One of the proposals related to the structure of the case management roles. Corrections considered there did not need to be two separately titled positions carrying out the function of case management in prisons and therefore proposed that instead of having two separate positions, there would be only one such position, namely case manager.

[11] The document explained the proposal in the following terms:

... It is proposed that Senior Case Manager positions are replaced with Case Manager positions, so while the overall number of positions in case management would not be reduced, the structure will be less hierarchical. This would mean all senior case manager positions would be retitled case managers however all current incumbents would retain their current terms and conditions including access to the Senior Case Manger progression criteria.

[12] Following a consultation process, the proposal was confirmed without amendment and then implemented as from 1 July 2015.

[13] All staff who were employed as senior case managers as at 30 June 2015 retained their existing terms and conditions of employment including their duties and responsibilities and their salary scale. The only change was that they no longer had the word “senior” in their job title. In colloquial terms, they were “ring fenced” on an individual basis, with any new appointments being to the role of case manager. The change did not therefore result in any redundancies. Nor did it result in any change of reporting line for either the former senior case managers or the case managers.

[14] Union members employed as senior case managers and case managers were covered under the collective agreement by the combined effect of the coverage clause in the agreement and a schedule to the agreement.<sup>8</sup>

[15] Under the coverage clause, coverage is expressed to be primarily restricted to any position listed in annexed schs A1–A4. Schedules A1–A4 are described in the agreement as “schedules for occupational classifications”. Schedule A1.1 is headed “Corrections Officer and Related Positions”; sch A2 “Prisoner Employment and

---

<sup>8</sup> There were 127 staff in the case manager role, 53 of those being union members. Union members also accounted for 29 of the 71 staff employed as senior case manager.

Training Positions”; sch A3 “Support and General Positions”; and sch A4 “Rehabilitation and Reintegration Positions”.

[16] Each of the schedules records the rates of pay and other terms and conditions of employment that apply to union members who work in the specified occupational areas and whose positions are part of the organisational structure of one of a listed number of prisons. The prisons in question are listed in sch B1.

[17] For the purposes of this appeal, the critical schedule is sch A4 Rehabilitation and Reintegration Positions. That Schedule relevantly provides:

**A4.1 Salary Scales**

<b>Case Manager</b>	<b>1/3/15 (2%)</b>	<b>1/3/16 (2%)</b>
Level 4	\$64,785	\$66,081
Level 3	\$60,467	\$61,676
Level 2	\$56,148	\$57,271
Level 1	\$51,828	\$52,865

<b>Senior Case Manager</b>	<b>1/3/15 (2%)</b>	<b>1/3/16 (2%)</b>
Level 4	\$73,424	\$74,892
Level 3	\$69,646	\$71,039
Level 2	\$66,407	\$67,735
Level 1	\$62,627	\$63,880

**Note:** Level 4 Case Managers who are appointed to a Senior Case Manager position shall be appointed at Step 2 of the Senior Case Manager salary scale

	<b>1/3/15 (2%)</b>	<b>1/3/16 (2%)</b>
<b>Scheduler Coordinators/Schedulers</b>	\$64,944	\$66,243

<b>Programme Coordinator</b>	<b>1/3/15 (2%)</b>	<b>1/3/16 (2%)</b>
Advanced	\$51,589	\$52,621
Competent	\$48,143	\$49,106
Learner	\$42,984	\$43,844

<b>Pou Arataki</b>	<b>1/3/15 (2%)</b>	<b>1/3/16 (2%)</b>
Advanced	\$68,824	\$70,200
Competent	\$62,489	\$63,739
Learner	\$56,310	\$57,436

The current rates for Librarians and Tutors as at the coming into force of this agreement will increase by 2% from 1 March 2015 and 2% from 1 March 2016.

#### **A4.2 Progression for Case Managers**

Progression will be in accordance with the progression criteria in the Department's performance management system.

Employees attain the position of Senior Case Manager by appointment by the Department.

#### **A4.3 Higher Duties Allowance**

A Higher Duties Allowance is payable where an employee is required to undertake the duties and responsibilities of a higher level position for five consecutive working days or more. The employee shall be paid for such time at the applicable salary rate.

#### **A4.4 Additional Hours Rate**

The additional hours rate shall be time and a quarter.

[18] As will be seen, each of the two roles relevant to this case had a four step salary scale. It was proposed as part of the restructuring that an additional step would be added for the case manager role to reflect there being a higher competency level for the more experienced case managers. Corrections considered that this aspect of the restructuring did require a variation to the collective agreement. The union has never agreed to it and therefore it has not been implemented.<sup>9</sup>

[19] As noted by Judge Smith,<sup>10</sup> apart from sch A4, the collective agreement does not contain any other references to senior case manager or case manager.

<sup>9</sup> The proposed fifth step was not as high as the maximum previously available for a senior case manager.

<sup>10</sup> EmpC decision, above n 4, at [24].

## The reasoning of the Employment Court

[20] In holding that the disestablishment of the senior case manager role did not require a variation to the agreement,<sup>11</sup> Judge Smith relied primarily on two provisions in the collective agreement, namely cls 2.2.4 (the right to manage) and 10 (management of organisational change).

[21] Clause 2.2.4 confirms Corrections' right to manage, stating that:

The Department has the right to plan, manage, organise and finally decide on the operations and policies of [Corrections], subject to the provisions of this Agreement...

[22] Clause 10 is headed "Management of Change" and under a subheading "Organisational Change" states at cl 10.1.1 that the "process of change is continuous and forms part of [Corrections'] continuous improvement". Clause 10.1.2 provides:

Where organisational change is being considered that may result in positions no longer existing, consultation with [the union] shall take place in accordance with the Consultation provisions of this Agreement, prior to a decision being made.

[23] Clause 10.1.3 goes on to provide that if, as a result of organisational change, a staff member's position no longer exists, then certain options must be considered, namely reconfirmation, reassignment, retraining, job search, part time employment, temporary employment, special leave and, as the last resort, severance.

[24] Judge Smith considered that cls 10.1.2 and 10.1.3 clearly contemplated that Corrections was entitled to carry out organisational changes that might result in positions no longer existing. He also held that reconfirmation was effectively what the 2015 restructuring proposed and carried out.<sup>12</sup> The Judge went on to say it was difficult to see how read in this light, the natural and ordinary meaning attributed to the ability to carry out change was anything other than what Corrections was claiming.<sup>13</sup>

---

<sup>11</sup> Judge Smith also had to consider an argument that the coverage clause required a variation to be concluded. However, that argument was not advanced on appeal and is therefore not addressed.

<sup>12</sup> Reconfirmation is defined in the agreement as meaning placement in a position where the duties are the same (or very nearly the same) the salary is the same, the new position has terms of employment including career prospects which are no less favourable, and the location is the same.

<sup>13</sup> At [42]–[43].

[25] In the Judge’s view, there was nothing difficult, unusual or ambiguous about the language used in the collective agreement. The natural and ordinary meaning of cls 2.2.4, 10.1.2, 10.1.3 and sch A4.1 was that Corrections could reorganise to be more efficient by making changes to positions.<sup>14</sup>

[26] Judge Smith acknowledged the express restriction on the right to manage contained in the proviso to cl 2.2.4 “subject to the terms of this agreement” but held that having regard to cl 10 the only restriction limiting Corrections’ ability to implement this restructuring was an obligation to consult. Corrections had discharged that obligation. It had consulted and therefore there was no impediment in the collective agreement to the changes taking place.<sup>15</sup>

### **Arguments on appeal**

[27] On behalf of the union, Mr Miles QC submitted the Judge made a critical error in the decision and that was his failure to consider cl 2.2.5 of the collective agreement. Clause 2.2.5 provides:

[Corrections] recognises that employment conditions referred to within this agreement may only be changed by negotiation and agreement.

[28] In Mr Miles’ submission, the wholesale abolition of an entire occupational classification must by definition constitute a change in employment conditions. Whereas before there had been two separate schedules of promotion and pay structure, now there was only one. In particular, the restructuring had significantly altered the terms and conditions of the case managers. The scope of their work had changed because they were now required to undertake complex work previously allocated to senior case managers. It had also fundamentally changed the career prospects for case managers by removing the possibility of promotion to a senior case manager position.

[29] As for cl 10, Mr Miles contended that cl 10 could not override cl 2.2.5 of the collective agreement. Similarly the other clause relied on by the Judge — cl 2.2.4, the right to manage — could not override cl 2.2.5. Clause 2.2.5 was supreme and because

---

<sup>14</sup> At [41].

<sup>15</sup> At [45] and [47].

the restructuring changed employment conditions, the clause meant Corrections was required to obtain the agreement of the union first. Consultation was not sufficient.

### **Analysis**

[30] We acknowledge the Judge did not mention cl 2.2.5.

[31] However in our view, Mr Miles' argument overlooks that not every change to an employment condition triggers cl 2.2.5. As the wording of the clause makes clear, it is only triggered if the change is to employment conditions *referred to within the agreement*. Those italicised words are pivotal. If the change is to an employment condition that is not referred to in the collective agreement, then cl 2.2.5 has no application.

[32] The collective agreement says nothing about the work to be undertaken by the case managers. That is detailed in separate job descriptions which are not cross-referenced in any way in the collective agreement and form no part of it.

[33] The collective agreement does, through the means of sch A4, specify salary rates and elsewhere specifies hours of work. Those matters therefore plainly qualify as employment conditions referred to within the collective agreement but on the facts of this case these have not been changed. The one change Corrections did want to make to the salary scale has not been implemented due to lack of agreement.

[34] As for promotion, the agreed statement of facts before the Employment Court was that career progression between the two positions was not automatic. When a senior manager role became vacant, the role was advertised as a vacant position in accordance with the requirements of the State Sector Act 1988 and a selection and appointment process would occur. Significantly, the selection pool was not limited to incumbent case managers and there was no requirement they be given any preference.

[35] In those circumstances, at most for the case managers what has been lost is the opportunity to apply for a particular position. However, there was no contractual entitlement to be promoted to senior case manager which in our view is what would

be required before promotion opportunities could be considered an employment condition within the meaning of cl 2.2.5.

[36] In coming to this conclusion we have not overlooked A4.2 of the schedule which states that progression for case managers will be in accordance with the progression criteria in Corrections' performance management system. After the hearing, we asked the parties for further information about the performance management system. The information supplied shows the system relates to competency models, against which the competencies and performance of employees are reviewed. The competencies are not the same as the tasks and there is no suggestion the restructuring has changed the progression criteria. We are satisfied the system does not have any bearing on the issue before us.

[37] That then leaves the issue of whether the existence of a position is itself an employment condition referred to within the collective agreement. In our view that is not a tenable argument because the parties have already negotiated and agreed in cl 10 what is to happen when Corrections imposes changes that result in existing positions being abolished. There is therefore no conflict between cl 2.2.5 and cl 10.

[38] A further argument raised by Mr Miles about cl 10 was that correctly interpreted cl 10 was concerned with organisational change in an individual prison such as a downsizing at a facility requiring a reduction in the number of senior case managers employed at that facility, rather than the removal of an entire occupational area department wide. We do not accept that submission. There is no such site specific limitation in cl 10. As Judge Smith pointed out,<sup>16</sup> the restructuring at issue comes well within the ordinary and natural meaning of the words of cl 10.

[39] It follows we reject the submission that Judge Smith erred in failing to refer to cl 2.2.5. In our view, the Judge was correct in identifying this as a cl 2.2.4 (right to manage) case.

---

<sup>16</sup> At [41]–[43].

## **Outcome**

[40] We answer the question of law submitted for determination by this Court:

Did the Employment Court err in holding that the respondent's removal of a work category from the collective agreement did not amount to a variation, itself requiring further agreement?

No.

[41] The appeal is accordingly dismissed.

[42] As regards costs the parties agreed these should follow the event. We therefore order the appellant pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:  
Hesketh Henry, Auckland for Appellant  
Department of Corrections, Wellington for Respondent