IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 329/10
5131096

	BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC Applicant
	AND	WAITEMATA DISTRICT HEALTH BOARD First Respondent
	AND	AUCKLAND DISTRICT HEALTH BOARD Second Respondent
		COUNTIES MANUKAU DISTRICT HEALTH BOARD Third Respondent
Member of Authority:	R A Monaghan	
Representatives:	P Cranney, counsel for applicant A Russell, counsel for first respondent A Drake, counsel for second respondent A Enright, advocate for third respondent	
Investigation Meeting:	16 December 2008	
Submissions received:	21 July 2009 from Counties Manukau District Health Board 27 July 2009 from Auckland District Health Board 5 August 2009 from the applicant	
Determination:	21 July 2010	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The NZ Public Service Association Inc (the PSA) and the Waitemata District Health Board (WDHB) are parties to the 'Auckland Region Mental Health and Public Health Nursing Collective Employment Agreement' which expired in June 2007 (the cea)' and its predecessors. They dispute the meaning and application of certain

clauses regarding the scheduling of breaks between qualifying periods of work, and associated entitlements to payment at the overtime rate.

[2] The cea has multiple employer parties. Section 129(2) of the Employment Relations Act 2000 provides:

> "If the dispute [about the interpretation, application or operation of the agreement] relates to a collective agreement, the person or party pursuing the dispute must ensure that all union and employer parties to the agreement have notice of the existence of the dispute."

[3] The Auckland District Health Board (ADHB), Counties Manukau District Health Board (CMDHB) and 'HealthAlliance' were cited as 'the employer' in the cea. They had not received notice of the dispute prior to the commencement of the investigation meeting. They were subsequently given such notice, as well as copies of the material before the Authority, and have filed submissions.

The disputed provisions

[4] Clause 5.7 in the cea read:

> "(a) A break of at least nine (9) continuous hours must be provided wherever possible between any two qualifying periods of work. Except that if a ten (10) hour duty has been worked then a break of twelve (12) consecutive hours must be provided wherever possible.
>
> (b) The qualifying periods of work for the purposes of this clause are:
> (i) A duty, including any overtime worked either as an extension or as a separate duty; or
> (ii) Call-back where eight (8) hours or more are worked continuously."
>
> ...
>
> (d) If a break of at least nine (9) continuous hours - or twelve (12) - cannot be provided between qualifying periods of work, the period of work is to be regarded as continuous until a break of at least nine (9) continuous hours is taken and it shall be paid at the overtime rate.
>
> (e) Time spent off duty during ordinary hours of work solely to obtain a nine (9) - or twelve (12) - hour break shall be paid at the normal hourly rate of pay. Any absence after the ninth – or twelfth – continuous hour of such a break, if it occurs during the ordinary hours of work, shall be treated as a normal absence from duty."

The interpretation clause included the following:

> "3.3 DUTY
>
> 'Duty' means a single continuous period of work (including rest and meal breaks) required to be given by an Employee, excluding on-call and call-back. A duty shall be defined by a starting and finishing time."

[5] The PSA seeks a declaration that 'these provisions mean any employee who works for 10 hours is entitled to overtime during the next shift unless the employee has had a break of at least 12 hours between the two shifts; and that this payment continues until a break of at least 9 hours is provided'.

Background

[6] The dispute arose in respect of hours worked by nurses at the WDHB's Taharoto acute in-patient mental health unit (Taharoto). Nurses at Taharoto were rostered on what I describe as core shifts lasting 8 hours and 35 minutes excluding overtime, but they would start their shift earlier or finish later when necessary.

[7] Some examples of how this could affect hours of work, and rates of pay, at Taharoto include:

a. rostered shift hours: 8 hours 35 minutes
   hours actually worked: more than 10
   break from finish time to starting work again: less than 9 hours
   rate paid until required break taken: overtime

b. rostered shift hours: 8 hours 35 minutes
   hours actually worked: more than 10
   break from finish time to starting work again: 9 – 12 hours
   rate paid until required break taken: ordinary time

[8] There are many variations of the above examples, but the example at the heart of the dispute here is (b). From about 2000 to February 2006 nurses at Taharoto received overtime rates of pay until their next required break was taken, when they had worked more than 10 continuous hours without having had a break of at least 12

hours before starting work again. Thereafter when they claimed payment of overtime in respect of their 'no 12-hour break', no payment was made. The change occurred because of a view that Taharoto had been making the payment in error. It has led to this dispute.

History and development of the relevant provisions

[9] Predecessor documents in force in the late 1980s and early 1990s defined hours of work for nurses with reference to a 'duty' which lasted 8 hours and 35 minutes and could be rostered as a 'day duty', 'afternoon duty' or 'evening duty'. 'Duty' was defined for mental health nurses as 'a period of service required to be given by an employee during any one period of 24 hours.' Overtime was payable for work done in excess of these hours when such work was properly authorised.

[10] A break of at least 9 continuous hours was to be provided 'wherever possible' between any two periods of duty of a full shift or more. A 'shift' was defined as 'a period of duty rostered within the week'. A 'period of a full shift or more' was defined as a period of normal rostered work, a period of overtime continuous with a period of normal rostered work, or a full shift of overtime or call back duty. If a break of at least 9 continuous hours could not be provided between periods of qualifying duty, the duty was regarded as continuous until a break of at least 9 hours was taken and was in general paid at overtime rates.

[11] The 1993 – 1994 cea included the new provision that:

> "4.2.2 The ordinary hours of work for a single duty shall be up to a maximum of 10 hours."

[12] Overtime was payable when a duty exceeded 8 hours or the ordinary hours of work of a duty, whichever was greater.

[13] The provision for overtime when a break of at least 9 continuous hours could not be provided between 'qualifying periods of work' remained. A new definition of 'qualifying period of work' was substituted for the definition of 'full shift or more'. A 'qualifying period of work' was defined as a duty, including overtime worked

either as an extension or separate duty, or a call back where 8 hours or more were worked continuously.

[14] There was also a new definition of 'duty', namely:

> "a single continuous period of work required to be given by an employee, excluding on call and call back. Duty shall be defined by starting and finishing time."

[15] The definition of 'roster' in the interpretation clause had read: "a list of persons required to work 'shifts' over a period of time.' It was amended to read:

> "A list of employees and their duties over a period of time".

[16] The 1994 – 1996 cea between Waitemata Health and the PSA added to the minimum break requirement. I was told this was in response to the introduction in the preceding agreement of the ability to roster duties of up to 10 hours. The addition read:

> "4.6
> (a) … except that if a 10 hour duty has been worked, then a break of 12 consecutive hours must be provided whenever possible."

[17] It went on to provide that:

> "4.6
> (d) if a break of at least nine (or twelve) continuous hours cannot be provided between qualifying periods of work, the period of work is to be regarded as continuous until a break of at least nine continuous hours is taken and shall be paid at the overtime rate."

[18] The definition of 'qualifying period of work' did not change materially. The definition of 'duty' was added to in a manner not material here.

[19] Counsel advised that the wording was the same in the corresponding agreement covering employees of Auckland Healthcare Services Limited.

[20] A series of further succeeding collective agreements included single-employer agreements to which the PSA and the predecessor bodies to the WDHB were parties. The agreements retained materially similar provisions, which were in turn retained to a material extent in the multi-employer cea with which this dispute is concerned.

The competing interpretations

[21] The approach the PSA has taken to interpreting the clause centres on what is meant by 'a qualifying period or work' and focuses on the structure and content of clause 5.7. Accordingly it says clause 5.7(a) sets out the general rule that a break of at least 9 continuous hours must be provided wherever possible between any two qualifying periods of work. An exception to this general rule applies when longer hours – namely a '10 hour duty' – are worked.

[22] 'Qualifying period of work' is defined in clause 5.7(b)(i). That is, a 'qualifying period of work' is 'a duty, including any overtime worked'. The word 'duty' as it appears in the second sentence of clause 5.7(a) is a reference to a particular kind of qualifying period of work, and incorporates the meaning of that phrase as set out in clause 5.7(b)(i). Accordingly, the word 'duty' in the second sentence includes overtime. That means for example that, wherever possible, employees who work a core rostered duty of 8 hours 35 minutes plus overtime taking them to a total of 10 hours actually worked, must have a break of 12 consecutive hours before the next period of work.

[23] This interpretation is supported by the definition of 'duty' in clause 3.3 as being a single continuous period of work, and defined by a start time and a finish time. A 'single continuous period of work' can encompass a core rostered duty of 8 hours and 35 minutes augmented by overtime. The reference to start and finish time is plainly a reference to actual start and finish times.

[24] The PSA says further that clauses 5.7(d) and (e) are core clauses underpinning the structure. They refer to the distinct 9 and 12-hour breaks and reflect the two separate scenarios in clause 5.7(a), namely that there be a minimum 9-hour break between two qualifying periods of work unless the first qualifying period is 10 hours in which case a break of 12 hours must be given.

[25] The WDHB says the requirement for a break of 12 consecutive hours applies when an employee has worked a 10-hour duty excluding overtime, but not when an employee has worked for a period of 10 hours or more including overtime.

[26] Its reasoning is concerned principally with the meaning of 'duty'. It says that the definition of 'duty' at clause 3.3 does not include overtime if the overtime is not a period of work 'required to be given' by an employee. At Taharoto the core rostered shift time of 8 hours and 35 minutes was the period of work 'required to be given' by an employee. The definition of 'duty' expressly excludes on-call and call-back hours precisely because this is otherwise work that is required of an employee.

[27] The definition does not similarly exclude other additional hours worked beyond the core rostered hours. These hours are treated as overtime hours and paid for accordingly, and must be authorised under the cea. The notion that such additional hours must be authorised is not consistent with their also being 'required' of an employee.

[28] Finally, the WDHB says the reference in the definition of 'duty' to the 'defined starting and finishing time' is a reference to the start and finish time identified in the relevant roster - being the document identifying the work required to be given by an employee - not to the employee's actual start and finish time.

[29] The first sentence of clause 5.7(a) simply sets out the minimum break required between any qualifying periods of work, and ensures that the necessary minimum break occurs whether or not a core rostered duty is augmented by overtime. The next sentence identifies the exception which gives rise to a higher minimum break period, namely when a 10-hour rostered duty is worked exclusive of overtime. The drafting of s 5.7(d) and (e) is no more than a haphazard way of reflecting this.

[30] The WDHB interpretation relies in part on placing the clause in its historical context. In particular, the requirement in respect of a 12-hour break was introduced in the 1994 – 1996 cea in response to the introduction of the ability to roster ordinary hours of work for a single duty of up to 10 hours, being duties employees could be required to carry out. The need for a break of that length was associated with that duty.

[31] Prior to and since then, while employees could and did at times work for continuous periods of 10 hours or more, these periods incorporated rostered periods plus overtime. They were not the single duty of up to 10 hours permitted for the first time in the 1993 – 1994 cea.

Determination

[32] I begin with the second sentence in clause 5.7(a), and address the meaning of '10 hour duty'. I turn next to the definition of 'duty' in clause 3.3, which refers to a '… continuous period of work **required** (my emphasis) to be given by an employee'.

[33] Some employees who gave evidence considered that they were 'required' to continue to work if, for example, a crisis occurred with a patient at or about the time their rostered shift was scheduled to end, necessitating the working of overtime. However that kind of 'requirement' depends on the employee's professional reaction to unexpected events occurring on a particular occasion rather than to a directive of the employer's.

[34] I construe the word 'required' as used in the cea as a reference to a directive of the employer's. The directive usually takes the form of the hours of duty for which an employee is rostered. In turn the definition of a duty with reference to a starting time and a finishing time must mean the starting time and finishing time identified in the roster. If the reference means actual start and finish times, these times could only ever be determined retrospectively and the system of rostering periods of work with reference to employees' duties would be turned on its head. That duties such as on-call and call-back, which are duties required of employees, are excluded from the definition reinforces this construction.

[35] The word 'duty' also appears in clause 5.7(b)(i). If the use of the word 'including' means overtime is included in the definition of duty, either there is an inconsistency with the definition in clause 3.3 as I have construed it, or clause 5.7(b)(i) should be read as modifying the definition in clause 3.3.

[36] However the overtime to be included in a duty in terms of clause 5.7(b)(i) is not overtime without more, but rather overtime worked either as 'an extension' or as

'a separate duty'. To give the word 'extension' meaning, something must have been extended. That something must be a duty as there is nothing else in the provision to which the word extension can relate.

[37] Accordingly if a duty is extended by overtime, it cannot in itself be inclusive of the overtime. Similarly if a duty includes overtime worked as a 'separate' duty, it cannot itself be inclusive of the same overtime.

[38] In turn, the word 'duty' as it appears in the second sentence of clause 5.7(a) means a rostered duty exclusive of overtime.

[39] I find accordingly, and decline to make the declaration sought.

Costs

[40] Costs are reserved.

[41] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority