NOTE: An order for the payment of penalties appears at [102] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 277
5361439

	BETWEEN	JAYA KINGI, GRANT HUGHES, KARINA KAU KAU, HANNA AKURANGI, ROBYN BOYNTON,
	AND	JANETTE HUNT, BARBARA ALLISON, HANNELIE ALBERTYN, ANNE O'HALLORAN, DAYLE WILLIAMS Applicants
		BAY OF PLENTY DISTRICT HEALTH BOARD Respondent
Member of Authority:	R A Monaghan	
Representatives:	S Austin, advocate for applicants G Bingham, counsel for respondent	
Investigation Meeting:	23 and 24 April 2012 at Whakatane	
Determination:	14th August 2012	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jaya Kingi, Grant Hughes, Karina Kau Kau, Hanna Akurangi, Robyn Boynton, Janette Hunt, Barbara Allison, Hannelie Albertyn, Anne O'Halloran and Dayle Williams are employed by the Bay of Plenty District Health Board (BOPDHB). Hannelie Albertyn's claim has not proceeded. All of the remaining applicants work as telephonists on 8-hour evening and night shifts at Whakatane Hospital.

[2] They say that:

- they have not been provided with a meal or rest break in accordance with ss 69ZD and 69ZE of the Employment Relations Act 2000;

- they are owed payments at penalty rates under cl 2.7(c) of the Tairawhiti, Waikato, Lakes, Bay of Plenty District Health Boards Clerical, Administrative and Related Employees' Multi Employer Collective Agreement (1 July 2009 – 30 June 2012), (the meca) in respect of meal breaks not taken;
- notice requirements or a requirement for agreement under cls 2.2, 2.3 and 2.4(c) in the meca were breached when changes to a roster commencing on 19 December 2011 were posted on 9 December 2011;
- Anne O'Halloran, Barbara Allison, and Dayle Williams (the named applicants) should have been classified as permanent part time rather than casual employees, and are owed arrears of holiday pay and reinstatement of entitlements to annual leave;
- the BOPDHB should be ordered to pay a penalty in respect of breaches of the Employment Relations Act, the Holidays Act 2003 and the meca.

Issues

[3] The issues between the parties are:

(i) were the applicants entitled to the meal and rest breaks specified in s 69ZD and 69ZE of the Act, or did the BOPDHB comply with rest and meal break provisions in the meca so that those in s 69ZD and s 69ZE of the Act did not apply;

(ii) were the applicants entitled to payments under cl 2.7(c) of the meca, or did clause 2.7(b) apply in that the employees were unable to be relieved from work for a meal break;

(iii) was the roster change posted on 9 December posted in breach of the, -
- requirement under cl 2.2 of the meca that any changes to hours of work be agreed,
- notice provision in cl 2.3 of the meca, or
- notice provision in cl 2.4(c) of the meca;

(iv) were the named applicants correctly classified as casual employees;

(v) if the named applicants were not correctly classified as casual employees,

- are they entitled to be rostered for a minimum number of shifts on a regular basis,
- are they entitled to annual leave rather than pay as you go payments,
- must that entitlement now be granted, and
- can the pay as you go payments be recovered; and

(vi) what remedies, including penalties, are available to the applicants.

Were the meal and rest break provisions in the Act applicable or was there compliance with the meca which was sufficient

1. The entitlements in the Act

[4] Section 69ZD provides:

> *(1) An employee is entitled to, and the employer must provide, the employee with rest breaks and meal breaks in accordance with this Part.*
> *(2) …*
> *(3) …*
> *(4)If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to –*
> *(a) two 10 minute paid rest breaks; and*
> *(b) one 30-minute meal break.*
> *(5)…*

[5] Section 69ZE provides:

> *(1) Rest breaks and meal breaks are to be observed during an employee's work period -*
> *(a) at the times agreed between the employee and his or her employer; but*
> *(b) in the absence of such agreement, as specified in subsections (2) – (5)*
> *(2) …*
> *(3)…*
> *(4) Where s 69ZD(4) applies an employer must, so far as is reasonable and practicable, provide the employee with –*
> *(a) the meal break in the middle of the work period; and*
> *(b) a rest break halfway between –*
> *(i) the start of work and the meal break; and*
> *(ii) the meal break and the finish of work.*

[6] Section 69ZG provides:

> *(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
> *(2) An employment agreement that excludes, restricts or reduces an employee's entitlements under s 69ZD –*
> *(a) has no effect to the extent that it does so; but*
> *(b) is not an illegal contract …*

[7] These provisions came into force on 1 April 2009.

2. The entitlements in the meca

[8] I refer in this determination to shifts in that the work in question concerned telephony and messaging and was carried out over successive periods for 24 hours a day over 7 days a week. Otherwise neither party has pressed an argument that cl 2.5(d) - which provides for half-hour meal breaks for shift workers, or in the alternative for sufficient time for a meal to be taken without complete cessation of duties - is applicable. My approach to that matter is the one I now set out.

[9] Clause 2.5(b) defines shift work as:

> *Shift Workers*
>
> …
> *(b) For the purposes of this clause shift work shall mean all regular and continuing periods of rostered duties. An employee shall be deemed to be a shift worker if employed on five consecutive shifts, but the intervention of rostered days off shall be deemed to break the consecutiveness of such shifts.*

[10] There is also a definition of shift work in cl 1.4. It does not apply to the applicants because it identifies work done by two or more employees or groups of employees, while the present applicants worked singly. Clause 2.5(b) does not apply to the applicants either, with one exception. The rosters show that Mr Hughes regularly worked on five consecutive night shifts in a week so that his work was shift work for the purposes of cl 2.5. Otherwise my review of the rosters suggests no individual worked for five consecutive shifts on the evening or night shift.

[11] The meca makes general provision for meal and rest breaks in clause 2.7 as follows:

Meal Periods and Rest Breaks

> a. *Except when required for urgent or emergency work, and except as provided in (b) below no employee shall be required to work for more than five hours continuously without being allowed a meal break of not less than half an hour.*
> b. *An employee unable to be relieved from work for a meal break shall be allowed to have a meal on duty and this period shall be regarded as working time.*
> c. *Except where provided for in (b) an employee unable to take a meal after five hours' duty shall be paid as a penalty payment at time half rate (T0.5) in addition to normal salary from the expiry of five hours until the time when a meal can be taken.*
> d. *Rest breaks of 10 minutes each for morning tea, afternoon tea or supper, where these occur during duty, shall be allowed as time worked. During the meal break or rest breaks prescribed above free tea, coffee, boiling water, milk and sugar shall be supplied by the employer. Where it is impractical to supply tea, coffee, milk and sugar free of charge, an allowance of $1.31 per week in lieu shall be paid.*

[12] Clause 1.10 provides that the meca came into effect on 1 July 2009.

3. Was there compliance with the Act or with the meca

[13] The applicants say the employer complied with neither the Act nor the meca in that no rest and meal breaks were provided. The BOPDHB says it complied with both the Act and the meca in respect of both rest and meal breaks.

[14] In support the BOPDHB pointed first to the presence in the rosters of provision for another person to 'cover breaks' for the applicants from Monday to Friday. It says that in doing so it provided for a rostered meal break of 30 minutes.

[15] The person who covered the breaks did so on the basis that she would be available at the commencement of the evening shift on Mondays – Fridays, so in any event there was no coverage on night, weekend and holiday shifts.

[16] In addition there was a conflict in the evidence about whether the person provided sufficient cover for a 10-minute break or a 30-minute break. The applicants said the cover was sufficient only for a 10-minute break. The person providing cover was expected to provide it at the end of her own day's work, and she was not available for a full half hour. After the investigation meeting that person provided an

affidavit saying she provided 15-20 minutes' cover. Accordingly if the cover provision in the roster was intended to provide cover for a 30 minute meal break, the period of cover was not specified in the roster and I am not satisfied it was observed in practice.

[17] For these reasons I do not accept the BOPDHB's submission that staff on the evening shift received a paid meal break at the commencement of their shift on weekdays.

[18] The BOPDHB also said in support that the applicants could take rest and meal breaks at their workstations, which was permissible under the Act and the meca. The applicants say no other break was available to them, which was not permissible under the Act.

[19] The constraints on the applicants' ability to take any other break included the:

- unavailability on their shifts of other staff members trained in the use of the telephone system, and able to provide cover while a break was taken;
- unavailability on their shifts even of untrained staff members able to provide cover while a break was taken;
- unsuitability of the telephony areas for eating and drinking; and
- distance of the telephony areas from more suitable areas in which to have a meal or refreshment, particularly given the need for time to hear and respond to incoming calls when cover was not available.

[20] This meant the applicants were tied to their work station, and were forced into the unsatisfactory position of eating and drinking at the work station when they could.

[21] I agree with the submission for the applicants that this does not amount to a break. Even if, for example, there was no call on their services for an extended period of up to an hour, and during this time it was possible to eat a meal at the work station, the applicants would remain constantly on duty in the sense that they would need to be ready to respond to a call which could be made at any time. There would be nothing to relieve them of the obligation to take the call and no stoppage of work

amounting to a break from work. The meca itself acknowledged this when it referred at cl 2.7(b), to the inability to be 'relieved from work' 'for a break' and in clause 2.5(d) to allowing time for a meal to be taken 'without a complete cessation of duties'.

[22] Accordingly I find that the BOPDHB did not comply with the rest break provisions in s 69ZD(4) of the Act in that - aside from a rest break at the commencement of the weekday afternoon shift - it did not provide the breaks specified in the subsection.

[23] The BOPDHB's further argument that it complied with the meca is not a complete response to these findings. The provisions of the meca, whether complied with or not, can be of no effect in the circumstances set out in s 69ZG.

[24] For that reason I turn first to the application, if any, of s 69ZG.

[25] The meca provides for meal breaks in cl 2.7(a) by providing that, with exceptions, employees are not to be required to work for more than 5 hours continuously without being allowed a meal break of not less than half an hour. The exceptions concern the intervention of urgent or emergency work under that clause, and extend to the inability to relieve an employee from work under clause 2.7(b). The BOPDHB submitted without elaboration that the clause does not fall within s 69ZG(2) because it does not exclude, restrict or reduce the right to a meal break. The submission asserted that the clause merely acknowledged there would be instances where it was not possible for employees to leave their work area for a break and compensated them for this.

[26] The statutory entitlement is to one 30-minute meal break, to be observed during a work period. Even if for good reason from an operational perspective, clause 2.7 contains exceptions which exclude, restrict or limit the entitlement in that they purport to permit the BOPDHB to dispense with a meal break and replace it with an entitlement to have a meal while on duty. I do not accept that cl 2.7(b) and (c) in particular are concerned only with the timing of the break. They bear directly on whether a break - let alone one of 30 minutes - is provided at all.

[27] Neither party addressed whether s 69ZG operates to permit clauses containing limits such as those in cl 2.7 provided they are accompanied by a correspondingly enhanced benefit - so that the overall 'package' is an improvement in the employee's entitlements - or whether it permits only enhanced benefits and prevents any exclusion, restriction or reduction of the entitlements to rest and meal breaks. For my part I consider the latter to be correct.

[28] The BOPDHB pointed in a general way to the presence of 'compensation' but again did not elaborate. If it was referring to the availability of penalty payments under cl 2.7(c), the words 'unable to take a meal' in cl 2.7(c) may be wide enough to amount to an unacceptable contracting out of the entitlement to a break in return for the payment of the penalty payment. Further, if cl 2.7(b) applies - as the BOPDHB says it does here - then there is in any event no entitlement to a penalty payment. Accordingly the employee does not receive the benefit of a meal break of a kind described in s 69ZD, and does not receive any compensation.

[29] If the reference to 'compensation' was a reference to the fact that the meca permits meals to be eaten while on duty but also on pay - in contrast to the Act which permits an unpaid meal break - I do not accept that the continuation of payment in such circumstances amounts to an improvement on the benefits under the Act. Since no break is provided and the employee remains on duty, payment would be required in any event.

[30] Accordingly, even if the 'package' approach was correct, I would not accept that the applicants' entitlements were enhanced.

[31] In turn I find that the BOPDHB has not complied with the meca in that, other than at the commencement of the afternoon shift on weekdays, it did not provide rest breaks. If it complied with the meca in respect of meals, the provisions with which it purported to comply exclude, restrict or reduce entitlements under the Act. I find further that the BOPDHB has not complied with the Act in that it did not provide the breaks required under s 69ZD(4).

Are payments at penalty rates payable under cl 2.7(c) or does cl 2.7(b) apply

[32] The findings I have made above raise a question of the extent to which cl 2.7(b) and (c) can be applied.

[33] If I assume that both apply in full, then I resolve this issue principally on the facts and with reference to the applicants' argument that cl 2.7(c) applies.

[34] The provision allows for the payment of the penalty rate if an employee has been unable to take a *meal* after five hours' duty. It does not refer to any inability to take a *meal break*, and I find it does not apply to the inability to take a meal break.

[35] To make an order for payment I require sufficient information to satisfy me that no meal was taken in the five hour period. In that respect, the applicants said they would take food to work that was quick and easy to eat, but they did not consider that they had a meal. While I accept what they said about the need to bring food that was quick and easy to eat, the range of such foods now available means that fact alone would not mean they could not have a meal. The matter is so significantly affected by their own choice, and their own view of what amounts to a meal, that I do not accept such practices mean they were unable to take a meal after five hours' duty every time they worked.

[36] Some of the applicants also said that on occasion some years ago claims for payment at the penalty rate had been submitted and met, but that they were told subsequently there was a policy of not making the payments to the telephonists. As a result they stopped recording the absence of a meal and stopped submitting claims.

[37] The difficulty now is that there is no record of the dates on which any of the applicants were unable to take a meal for the purposes of cl 2.7(c). Since I do not accept that the applicants' choices in food that is quick and easy to eat should be reflected in a finding that no meal was taken at all, there remains no evidence on which I could find that there is an entitlement to payment under cl 2.7(c).

[38] Accordingly the claim is declined without the need to address whether cl 2.7(b) applies.

Changes to rostered hours of work

1. Relevant provisions in the meca

[39] Clause 2.3 reads:

> *Rosters*
>
> *Rostered duty means a schedule of duty times showing the days of the week and or shifts when an employee is to be on or off work respectively*
>
> *A roster for a minimum period of 21 days shall be posted at least 21 days in advance. Once posted rosters may only be varied following consultation with the staff affected or in the event of exceptional circumstance.*

[40] Clause 2.4 reads:

> *Variation of hours of work requirements*
>
> *(a) Emergencies*
> *The employer may require variations to hours of work requirements to meet the needs of emergencies*
>
> *(b) Occasional variations*
> *Occasional variations to the times of day and/or days of week to meet service requirements shall be by agreement between the employer and the directly affected employee(s)*
>
> *(c) Changes to hours of work requirements*
> *Except as provided for above, where the employer requires an employee to change their hours of work requirements to meet service needs, then a minimum of eight weeks prior notice of the change, including notification to the Union, shall be given for the purpose of reaching written agreement between the employee and employer. A shorter period of notice may be applied by agreement.*
>
> *Hours of work requirement, if not defined in their current terms of employment, means the regular routine or rostered hours normally worked by an employee on an on-going basis.*

2. Background

[41] In or about June 2010 the BOPDHB commenced a process of aligning rosters at Whakatane Hospital with those at Tauranga Hospital. In or about June 2011 it embarked on consultation with the telephonists on the matter. A draft roster template for Whakatane Hospital was circulated as part of the process. The draft identified a rotating pattern of day, evening and night shifts, with shift hours identified on the template provided at the investigation meeting as 0700-1530 for the day shift, 1500-2300 for the evening shift and 2300-0700 for the night shift (the existing start and finish times).

[42] The existing start and finish times were worked up to the period immediately prior to the period covered by the 9 December roster, pending determination or agreement on the final roster. I understand from the parties' correspondence at the time, and discussions during the investigation meeting, that the BOPDHB sought to align the hours of work at Whakatane Hospital – as well as the rotating pattern – with those at Tauranga. The overall aim was to achieve a more efficient operation by better integrating the hospitals' activities and services.

[43] A letter dated 20 October 2011 from Penny Sanderson, regional manger clinical support services, recorded a view of progress in the parties' discussions to that date, and attached a final roster which was to take effect on 19 December 2011. The roster identified the hours of work as 0645-1515 (day), 1515 – 2315 (evening) and 2315 – 0745 (night) (the new start and finish times).

[44] There was no suggestion that the change on its own would cause any reduction in the time available to be worked, or any loss in remuneration or other benefits. One reason why the parties' discussions did not lead to agreement was that they encompassed the parties' dispute about the entitlement to rest and meal breaks, and the dispute about whether the named employees were correctly classified as casual employees. Otherwise most of the applicants would suffer minimal inconvenience as a result of the change, although I accept the inconvenience was more significant for one of them in particular.

[45] Mr Austin responded to the 20 October letter in a letter dated 25 November 2011, in which he drew attention to the requirement that any change be agreed. He sent a counterproposal which was rejected by letter dated 6 December.

[46] A further roster dated 23 November 2011 was issued, although it is not clear when it was circulated. The start and finish times were corrected to return to the existing start and finish times.

[47] By emailed message dated 9 December 2011 the applicants' manager Kevin Marden circulated a draft roster for the week starting 19 December 2011 and continuing to the week starting 23 January 2011. The start and finish times were the new start and finish times. Mr Marden said in evidence that the new start and finish times were included in error. He said he should not have used them in the roster he circulated, and that he knew what the hours should have been but did not pay attention to what he was doing.

[48] By a message sent later on 9 December, Mr Austin raised a concern about the apparent changes to the hours of work. In a response on 13 December 2011 Sherida Cooper, a business leader, advised that rosters containing the new start and finish times would commence on 9 January 2012, while the existing start and finish times would continue until then. Replacement rosters would be circulated to reflect this.

[49] Mr Marden duly circulated the replacement rosters on 13 December 2011. The first covered the period 19 December 2011 – 8 January 2012; while the second covered the period 8 January – 19 February 2012. As foreshadowed the start and finish times identified in the roster for December-January were the existing start and finish times. The roster for January-February identified the new start and finish times.

[50] Mr Marden circulated one more roster on 20 December 2011. It covered the period January-February and retained the new start and finish times. It was issued because staffing changes were necessary after Mrs Kingi experienced a car accident and was seriously injured. The extent of her injuries, and the implications, were only slowly becoming known.

3. Determination

[51] The statement of problem referred to the 9 December roster, and alleged the circulation of that roster was a breach of cl 2.3 in that it did not provide 21 days' advance notice of the 19 December commencement date. That concern was not pursued with any vigour. Since Mr Austin has also acted as Mr Marden's representative in a personal grievance there is a difficulty if at the same time he seeks to hold the BOPDHB responsible for Mr Marden's errors in respect of that roster. In any event I regard the matter as part of the background to the wider issues to which I now turn, and decline to find the 9 December roster was circulated in breach of cl 2.3.

[52] The wider issues concern the attempt to change the shift start and finish times from the existing to the new times, and arise in respect of cl 2.4 in particular. The applicants say:

- their employer was requiring them to change their hours of work requirements to meet service needs;
- they were entitled to 8 weeks' notice of that change;
- the change could not be implemented unless agreement was reached; and
- agreement was not reached.

[53] BOPDHB says:

- it was not requiring the employees to change their hours of work requirements;
- 8 weeks' notice of the change being implemented was provided nevertheless; and
- the change could be implemented without agreement.

[54] The first question arising concerns the meaning of 'hours of work requirement' as it appears in the last paragraph of cl 2.4. According to the paragraph 'hours of work requirement', if not defined in the employees' current terms of employment, means the regular routine or rostered hours normally worked by an employee on an ongoing basis.

[55] The BOPDHB submitted that the hours of work were defined in the applicants' letters of appointment, and those were the relevant hours for the purposes of cl 2.4.

[56] The contents of the letters of appointment for the applicants who were permanent employees differed for each employee, although in general they recorded that the work was shift work and gave an indication of the number of hours or shifts to be worked over a specified number of weeks. None mentioned shift start and finish times. The BOPDHB says that, because the applicable definition is the one set out in the letters of appointment and these times are not included in the definition, nor do the start and finish times amount to an 'hours of work requirement' for the purposes of cl 2.4.

[57] The submissions for the applicants relied on the phrase '*regular routine or rostered hours normally worked by an employee on an ongoing basis'*, and said this included the start and finish times. The submissions did not comment on the phrase '*if not defined in their current terms of employment'*. But for the inclusion of that phrase I could accept that a change from the existing start and finish times to the new start and finish times would be a change in the regular routine or rostered hours normally worked by an employee on an ongoing basis, and would amount to a change of 'hours of work requirements' under cl 2.4(c).

[58] The phrase cannot be ignored. As framed the applicants' submission has force only if the phrase does not apply. To the extent that there is reference in the applicants' letters of appointment to an hours of work requirement then such a definition is part of the applicants' current terms of employment.

[59] However the phrase '*current terms of employment'* has a wide meaning, and extends beyond the contents of the applicants' letters of appointment. It includes the contents of the meca, and to other obligations or entitlements known to the parties and expected of each other. By virtue of the period of time over which they had been applied, and the mutual understandings and expectations of the parties regarding the matter, I find the shift start and finish times were current terms of the applicants' employment.

[60] For that reason I conclude that a change in the employees' hours of work requirements was being required, and cl 2.4(c) applied.

[61] The second question arising is whether agreement to any change in start and finish times must be reached before the change can be implemented, and in particular the meaning of '*... notice of the change ... shall be given for the purpose of reaching written agreement between the employee and employer'* as it appears in cl 2.4(c).

[62] The applicants say the mere giving of 8 weeks' notice is not enough to permit implementation of the change at the end of the notice period – agreement must also be reached. The BOPDHB did not address this issue. I accept that, on the wording of the clause, merely meeting the notice requirement does not authorise the implementation of the change in question in the absence of agreement. Since the purpose of the notice is to allow time for agreement to be reached, I find that agreement is also a requirement before a change is implemented.

Were the named employees correctly classified as casual employees

1. Relevant provisions in the meca

[63] The meca defines 'casual employee' at cl 1.4 as

> *An employee who has no set hours or days of work and who is asked to work as and when required*

[64] The DHB's 'Staff Management Protocol' on casual employees provides:

> *Standards to be met*
>
> 1. *Casual employees will only be engaged for short periods to cover illness, annual leave and to deal with short term requirements for extra staff, eg higher than expected patient level for a week.*
> 2. *...*
> 3. *...*
> 4. *...*
>
> *4.1 Casual employees are entitled to sick leave annual leave and bereavement leave under the Holidays Act 2003.*

> *(a) … to be entitled to sick leave employees must have been pre-rostered to work on the day that they call in sick*
> *(b) All casual employees employed are paid 8% holiday pay for each engagement.*

[65] The named employees' letters of appointment specified that the positions were casual, and provided that hours of work would be as requested by the employer. Letters sent to Anne O'Halloran and Dayle Williams specified that these employees were to provide cover when permanent staff members took annual leave and sick leave, as well as meet other unplanned cover requirements.

2. Background

[66] Mr Marden prepared the rosters. From about August 2011 his approach was to pencil in the names of permanent members of the staff as appropriate, then circulate the incomplete roster to the casual employees and invite them to place their name in any gap they wished to fill. Prior to August he would pencil in the names first of permanent, then of the casual employees based on his understanding of their availability and preferences. He took the view that it was open to the casual employees to decline a shift if they wished.

[67] There was no evidence any shifts were declined in these circumstances, although all of the applicants agreed in a general way that they would swap shifts if they needed to. Indeed the swapping of shifts was not uncommon.

[68] Mr Marden also observed that it was rare for there to be no need to call on a casual employee to assist. For its part the BOPDHB analysed the rosters to show that on the majority of occasions on which the casual employees were rostered, the employees were covering for a permanent employee who was sick or on leave.

(a) Anne O' Halloran

[69] Anne O Halloran commenced employment as a casual telephonist in December 2009. She also holds a permanent part time position at the BOPDHB.

[70] Mrs O'Halloran says that in practice her telephonist's position is not that of a true casual, rather that of a permanent part timer. She pointed in support to:

- a compilation of the numbers of shifts she worked per week throughout her period of employment, which she said established that she worked a pattern of 3 shifts per week;
- Mr Marden's practice until August 2011, under which she would routinely be rostered for work, and
- the ability to accrue annual leave and days off in lieu when work was done on a statutory holiday, and the making of penalty payments for work done on statutory holidays.

[71] The compilation of Mrs O'Halloran's shifts showed that aside from a period in July 2011, and another in December 2011-January 2012, Mrs O'Halloran worked every week from the commencement of her employment. For 34% of the time she worked on 3 shifts in a week, for 28% of the time she worked on 2 shifts in a week, for 17% of the time she worked on 4 shifts in a week, and for the remainder she worked on either 1 or 5 shifts in a week. At the same time she did not have a pattern of working a particular number of shifts per week.

[72] Until about April 2011 Mrs O'Halloran received an 8% loading on her hourly rate of pay, which was recorded on her payslip as '*casual hol 8%*'. The evidence of the BOPDHB was that the 8% loading on the hourly rate of pay ceased because of administrative difficulties associated with the payment. From the cessation, casual employees' annual leave entitlements were accrued.

[73] Mrs O'Halloran also said she was given time off in lieu when she had worked a public holiday, and she was paid at penalty rates for the work done.

[74] A brief affidavit from the general manager human resources was lodged after the investigation meeting. It asserted that Mrs O'Halloran's entitlements were available as part of a practice applied to all employees at the BOPDHB and '*is*

considered over and above the statutory requirement as per s 56[1] of the Holidays Act'. Unfortunately while that may describe the employer's practice, and may amount to the general manager's view that employees considered to be casual were being given a benefit greater than required, in the absence of any other supporting analysis or argument it does not advance matters here and is not determinative.

(b) Barbara Allison

[75] Barbara Allison commenced employment as a casual telephonist in July 2008. From November 2008 she has also held another permanent part time position with the BOPDHB.

[76] My review of the rosters shows that Mrs Allison, too, did not have a pattern of working a particular number of shifts per week. Although on most weeks in 2008 she worked on 1 shift in a week, in 2009 she worked between 1 and 3 shifts in a week often relieving for Mr Hughes who worked permanently on the night shift. In 2010 there was a large number of weeks when no shifts were worked – and an extended gap between June and August. For the rest of the year the numbers of shifts worked per week was again between 1 and 3. There was a substantial overall drop in the number of shifts worked per week in 2011, with no shifts being worked at all for more than a third of the time, and 1 or 2 shifts being worked otherwise.

[77] The treatment of Mrs Allison's 8% loading and other leave entitlements was the same as Mrs O'Halloran's.

(c) Dayle Williams

[78] Dayle Williams commenced employment as a casual telephonist on 27 June 2011.

[79] My review of the rosters shows that, aside from a period in January 2012, Mrs Williams worked every week from the commencement of her employment. For 32% of the time she worked 2 shifts in a week, for 16% of the time she worked 3 shifts in a

[1] This section provides for alternative holidays when work is done on a public holiday.

week, for 22% of the time she worked 4 shifts in a week, and for 19% of the time she worked 5 shifts in a week. Mrs Williams was the person who took over most of Mrs Kingi's shifts after Mrs Kingi's accident.

[80] Apart from an early and brief period, Mrs Williams was offered shifts in accordance with Mr Marden's revised practice. Mrs Williams did not receive the 8% loading on her rate of pay, rather her leave entitlements accrued.

3. Determination

[81] A useful checklist for whether an employment relationship is casual is found in *Lee v Minor Developments Limited t/as Before 6 Childcare Centre.*[2] Factors pointing to the existence of a casual employment relationship include:

- Engagement for short periods of time for specific purposes;
- A lack of regular work pattern or expectation of ongoing employment;
- Employment is dependant on the availability of work demands;
- No guarantee of work from one week to the next;
- Employment as and when needed;
- Lack of an obligation on the employer to offer employment or on the employee to accept any other engagement; and
- Engagement only for the specific term of each period of employment.

[82] The Employment Court has also discussed the nature of casual employment in considerable detail in *Jinkinson v Oceana Gold (NZ) Limited*[3]. In doing so the court noted that an agreement which defines a relationship as casual may change over time[4] so that an implied variation to the definition may be the result. I have considered whether that occurred here.

[83] Overall the court found:

[2] EmpC Auckland, AC 52/08, 23 December 2008.
[3] *[2009] ERNZ 225*
[4] At [42]

> *[41] The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but, if there are truly no obligations to provide and perform work, they are unlikely to suffice.*

(a) Anne O'Halloran

[84] I give weight to the frequency with which Mrs O'Halloran worked, and the very high proportion of occasions on which she worked from 2 – 4 shifts per week. In the period to August 2011 in particular her engagements were so continuous, and the rostering practice was such, as to indicate the BOPDHB had accepted an obligation to provide her with work. In return Mrs O'Halloran had an obligation to accept the work for which she was rostered, which she observed.

[85] I also give weight to the routine rostering of Mrs O'Halloran in accordance with her known preferences, rather than first completing the roster using permanent employees then calling on casual employees as necessary in order to fill any gaps. That Mr Marden changed his practice after August 2011 does not affect this conclusion. In practice a significant number of gaps remained available to be filled every week.

[86] Finally I give weight to the approach taken to annual leave and holiday entitlements. A true casual employee would not accrue entitlements to time off in lieu when work was done on a public holiday. The concept that casual employment is performed on an irregular, unpredictable or 'as and when required' basis is not consistent with the concept that time off in lieu must be granted if the employee works on a public holiday when the day would otherwise be a working day for the employee.[5] The same applies to the payment of penalty rates for work done on public holidays.

[87] I do not accept the explanation that the arrangement was entered into as a matter of administrative convenience assists the BOPDHB. Its actions in respect of the employees here mean that what already looked like permanent employment acquired even more of the characteristics of a permanent arrangement.

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[5] Ref: Holidays Act 2003 s 48

[88] For these reasons I find that, although the relationship was described as casual in the letter of appointment, in practice mutual ongoing obligations developed to the extent that I conclude the nature of the relationship changed and Mrs O'Halloran was not correctly classified as a casual employee.

[89] I do not go further and find that there was a pattern under which Mrs O'Halloran worked for 3 shifts per week. In making the findings I have, I was also mindful that there was substantial variation in the actual number of shifts worked from week to week and there was no discernable pattern of working any particular number of shifts per week.

(ii) Barbara Allison

[90] My analysis of the rosters provided by the BOPDHB differs from Mrs Allison's own analysis. An explanation suggested at the investigation meeting was that the BOPDHB analysis is based on a record of rosters actually worked, while Mrs Allison's is based on a record of rosters scheduled. The differences do not affect my conclusions, so I have not made further attempts to account for the differences.

[91] I also take into account that Mr Marden's rostering practices applied to Mrs Allison, and that Mrs Allison's entitlements under the Holidays Act were treated in the same way as Mrs O'Halloran's. Those practices support a conclusion that the true nature of the employment was permanent.

[92] I have measured those practices against the extent of the unpredictability and irregularity indicated by the analysis of Mrs Allison's shifts worked. I find on balance that the casual nature of her employment did not change, there were no mutual ongoing obligations between the parties and she was a casual employee.

(iii) Dayle Williams

[93] The analysis of Dayle Williams' rosters shows a sustained period of ongoing work. Her engagements were so continuous as to indicate that, together with the accrual of leave entitlements, the BOPDHB had accepted an obligation to provide her

with work, despite originally defining her employment as casual. In return Mrs Williams had an obligation to accept the work for which she was rostered, which she observed.

[94] I have taken into account that Mr Marden's changed rostering practice applied to Mrs Williams. She could choose the gaps she wished to fill rather than having a gap allocated to her. This was not sufficient to outweigh the factors pointing away from casual employment, and I find Mrs Williams was a permanent employee.

Remedies

[95] The following addresses orders I was asked to make. In that submissions on remedies also requested particular findings, I have made such findings as I consider necessary or appropriate in respect of those matters in the body of this determination.

1. Rest and meal breaks

(i) Orders for compliance

[96] In effect, orders were sought for compliance with s 69ZD to s 69ZG of the Act by requiring the BOPDHB to provide and to roster rest and meal breaks in accordance with those provisions.

[97] I do not go as far as to make those orders, particularly in the absence of full argument as to their scope and implications, the relationship between the requirements of the Act and the terms of the meca, and the possibility that the matter will be addressed in any event when the meca is renegotiated as it is due to be. Otherwise I have made findings about the Act and the meca which the parties should address as they consider appropriate.

(ii) Penalties

[98] I have found that the BOPDHB has breached s 69ZD of the Act. Penalties for a breach of s 69ZD and ZE are available under s 69ZF.

[99] I accept further that inadequate efforts were made to address the applicants' rights to rest and meal breaks. An order for the payment of a penalty is appropriate.

[100] I consider the breach was serious, but it was not egregious in the sense that the BOPDHB believed it was acting as it was entitled to in accordance with the meca. For the reasons I have indicated, the meca itself may be deficient in the way it addressed employers' obligations to provide rest and meal breaks. Accordingly more than a modest order is required but the order should be tempered by the fact that, at relevant times, the extent of the obligations was untested.

[101] Penalties were sought on the basis that a separate breach has occurred in respect of each applicant, but otherwise that the failures to provide the required rest and meal breaks to each applicant be treated as a single breach. In the circumstances I consider that appropriate.

[102] The BOPDHB is ordered to pay a penalty of $3,000 in respect of each applicant.

[103] I further order under s 136(2) that the payments be made to the applicants.

(iii) orders for payments owed under the meca

[104] I have declined to make orders for payment under cl 2.7(c).

2. Rosters

(i) Compliance order

[105] I referred at [51] of this determination to an apparent change in emphasis in respect of the dispute about rosters. Since I consider the true nature of the employment relationship problem was a dispute about the interpretation of cl 2.4 about whether changing start and finish times was a change to 'hours of work requirements', and about whether agreement was required before any such change was implemented, I have determined that matter.

[106] As I have made findings about the meaning of the meca which the parties should address as they consider appropriate, there is no need for any order in the nature of an order for compliance.

(ii) Other remedy

[107] What remained in submissions was a request for a finding that an instruction issued in January 2012, that the applicants observe the roster then to commence in January 2012, was an unlawful instruction. As at the date of the investigation meeting that matter appeared to have been included as part of the background, was not itself the subject of any cause of action and had not been put to me for any determination. Such findings as are appropriate in respect of it are subsumed in my findings on the meaning of cl 2.4.

3. Casual employees

(i) Hours of work

[108] I was asked to find that, on the basis of the regularity of their work patterns, Mrs O'Halloran, Mrs Allison and Mrs Williams are entitled to be rostered for not less than three, one, and two shifts per week respectively.

[109] Although I have found sufficient to characterise two of these employees as permanent part time employees, the evidence does not support a finding that it was a term of the employment of any of these three employees that they be rostered for the cited numbers of shifts per week, whether they were casual employees or permanent employees. I do not accept that their respective work patterns were such that any express or implied term to that effect can be identified. I do not accept there is a custom and practice to that effect.

[110] The Employment Relations Authority has no power to create a term of employment that the parties have not made expressly or by implication, or have not observed as a matter of custom and practice.

[111] For these reasons I decline to make the orders sought.

(ii) Holidays and leave

[112] I was asked to order that,

- the named applicants be permitted four weeks' annual leave under the Holidays Act, and
- the BOPDHB is not entitled to reclaim the 8% loading in their pay.

[113] The first of the orders sought relies on s 28(4) of the Holidays Act.

[114] Section 28 provides in part:

> *(1) Despite s 27, an employer may regularly pay annual holiday pay with the employee's pay if –*
> *a. the employee –*
> *(i) [is a fixed term employee]; or*
> *(ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16; and*
> *b. the employee agrees in his or her employment agreement; and*
> *c. the annual holiday pay is paid as an identifiable component of the employees' pay; and*
> *d. the annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.*
>
> *…*
>
> *(4) If an employer has incorrectly paid holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then despite those payments, the employee becomes entitled to annual holidays in accordance with s 16 and paid in accordance with this subpart.*

[115] In submissions the BOPDHB asserted that s 28(4) does not apply because s 28(1) does apply.

[116] Section 28(1)(a)(ii) is usually understood to apply to casual employees. Ironically, particularly to the extent the provision may also be capable of applying to permanent employees, the BOPDHB said it decided to change from the 8% loading - or the pay as you go arrangement - to a system of accruing entitlements to leave

because of the impracticability of administering the pay as you go arrangement. Accordingly the BOPDHB cannot say that it was impracticable to provide the employees with annual leave under s 16.

[117] For that reason I find s 28(1)(a)(ii) does not apply. Further, the use of the word 'and' at the end of each paragraph in that subsection means each paragraph must be met in order for s 28(1) itself to apply. Because not each paragraph has been met, I find that s 28(1) does not apply. Section 28(4) applies to those employees whose employment has continued for 12 months or more.

[118] The BOPDHB asserted in the alternative that there was compliance with s 27(1). Section 27(1) provides:

> *An employer must pay an employee for an annual holiday before the holiday is taken unless –*
> *(a)[agreement to payment during period when holiday is taken]; or*
> *(b)[payment on termination]*

[119] It was asserted that the 8% loading amounted to a payment made before a holiday was taken. If that were the correct meaning of subsection (1) it would permit any employer to make pay as you go payments to any employee. That is not consistent with the scheme of the Act and cannot have been the intention of Parliament.

[120] I find further that the presence in s 28(4) of the word 'despite' suggests that, without s 28, pay as you go payments would not be acceptable under s 27. Accordingly, if they are to be made, pay as you go payments must be made in accordance with s 28. The mere making of them does not satisfy s 27.

[121] These are my findings on the matter of the applicants' entitlement to annual leave. Unless or until there is a difficulty with the implementation of those findings I do not consider it necessary to make any further order in that respect.

[122] Nor do I consider it necessary or appropriate to make the second of the orders sought, or any declaration to similar effect. Should the BOPDHB seek to reclaim an amount in respect of the loading it will need either to resolve the matter with the

employees concerned, or make an appropriate application which can then be heard and determined. Should it consider making such an application it will need to address matters of a kind discussed in the determination of the Authority in *David O'Neill Contracting Limited v Labour Inspector (Jon Henning)*[6]. In that determination the Authority found it was inconsistent with the Holidays Act to treat as an overpayment a payment of holiday pay made together with regular pay but in breach of the Act, and to seek to deduct the overpayment on the termination of employment.

(iii) Order for payment to Anne O'Halloran

[123] I was asked to order that Mrs O'Halloran be paid lost earnings equivalent to 25 shifts at her ordinary rate of pay. The figure of 25 shifts was suggested to reflect the uncertainties inherent in her original figure of 75 shifts, and which was based on an entitlement to 3 shifts per week.

[124] For the reasons identified in the body of this determination, I do not accept there was any term of employment that Mrs O'Halloran be employed on three shifts per week, or any other number of shifts per week, and there will be no order for payment.

Summary of orders

[125] The BOPDHB is ordered to pay a penalty of $3,000 to each of the applicants in respect of breaches of s 69ZD of the Act.

Costs

[126] Costs are reserved.

[127] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination

[6] ERA Christchurch CA41/08, 16 April 2008

in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority