IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2014] NZERA Christchurch 114
5430872

BETWEEN	NATIONAL UNION OF PUBLIC EMPLOYEES INCORPORATED Applicant
A N D	CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Andrew McKenzie, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	30 January and 11 July 2014 at Christchurch
Submissions Received:	11 July 2014 from Applicant 11 July 2014 from Respondent
Date of Determination:	4 August 2014

DETERMINATION OF THE AUTHORITY

A. The respondent has not breached the terms of the applicable collective agreement in respect of the closing dates it has set in 2012 and 2013 for the Community Dental Service.

B. Costs are reserved.

Employment relationship problem

[1] The applicant (NUPE) is seeking a determination into the proper interpretation, application and operation of the collective agreement between the parties as it relates to the setting of annual closing dates for the Community Dental

Service. It is the contention of NUPE in its statement of problem that dental therapists and dental assistants should not be required to work more than a total of 40 weeks (or, put another way, 200 days) in a calendar year without receiving additional remuneration for doing so.

[2] During the second day of the investigation meeting, the applicant argued their case differently, saying that the number of days worked by dental therapists and dental assistants in a year must not exceed the number of days that the Ministry of Education states primary schools should be open for in that year (expressed in half days), plus three training days expressly provided for in the applicable Allied Health and Technical and Mental Health Nursing Collective Employment Agreement (the collective agreement). The applicant says that the dental staff members have been required to work beyond those limits in 2012 and 2013 without additional pay.

[3] The respondent (CDHB) argues that the terms of the collective agreement between the parties do not restrict the weeks when the dental therapists and dental assistants are required to work to a maximum number of weeks, and that the only limit in the number of days is set by the term that stipulates that dental therapists and dental assistants are not required to attend clinics on days when primary schools are closed.

[4] This matter has been investigated over two half day investigation meetings, six months apart, because I had directed the parties at the end of the first meeting to gather together data on the start and finish dates for the Community Dental Service between 2008 and 2013. Whilst this additional evidence was being produced, a second dispute on the interpretation of other terms of the collective agreement then arose between the parties, which resulted in new proceedings being lodged in the Authority (under file number 5450166). By consent of the parties, the reconvened investigation of the present matter also considered the new dispute, after the parties had attended mediation in relation to it. This is why the reconvened investigation meeting is some six months after the adjourned meeting.

Background

[5] The respondent operates a Community Dental Service which provides free oral health services to all eligible children residing in the Canterbury and South Canterbury District Health Board areas. Services are provided through check-ups in

primary schools and check-ups and treatment at purpose built community dental clinics. These services are available for children from age 0 to the end of their Year 8 schooling.

[6] The employment relationship between dental therapists and dental assistants on the one hand and the respondent on the other is currently governed by the terms of the 1 May 2012 to 31 August 2014 collective agreement. Material provisions of this collective agreement are as follows:

> *18. **ANNUAL LEAVE***
>
> *18.1 Employees, other than casuals, shall be entitled to 4 weeks annual leave, taken and paid in accordance with the Holidays Act 2003 and subject to the other provisions of this clause, except that on completion of five years recognised service the employee shall be entitled to 5 weeks annual leave..*
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> ...
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> *18.7 Dental Therapists and Assistants shall not be required to attend clinics on days when primary schools are closed and their absence shall be paid time off. They may be requested however to attend continuing education and in-service courses for no more than 3 days per annum as directed by the employer on days when clinics are closed provided one school term's notice is given. Dental Therapists and Assistants are required to take their annual holidays when primary schools are closed.*
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> *18.8 Notwithstanding the provisions of 18.7 above, Dental Therapists and Assistants may by agreement between an individual employee and the employer attend work when primary schools are closed. When this occurs, the provisions of Clause 11.19 (overtime) shall not apply but the employee will receive the ordinary hourly rate in addition to being paid the ordinary hourly rate.*

[7] Historically, up to 1996, New Zealand primary schools operated on a three- term a year basis and each school throughout the country opened and closed each term on the same day. In 1996, the school year was changed to a four-term year and the Ministry of Education set flexible start dates at the beginning of Term 1 and closing dates at the end of Term 4. Section 65A of the Education Act 1989 provides, at subsection (1), that the Ministry of Education may, before 1 July in any year, prescribe the number of half days on which schools must be open during the next

year, and different numbers may be prescribed for schools of different classes or descriptions.

[8] In 2012, when the current dispute between the parties first arose, the Ministry of Education provided that primary schools had to be open for instruction for 388 half days during that year. It prescribed that the start date for Term 1 was between Monday, 30 January (at the earliest) and Tuesday, 7 February (at the latest) and that the end date of Term 4 was no later than Thursday, 20 December, or to a day in December that ensured that the school had been open for instruction for 388 half days.

[9] Evidence was heard on behalf of the respondent from Ms Gibbs, the Service Manager of the Community Dental Service, who has held her position since January 2006. She explained that, up until 2010, she set the start and finish dates for the Community Dental Service based on the needs of the service and formally communicated these to all staff. She says that that process was accepted by all staff and there were never any queries or issues raised with it.

[10] In 2011, Ms Gibbs agreed a consultation process with NUPE and states that she has adopted the practice of consulting with staff before setting the relevant dates for their working year. Her evidence is that, in proposing and setting the dates, she has ensured that they fell within the date range provided by the Ministry of Education and has not proposed or set a date that was the last date of the date range. She states that she has also ensured that there is at least a six week break before the return to work date.

[11] On 31 May 2012, Ms Gibbs proposed a closure date for that year of 19 December 2012. Having received informal feedback to her proposal, she confirmed the date of 19 December 2012 as the closing date of the service for that year. However, concerns were raised by NUPE because the date set meant that the dental therapists and assistants would actually work a total of 41 calendar weeks during 2012. They believed that the final day of the service should be Friday, 14 December 2012 so as to ensure that each dental therapist and assistant had a paid break of 12 weeks' duration per year.

[12] When viewing 2012 in terms of the number of days worked, and whether that exceeded 200 days, the dental therapists and assistants had to work for 198 days. However, NUPE also argues that all public holidays that fell during school terms

should also be added as these are counted as *working days* under the Holidays Act 2003. Four public holidays fell in that way, which pushes the total of days worked in 2012 to 202. However, NUPE concedes that the dental staff were not required to actually turn up for work on those four public holidays.

[13] Finally, in 2012 primary schools had to be open for 388 half days, which equates to 194 full days. As the dental staff were required to work for 198 days, ignoring public holidays and in-service training days, they exceeded that figure.

[14] A similar dispute arose in 2013 when Ms Gibbs set Thursday, 19 December as the final date. Applying the same analysis, in 2013, as is set out in paragraphs 11 to 14 above, the dental staff worked:

a. Over 40 complete calendar weeks during the year;

b. 197 days, to which they would add six public holidays falling during school term (making 203 days); and

c. Primary schools had to be open for 384 half days, which equates to 192 full days. They had to work 197 days (ignoring public holidays) and so exceeded the figure by five days.

[15] Ms Gibbs' evidence is that there is no provision in the collective employment agreement that dental therapists and assistants should work no more than a total of 40 weeks in a year, or that they are entitled to no less than 12 weeks' paid leave a year. Ms Gibbs relies upon the wording of clause 18.7 and asserts that no dental therapist or assistant is required to work when primary schools are closed. She relies on an interpretation of clause 18.7 whereby the term *primary schools* means *all primary schools* within the area served by the respondent District Health Board are closed.

[16] Ms Gibbs states that the nature of the Community Dental Service has evolved so that, for the past six years, it operates on a community base rather than a school base. Most of the dental staff are based at the community site, but travel into all schools in specially equipped vehicles to provide check-ups to school-aged patients. She says that none of the 53 dental therapists are permanently based at a particular school and only 14 visit schools to provide check-ups on any given day. Therefore, most dental therapists and assistants work with children from a number of different schools who have different start and finish dates for the school year, or who do not

attend school at all, so actual closing dates of particular schools are of little relevance to individual dental therapists and assistants.

[17] Evidence was heard from Ms Walsh, a dental therapist with the Community Dental Service, who is based in Lincoln. Ms Walsh confirmed that she treats children from around 16 different primary schools and that these primary schools do not all have the same start and finish dates. She says that she took up employment on the understanding (from Ms Gibbs) that she would work 40 weeks a year and that her salary would be annualised, so that she would receive fortnightly payments throughout the calendar year. She says that, along with her four weeks' a year annual leave entitlement, she receives 44 weeks' pay, paid over 52 weeks. In other words, no pay is allocated to the period of eight weeks a year when Ms Walsh does not work, even though she receives pay during that period. That pay is part of the pay she earns for 44 weeks a year.

[18] Ms Walsh also says that she is not paid for public holidays. For example, in 2014, there will be six public holidays which fall outside of the school year. She also says that she is not paid for *In service/Teacher Only days,* as she can be asked to attend three in service days per year, when the school is closed, provided that one term's notice has been given. I understand that in service days are education or training days for the dental staff.

[19] Evidence was also heard on behalf of NUPE from Ms Gemmell, who has been employed by NUPE as an organiser since 1998 and who has predominantly organised for the CDHB members employed within the Community Dental Service. It was Ms Gemmell's evidence that the dental therapists and assistants have an expectation that they have 12 weeks' paid leave per year. She says that this expectation is based on historical practice.

[20] Ms Gibbs' evidence in her second brief of evidence is that there was never any agreement that Ms Walsh or any other dental therapist or assistant would only work 40 weeks, or 200 days a year, or have at least six weeks off over Christmas. She also denied that their salaries were for 40 weeks but annualised over 52 weeks a year. She acknowledges that she may have told Ms Walsh that the understanding of the dental staff is that they only work 40 weeks a year.

[21] An affidavit was also produced from Heather Kirner, who is employed by the respondent as *Professional Leader – Dental Therapy, Community Health Service*. In this Ms Kirner deposed that she was involved in the recruitment of Ms Walsh but that she never told Ms Walsh that her hours would be annualised over 52 weeks, or that her pay would be lower than in other regions because she and her CDHB colleagues would only work 40 weeks a year.

[22] Ms Gibbs' evidence is that she has analysed the amount of holidays taken and days worked by dental therapists and assistants between 2008 and 2013, and that each year they worked for fewer than 200 days and had at least six weeks' holiday over the Christmas period each year.

[23] The parties produced a record of the days worked for the years 2008 until 2013 inclusive. These data showed the following (after corrections of errors in the data):

a. 2008 – 193 days worked, during 40 weeks;

b. 2009 – 194 days worked, during 40 weeks;

c. 2010 – 196 days worked, during 40 weeks;

d. 2011 – 197 days worked, during 40 weeks;

e. 2012 – 197 days worked, during 40.5 weeks; and

f. 2013 – 196 days worked, during 40.5 weeks.

Issues

[24] In order to resolve the dispute before it, the Authority must determine the following issues:

(a) The meaning of clause 18.7 of the collective agreement, and whether it imposes a limit on the number of days required to be worked by the dental therapists and dental assistants defined by reference to:

a. 40 weeks a year;

b. 200 days a year; and/or

c. The number of half days a year that the Minister of Education prescribes primary schools must be open.

(b) Whether a term can be implied into the collective agreement by way of the mechanism of custom and practice that dental therapists and assistants are required to work no more than the limits set out above in each year;

Principles of contractual interpretation

[25] In the Employment Court case of *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149, His Honour Judge Ford summarised at [17] the principles of contractual interpretation as set out in the Supreme Court case of *Vector Gas Ltd v Bay of Plenty Energy Ltd,* [2010] NZSC 5, [2010] 2 NZLR 444 as follows (omitting footnotes):

> *In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time*

What is the natural and ordinary meaning of the language used by the parties?

[26] The starting point is the first sentence of clause 18.7 of the collective agreement. This states *Dental Therapists and Assistants shall not be required to attend clinics on days when primary schools are closed and their absence shall be paid time off*.

[27] In order for any of the applicant's three arguments to work the words *when primary schools are closed* must mean when any one primary school is closed, not when all schools could be open. In other words, at the start of the year, some primary

schools will open after others and some will close at the end of the year before others. The applicant's argument means that the phrase *primary schools* in clause 18.7 has to be interpreted to mean either that the dental therapists do not have to start work until all primary schools are open or they may stop work when the first primary school closes.

[28] Mr McKenzie made reference in his submissions to section 33 of the Interpretation Act 1999, which states that:

> ***33 Numbers***
> *Words in the singular include the plural and words in the plural include the singular.*

[29] However, first, I do not accept that s. 33 of the Interpretation Act means that the phrase *primary schools* has to be interpreted to mean any single primary school. However, that interpretation would be a strained and unnatural one that defies the natural meaning of the plural phrase, *primary schools.* Rather, I believe that the ordinary meaning of the phrase is either *all primary schools in the CDHB's region* or *a sub set of primary schools numbering more than one in the CDHB's region*. Given that the second meaning would require words to clarify which primary schools, or which number of primary schools are meant, and those words are absent, and cannot be implied, the phrase *primary schools* in clause 18.7 must only mean all primary schools in the CHHB's region.

[30] Secondly, the applicant's submissions do not accord with the practice of the service. For example, in 2012, the first day of the first school term by which all primary schools had to be open was 7 February 2012 (the last prescribed day for opening). The last day in the last school term when all schools had to be open (to ensure they were open for the requisite number of half days) would be 10 December 2012. That means that the dental therapists would only have had to have worked 39 weeks on the argument of the applicant. That was not the case and the applicant does not seek to say that the dental therapists did not have to work more than 39 weeks in that year.

[31] In my view, aside from this argument about the meaning of the phrase *primary schools*, the words in the first sentence of clause 18.7 are plain and unambiguous. Furthermore, when turning to the cross checking by reference to extrinsic evidence referred to by Judge Ford in *New Zealand Firefighters* Union, no material extrinsic

evidence has been put before the Authority to show that the words of clause 18.7 mean anything other than the plain meaning readily ascertainable from their reading. I am therefore satisfied that the meaning of these words is *all primary schools*.

[32] As an aside, it should be noted that the statement in clause 18.7 of the collective agreement that the dental staff's absence shall be paid time off seems to be at odds with what Ms Walsh says in her evidence, that she is only paid to work 40 weeks, plus four weeks' annual leave, but that her pay is spread over 52 weeks. In other words, the corollary of her evidence is that her absence (for eight weeks a year) is not paid, which is contradicted by clause 18.7.

[33] In any event, I do not believe that her analysis about annualised pay is correct for another reason. Clause 11.7.1 sets out in a table the pay rates for dental therapists according to a scale, and states that the minimum basic rates are the rates set out in the table, divided by 1,846 and multiplied by the number of hours worked. It then states *i.e. these rates are "full time" for 35 hours and 25 minutes per week.* The figure of 1,846 is the number of hours assumed to be worked by dental therapists (at 35 hours, 25 minutes a week) over the period of 52 weeks, not 40 weeks. This strongly suggests that the pay received by Ms Walsh remunerates her for the entire year, including weeks when she is not working.

[34] I also do not accept that dental therapists in the Canterbury region are paid less than those in other regions. The difference is because the Canterbury dental therapists work fewer hours than their counterparts elsewhere. Their pay rates are the same, as was demonstrated by Ms Shaw by reference to a PSA multi-employer collective agreement.

[35] Turning to the question in issue, is the corollary of the first sentence at clause 18.7 of the collective agreement necessarily that dental therapists and assistants are required to attend clinics on days when not all primary schools are closed? It is my believe that it is, in the absence of either an express or implied term which defines the circumstances when a dental therapist is not required to work when at least one primary school is closed. I derive this view from a logical analysis of the situation.

[36] A primary school is either open or closed, and a dental therapist either works or does not work. There is a causal connection established between the two by clause 17.8. When the primary schools are closed, the dental therapists are not required to

work, save under defined circumstances. If the corollary was not expected to apply (i.e. they work when the primary schools are open) one would expect the circumstances when it did not apply to be spelled out.

[37] For example, it is conceivable that they would also not be required to work on Mondays, say, or, to be a little facetious to illustrate a point, on any day which is a full moon. However, one would need such exceptions to be made clear, either by express or implied terms.

[38] There does not appear to be any express clause in the collective agreement which limits the amount of weeks per annum that a dental therapist and assistant can be required to work when a primary school is open. The applicant must, therefore, rely upon an implied term to argue that the dental therapists and assistants are not required to work more than 40 weeks a year. The applicant argument amounts to custom and practice being the mechanism by which the exception is implied into the collective agreement.

Custom and practice

[39] Custom and practice is one of the mechanisms for implying or importing into a contract terms that are not stated expressly. Custom and practice is a common law concept that has been accepted into New Zealand law and which was examined in the leading (non-employment) case of *Woods v NJ Ellingham & Co Ltd* [1977] 1 NZLR 218. The principles set out in *Woods* for deciding whether a custom can be implied were summarised in *The Law of Contract in New Zealand,* Burrows, Finn & Todd, 4th edition, as follows:

> *First, the custom must have acquired such notoriety that the parties must be taken to have known of it and intended it should form part of the contract. Secondly, the custom must be certain. Thirdly, in addition to being certain, it must be reasonable. If it is "in high degree unreasonable" this is of weight in considering whether it exists or not. Fourthly, until the courts take judicial notice of a custom it must be proved by clear and convincing evidence. Finally, as already stated earlier, the custom must not be inconsistent with the express contract.*

[40] I do not believe that sufficiently clear evidence has been produced by the applicant to be able to satisfy these tests. Evidence was given by Ms Walsh only, who started with the respondent in 2010. There has clearly been a trend over the past six years for the number of days that the dental therapists and assistants have been required to work to have increased, as is shown by the data in paragraph [23] above.

However, these data do not establish what the limit is that the applicant says must not be exceeded. Just because the data for 2008 shows that the staff did not work above 40 weeks, 200 days or the number of half days prescribed by the Minister of Education does not mean that those limits have been established as contractual constraints on the respondent.

Conclusion

[41] It is my view that the respondent has not breached the terms of the collective agreement by setting the start and finish dates as it did in 2012 and 2013. First, I do not accept that there is any limit of 40 weeks, beyond which the dental therapists and assistants cannot be required to work. For example, in 2013, when the staff worked for more than 40 weeks, they worked a total of 196 days. However, they worked the same number of days in 2010, about which they did not complain and also worked 197 days in 2011, about which they did not complain, as I understand it. I believe that the limit of 40 weeks is a red herring, which arises partly from the way the calendar falls in different years. Whilst there may be an popular understanding amongst dental staff that they work no more than 40 weeks a year, that is not established in any binding contractual arrangement.

[42] I also do not accept that there is a threshold of 200 days. Again, there is no reference to any such limit in the collective agreement, and custom and practice cannot assist the applicant, as the number of days worked by the dental staff have never reached 200 (I exclude training days, which are clearly provided for separately in the collective agreement). I also do not accept that public holidays falling during school terms can be brought to bear in the argument. The staff are not required to work during those days and are paid for the days correctly under the Holidays Act 2003.

[43] Finally, I do not accept that the respondent is limited to requiring their dental therapists and assistants to work for the same number of half days (whether recast as full days or not) prescribed each year by the Minister of Education. That is not what clause 18.7 says. It defines the requirement to work by reference to when primary schools are closed. I have interpreted that to mean when all primary schools are closed, not a sub set of them. Therefore, whilst any one primary school in the region remains open in accordance with the prescription of the Minister of Education, the

respondent may contractually require dental therapists and assistants to work on that day.

[44] Whilst the dental therapists and assistants will no doubt feel disturbed at this interpretation, I observe that the respondent has not hitherto dictated the date on which the dental staff members have to start as the earliest date when a school may open and the last date as the latest when a school must close. I did not detect any desire on the part of the respondent during its evidence to do so in the future. Nonetheless, the parties may wish to debate the ramifications of this determination on the future practice with the Community Dental Service.

Costs

[45] Mr McKenzie asked for costs to be reserved, although voiced a wish for costs to lie where they fall. However, as Ms Shaw did not express a view, I reserve costs. If the parties cannot agree how costs are to be dealt with between them, within 21 days of the date of this determination, any party seeking a contribution to it costs must lodge and serve a memorandum of costs within a further 14 days, and any response must be lodged and served within a further 14 days.

David Appleton
Member of the Employment Relations Authority