IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 407
3038556

	BETWEEN	ASSOCIATION OF PROFESSIONAL AND EXECUTIVE EMPLOYEES INCORPORATED Applicant
	AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Respondent

Member of Authority:	TG Tetitaha
Representatives:	B Manning, counsel for the Applicant D Traylor, counsel for the Respondent
Investigation Meeting:	1 May 2019 at Auckland
Submissions Received:	1 May 2019 from both parties
Date of Determination:	11 July 2019

DETERMINATION OF THE AUTHORITY

A. Clauses 14.1.2 and 14.1.5 of the parties' MECA provide for part-time employees to receive a proportion of the 5 days sick leave granted at the start of their employment and a proportion of the 5 days sick leave granted at each six months of employment.

B. Costs are reserved.

Employment Relationship Problem

[1] The Association of Professional and Executive Employees Incorporated (Union) is a union covering medical laboratory workers, including phlebotomists in part-time employment of the respondent Counties Manukau District Health Board (DHB).

[2] A dispute has arisen about the DHB's application and interpretation of clause 14.1.5 of the parties' multi-employer collective agreement, in particular, the accrual of sick leave for part-time union employees.

Relevant facts

[3] The DHB employs phlebotomists who primarily work part-time. It is common ground the parties' MECA provided the relevant clauses for the accrual of sick leave by part-time employees below:

> 14.1.2 On appointment with the employer, a full time employee shall be entitled to five working days sick leave on ordinary pay (i.e. T1 rate). On completion of each subsequent six months, he/she shall be entitled to a further five working days with a maximum entitlement of 260 working days.
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> …
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> 14.1.5 Part time employees are entitled to sick leave on a pro rata basis but not less than the minimum provided for under the Holidays Act 2003.

[4] In 2010, the DHB identified issues regarding the application of various sick leave entitlements across its collective agreements that were in place at the time. One issue that was identified in 2010 was that a specified sick leave entitlement was recorded in the payroll system in hours rather than in days. The payroll system was also set with a default assumption that a full time employee's entitlement to ten days of sick leave per 12 month period was the equivalent of 80 hours of sick leave per 12 month period.

[5] As a result the DHB believed that part-time employees who worked fewer than eight hours per day were receiving more sick leave entitlement than they should have. For example, a 0.5FTE or part-time employee who worked four hours per day, five days per week, would be recorded in the payroll or roster system as 40 hours per week per 12 month period because that was half of the default full time entitlement of 80 hours sick leave. When that employee took a day of sick leave, their sick leave balance was reduced by the period of their absence, four hours. The effect of this was to provide to a 0.5 FTE employee ten days of sick leave, rather than their contractual entitlement of five days.

[6] The DHB believed this was an incorrect interpretation of the contractual provisions set out in clauses 14.1.2 and 14.1.5 above.

[7] Therefore, it changed the recording of sick leave from hours to days. As a result, the union member part-time phlebotomists' sick leave entitlements were reduced from ten days to less. The Union submits this is unfair and an incorrect interpretation of the clauses.

Contractual Interpretation

[8] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended those words in dispute to bear.[1] This requires an objective approach to ascertain[2]:

> The meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> This subjective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole in any relevant background informs meaning.

[9] The first step is the ordinary and natural meaning of the language used within the provision itself.[3] Secondly checking this meaning against the contractual context.[4] If the words are ambiguous the inquiry will move to an assessment of relevant facts and circumstance.[5]

[10] The next stage asks whether the meaning would lead to a nonsensical result – whether it defies commercial (or employment relations) common sense or otherwise.[6] In exceptional circumstances, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.[7]

[11] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intend them to be understood in any other way than what they plainly say. The Authority cannot ascribe to the

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1 *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5, 5 at [19].
2 *Affco New Zealand Limited v New Zealand Meat Workers and Related Trades Union Incorporated* [2017] NZSC 135 at [39] *citing Firm PI 1 Limited v Zurich Australian Insurance Limited* [2014] NZSC 147 (footnotes omitted).
3 *Air New Zealand Limited v New Zealand Airline Pilots Association Inc* [2016] NZCA 131 at [40].
4 *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33]
5 See above *Vector Gas* at [59] per McGrath J.
6 See above *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* citing *Pyne Gould Guinness Limited v Montgomery Wilson (NZ) Limited* [2001] NZAR 789 (CA) at [18], [29].
7 *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 citing *Vector Gas* at [25], [34] per Tipping J.

parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.[8]

Parties positions

[12] The parties agree that part-time employees are entitled to the statutory minimum sick leave provided in the Holidays Act 2003. Therefore, part-time employees who work less than 0.5 FTE would always receive the statutory minimum of five days leave. The DHB submits, and I accept, that all employees upon employment receive five days sick leave irrespective.

[13] The parties disagree about if and how sick leave should accrue in respect of any contractual entitlement in excess of the statutory minimum of five days.

[14] The applicant argues that an ordinary working day is eight hours, irrespective of the actual amount of hours an employee may work. In those circumstances it submits that a part-time employee should be entitled to the benefit of an eight hour sick leave day even if they do not work eight hours. Therefore, if they take a day and are only paid for four hours, they are still entitled to receive a further day of sick leave and be paid the remaining four hours of the eight hour day outstanding. This is consistent with the way the applicant was accruing and paying sick leave prior to 2011.

[15] Further, the applicant submits it is unfair that the DHB has made changes to the payroll that disenfranchised Members of the benefit of using the eight hour ordinary working day.

[16] The DHB disagrees. It accepts that it has been misapplying the contractual entitlements. This was corrected in 2011 and the applicant has not until now taken issue with the changes in the payroll system. It further submits this is more properly a disadvantage grievance or alternatively, the delays in bringing this application should not detract from the applicant's submissions regarding any conduct.

Determination

Interpretation of Clauses 14.1.2 and 14.1.5

[17] There is no dispute ss63 and 65 Holidays Act 2003 provides all employees an additional five days sick leave after the first 6 months of employment and on each 12 month

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[8] *Vector Gas* at [4], [22].

anniversary thereafter. This is a dispute about the accrual of additional contractual leave provided for in clauses 14.1.2 and 14.1.5 for part time Union employees.

[18] The parties' contract defines full time employees as "an employee who works not less than the "ordinary" or "normal" hours set out under "hours of work in this agreement."[9] Clause 3.0 sets various definitions of an employee's ordinary hours of work from 40 hours per week and not more than eight hours per day[10], 80 per fortnight and not more than 8 hours per day with four days off in every 14 with different rostered days off[11] or 40 hours per week within 4 consecutive ten hour days. Part time employees are defined as "an employee, other than a casual employee, who works on a regular basis but less than the ordinary or normal hours prescribed in this agreement."[12] The Union's part time phlebotomists qualify as part-time employees.

[19] Clause 14.1.5 refers to part-time employees entitlements to sick leave on a "pro rata basis". "Pro rata" means "proportional" or "proportionality". On its face the clause allows part-time employees to receive a proportion of sick leave entitlements in clause 14.1.2 which are those given to full time employees. Clause 14.1.2 grants full time employees on completion of each subsequent six months, a further five working days with a maximum entitlement of 260 working days.

[20] Clauses 14.1.2 and 14.1.5 can plainly be interpreted as providing part-time employees with additional sick leave that is a proportion of a full time employee's entitlement but no less than their entitlements under the Holidays Act 2003. There is no basis within the clause 14.1.5 for part-time employees to receive the equivalent of full time employees because of the use of the words "pro rata". If they were intended to receive the same as full time employees clauses 14.1.2 and 14.1.5 would need to be rewritten. Clause 14.1.5 would be redundant as would the reference to "full time" in clause 14.1.2. I cannot ascribe such an intention to the parties based upon the plain words of their contract.

[21] There are 15 part-time phlebotomist Union members working 5 hours per day 5 days per week 25 hours per week. They work the equivalent of 62.5% of a full time employee's ordinary hours of work of 40 hours per week. Therefore under clauses 14.1.2 and 14.1.5

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9 Clause 2.0 Collective agreement 2009 to 2011 (CEA).
10 Clause 3.1 CEA.
11 Clause 3.1.1 and 3.1.2 CEA.
12 Clause 2.0 CEA.

these part-time phlebotomist employees would accrue 62.5% of a full time employee's sick leave at the relevant dates it accrues under the parties' contract and statute. 62% of 5 days is 3.125 days.

[22] Using this analysis these part-time phlebotomists should receive 3.125 days sick leave at the start of their employment. At the first six month anniversary these workers should receive a further 5 days being their s.63 Holidays Act 2003 entitlement. Therefore they should at this stage receive an additional 1.875 days sick leave by operation of law.

[23] Under clause 14.1.2 and 14.1.5 a further contractual entitlement of 3.125 days sick leave is accrued in any event. This combined with the 3.125 days accrued at the start exceeds the statutory minimum entitlement amount. Therefore every 6 months each of these part-time Union employees should receive an additional 3.125 days sick leave under clauses 14.1.2 and 14.1.5 to a maximum of 260 days. In short every 12 months these phlebotomists ought to be receiving 6.25 sick days under clauses 14.1.2 and 14.1.5.

Parties conduct

[24] The DHB states they are only entitled to 6.2 days of sick leave per 12 month period[13] because they have pro-rated the total of 10 days sick leave irrespective of the contractual and statutory requirements. This is lower than their actual entitlement of 6.25 days.

[25] There is evidence the DHB advised the Union in 2011 that it changed the method of calculating part-time employees sick leave as described above. The Union has produced evidence it was never consulted about the change to the accrual of sick leave or its effect upon part-time employees prior to the change. The Union delegate became aware of the changes in 2011 when it received emails two months after the changes had been effected.

[26] There has been substantial delay in bringing this proceeding. The DHB's implementation of the changes to part-time employees' sick leave has been ongoing for 8 years. There is little to support any implied variation or special interpretation of clauses 14.1.2 and 14.1.5 of the MECA given the delays and sparse evidence about the delay. More evidence about this point including the interactions between the parties from 2011 to 2018 would be required. I am not persuaded based upon the evidence before me.

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[13] Affidavit DM Tivale sworn 1 March 2019 at [23].

Determination

[27] Clauses 14.1.2 and 14.1.5 of the parties MECA provide for part-time employees to receive a proportion of the 5 days sick leave granted at the start of their employment and a proportion of the 5 days sick leave granted at each six months of employment.

[28] Costs are reserved. If the parties are unable to resolve costs between themselves, they are to file an application within seven days of the determination. The other party shall have seven days thereafter to reply.

TG Tetitaha
Member of the Employment Relations Authority