

[3] Dr Trewick worked, and continues to work, on a roster basis comprising ten hour work periods over seven days. Initially these were during the day between 8:00 am and 6:00 pm, seven days a week. The pattern of patient presentation altered over the years, which led to changes to the MEC hours. The first such change was that the MEC began opening at 9:00 am and operated until 7:00 pm.

[4] Sometime later the opening hours changed to 11:00 am to 9.00 pm, still on a Monday to Sunday basis. More recently still, in 2018 the MEC introduced two overlapping duty periods: one starting at 8.30 am and running until 6.30 pm and the second starting at 1.30 pm and finishing at 11.30 pm. There has also been a name change from MEC to Emergency Department Fast Track ("ED Fast Track").

[5] Dr Trewick receives a salary but does not receive any additional payment for hours he works after 7:00 pm on weekdays and weekends, unlike his colleagues in the ED. In 2013 Dr Trewick raised this issue with the DHB and was informed that the shift conditions of the applicable Multi Employer Collective Agreement (the "MECA") did not apply to him. Dr Trewick then brought up the matter with his union, the Association of Salaried Medical Specialists ("the Association" or "ASMS") or). The Association took the matter up with the DHB on his behalf without success.

[6] Dr Trewick asks the Authority to determine whether the shift work clause of the MECA applies to his work in the ED Fast Track and its predecessor MEC.

[7] The DHB's position is that Dr Trewick does not work a "shift system" or perform "shift work" and is therefore not entitled to additional payments for shift work under the MECA. It says that on days set aside for Dr Trewick to have non-clinical time, and on his non-rostered days, his work is completed by a nurse practitioner or another medical officer.

[8] The DHB says that, while Dr Trewick works irregular days; one in four weekends; has irregular days off; and works in with other employees who work when he is not rostered on, those employees do not take over from him to perform the same role on the same day. It also notes that, while Dr Trewick's rostered work days change, his hours of work do not. He works 16 ten-hour days in every four-week period and averages 40 hours per week.

[9] The parties have attended mediation but have been unable to resolve the matter.

Issues

[10] While Dr Trewick has a claim for arrears of wages backdated to 2013, the parties by agreement do not require the Authority to consider that matter. The sole issue for determination, therefore, is whether the work Dr Trewick performs is shift work in terms of the MECA that is binding on the parties.

The MECA

[11] Dr Trewick's terms and conditions of employment are determined by the MECA that applies to ASMS members employed by New Zealand District Health Boards. The current MECA is operative from 1 July 2017 to 31 March 2020. The applicable provision is as follows:

19 Shift Work

- 19.1 In the event that the employer is proposing to introduce shift work there will be prior agreement between the employer, the affected employees and the Association over applicable terms and conditions of employment before such shift work commences.
- 19.2 For employees in Emergency Departments, Intensive Care Units or High Dependency Units and other departments or services as agreed between the union and the employer, where a shift system is in place or is introduced, all hours worked between 1900 and 0800 hours Monday to Friday shall be paid at time and a half of the ordinary hourly rate and all hours worked on weekends or public holidays shall be paid at time and a half of the ordinary hourly rate.
- 19.3 During the term of this Agreement the parties will review the safety of shift rostering practices.

[12] There is no definition of shift work, shift systems or shift rostering practices in the MECA.

The Authority's investigation

[13] Dr Trewick gave evidence on his own behalf. Ian Elson, Deputy Service Director – Medical Directorate, gave evidence on behalf of the DHB.

[14] I have not referred in this determination to all the evidence received from those witnesses or to all of the submissions advanced by the parties, in accordance with s 174E of the Employment Relations Act 2000 ("the Act"). I have, however, considered all material provided to the Authority in reaching decisions on this matter.

[15] The determination has been issued outside the timeframe set out at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Evidence

[16] Dr Trewick gave evidence of the work he had performed during his more than 25 years with the DHB. He was recruited in 1992 by Hastings Hospital as the clinical lead in the Casualty department, now known as the ED. In the mid 1990's he was part of a shift system that was established, which saw the ED operating from 8 am to midnight, seven days a week.

[17] That changed in the early to mid-2000's when shift lengths were standardised around a 4 by 10 hour shift system over 7 days. Dr Trewick was part of this shift system for the next several years until he was asked to head up the newly-established MEC (ED Fast Track) within the ED. Evidence presented by the DHB shows he was offered the position on 10 November 2011 and formally signed his acceptance on 23 January 2012.

[18] Dr Trewick continued to work 10 hour shifts over seven days and he continued to average 40 hours work per week as previously. Initially the shifts were daytime between 8 am and 6 pm but, as noted earlier, the pattern has changed over the intervening years. Currently there is a two-shift system whereby the ED Fast Track is open between 8.30 am and 11.30 pm, with one shift being from 8.30 am to 6.30 pm and the second from 1.30 pm to 11.30 pm.

[19] Dr Trewick said he became aware from talking with colleagues in the ED that he was not being remunerated for the hours he worked after 7 pm and over weekends. Having raised this matter with his employer since 2013, he is unhappy about working the late shift until he is properly remunerated for doing so and is predominantly rostered on the day shift currently. He said he continues to work weekend rosters so as not to burden his colleagues.

[20] Mr Elson, who has been employed by the DHB since 2011, is responsible for the overall management of the ED, Intensive Care Unit (ICU) and Acute Assessment Unit. He gave evidence of how the DHB operates the ED Fast Track and, with regard to the more recent changes, particularly the extension of hours of operation, Mr Elson emphasised that the service does not operate overnight, and that there was no handover from the staff who started at 8.30 am to those who started at 1.30 pm.

[21] His evidence was that there was insufficient demand for a continuous service and that if the DHB wished to implement a shift system in ED Fast Track, it would initiate a formal change management process in the usual way. He contrasted the ED Fast Track with the ED and the ICU, where the DHB operates shift systems. Both the latter two areas operate overnight and there is hand over from physicians working one shift to the next. In his evidence there was no such hand over in ED Fast Track at the end of the working day.

Submissions of the parties and discussion

[22] Counsel for both parties referred to the legal principles applicable to the interpretation of contracts in support of their opposing views of the interpretation of clause 19 of the MECA as it applies to Dr Trewick. There was no disagreement between counsel over the leading cases and the correct approach to interpretation. Amongst other cases, both counsel cited the Supreme Court in *Firm PI 1 Limited v Zurich Australian Insurance Limited t/a Zurich New Zealand*¹:

[60] ... the proper approach is an objective one, the aim being to ascertain “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 objective 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 and any relevant background informs meaning.
[Footnotes omitted]

[23] In counsel for the applicant’s submission the use of three different phrases containing the word "shift" in clause 19 emphasises that the parties intended it to have

¹ [2014] NZSC 147.

a broad and flexible meaning. Mr Cranney submits the lack of a definition of "shift" in the MECA is also consistent with that broad and flexible approach.

[24] He cited various examples of "shifts" which showed the variety and breadth of situations in which they occurred. He described a shift system as being inevitable where the requirement for a particular service was greater than could be met by a single group of workers working identical hours of work.

[25] Referring to Mr Elson's evidence, Mr Cranney submitted it was not necessary for one group to hand over to the workers coming in for the next shift. He noted that Mr Elson had given the example of current arrangements in the rest of the ED and that these did not require succeeding relays of employees.

[26] Rather, they involved overlapping work periods in which there was a five hour overlap of day shift and evening shift. Mr Cranney submitted that this was common in the hospital environment. He noted the ICU, which Mr Elson had also cited as operating a shift system that involved the hand over of responsibilities, did not strictly operate such a system.

[27] In the ICU staff were rostered on from 8 am to 6 pm. Following the end of the shift, one of the employees was tasked with continuing responsibility and remained on call at home for the next 14 hours until the next shift commenced.

[28] Mr Cranney referred to the changes in the shift times in the ED Fast Track and submitted that there was nothing different in principle between a shift where the days were rotated and a shift pattern in which start and finish times differed on different days, an example of which was a rotating day and night shift.

[29] He submitted that ED Fast Track was part of an integrated system within the ED to make sure the service worked and was available. The work was continuous for the minor emergencies such as small burns and wounds and that if no one was available in ED Fast Track the patient would be triaged and treated in ED.

[30] With regard to clause 19.1 Mr Cranney submitted there was no evidence that there was or was not agreement between the employer, affected employees and the Association over terms and conditions before shift work commenced. He turned to the purpose of clause 19.2 which, in his submission, was introduced to compensate

workers for the unsociable hours required by the shift system. That was the reason for paying time and a half for all hours after 7 pm and before 8 am and for weekends.

[31] Counsel for the DHB has focussed on clause 19.1 of the MECA which requires prior agreement between the employer, the affected employees and the Association over applicable terms and conditions for the introduction of a "shift system". In Mr Chemis' submission there was no prior agreement as required by clause 19 when the MEC began operating in 2011.

[32] Nor has there been such agreement since that time when changes have been made to the number of employees involved and the hours of operation of the ED Fast Track. In counsel's submission that is significant as it demonstrates the Association did not consider a "shift system" was in place.

[33] With regard to the application of the agreed legal principles Mr Chemis submitted that the natural and ordinary meaning of "shift system" is a system where there are two or more shifts in a day and where employees take over from each other at the end of one shift and the beginning of another. In his submission the term denotes something more than different start and finish times.

[34] Mr Chemis notes a number of sources which, in his submission support the DHB's position. These include the Oxford Online Dictionary definition of "shift" which is:

Each of two or more recurring periods in which different groups of workers do the same job in relays.

[35] Counsel for the DHB also refers to the statutory definition of shift in the Act where, at s 67G(9), it is stated as:

...a period of work performed in a system of work in which periods of work-

- (a) are continuous or effectively continuous; and
- (b) may occur at different times on different days of the week.

[36] He also cites the International Labour Office which defines working in shifts as:

A method of organisation of working time in which workers succeed one another at the workplace so the establishment can operate longer than the hours of work of individual workers.

[37] Mr Chemis cites case law in support of the DHB's position including a 1987 Arbitration Court judgment which held that:

A shift as we understand it is normally considered to be a relay of workers working successive periods usually at substantially the same tasks...in more recent times the term has frequently been used in a wider sense.²

[38] He also cites a more recent Employment Court case where the Court referred to the 1987 Arbitration Court judgment above and stated that:

...although it may be said that the notion of 'shift' has developed more generally in New Zealand in recent decades, the original concept of relays of workers following each other on a continuous process is still applicable.³

[39] Counsel for the DHB summarises the core features of a "shift system" as being:

- (a) Two or more largely contiguous periods of work;
- (b) The same work that is shared between employees in a relay system.

Discussion and findings

[40] I have carefully considered the evidence and submissions of the parties and conclude that Dr Trewick is entitled to the benefit specified in clause 19.2 of the MECA. In reaching that conclusion I have accepted counsel for Dr Trewick's submissions regarding the flexible meaning of "shift" and associated phrases in clause 19.

[41] It follows that I reject the more rigid interpretation counsel for the DHB invited me to accept as being the natural and ordinary meaning of "shift system". That meaning would entail employees taking over from each other at the end of one shift and the beginning of another.

[42] That may an appropriate definition in some contexts, for example in manufacturing and industrial settings. However, it is clear from the examples provided by counsel for Dr Trewick that it is not necessarily always applicable in the context of a hospital. There are situations within the DHB where shifts overlap rather

² *NZ (With Exceptions) Food Processing, Chemical and Related Products Factory Employees IUOW v Skeggs Foods Limited* [1984] ACJ 85 at [87].

³ *Sealed Air (New Zealand) v The New Zealand Amalgamated Engineering Printing and Manufacturing Union Incorporated*, WC/18, 19 May 2008 at [23].

than neatly dovetailing when one ends and another commences, and situations, such as in the ICU where there is a 14 hour gap between shifts during which time a person off-site is on-call.

[43] With regard to the definition of "shift" within s 67G of the Act, I note it is specific to that section, which concerns protections for workers where shifts are cancelled. It is not stated as a definition applicable to any other provisions of the Act. With regard to the ILO's Night Work Convention No 171, I note that New Zealand is among the majority of countries that have not ratified the convention. Any definitions within that Convention are therefore likely to be of little relevance to the current situation.

[44] Counsel for the DHB has accurately quoted former Chief Judge Colgan in *Sealed Air*, a case concerning entitlement to meal breaks for certain workers. However, immediately before the paragraph Mr Chemis quoted, the former Chief Judge had referenced the following discussion in *NZ (with exceptions) Food Processing etc IUOW v Skeggs Foods Ltd [1984] ACJ 85,87*:

What is a shift? A shift as we understand it is normally considered to be a relay of workers working successive periods usually at substantially the same tasks. ... We note that Judge Jamieson in *Inspector of Awards v. Caxton Printing Works 75 B.A. 6445* said:

"...the term shift does not connote, as it once did, a relay of workers following each other on a continuous process. In this particular award, as in others, a shift means no more than a period of work permitted at ordinary rates of wages at a time which would otherwise attract overtime rates because the work is performed outside the declared hours."

[45] From the context of the Chief Judge's comments about the applicability of the original concept of "shift", I do not understand him to be rejecting the developments in recent years in the notion of "shift". Nor do I understand him to be restricting "shift" to its original meaning, but to be asserting there can be a place for both that meaning and new developments. Immediately after this discussion, the former Chief Judge quoted the following⁴:

What is "shift work"? What is a "shift"? In the absence of some express contractual definition, it is usually easy to say whether a

⁴ J Hughes *Mazengarb's Employment Law: Wages* (Lexis Nexis, Wellington) at [1828].

particular system of work is or is not a "shift", but difficult to define "shift" or "shift work" in the abstract.

[46] I find the absence of definitions of "shift" and "shift systems" in the MECA supports submissions on behalf of Dr Trewick regarding the broad and flexible meaning those words were intended to have. It is neither stated nor implied that the prerequisite for a shift system is for there to be a handover at the end of each period of duty.

[47] I am not persuaded, as submitted by the DHB, that the prerequisite for the introduction of shift work into the MEC/ED Fast Track, as specified in clause 19.1 of the MECA, has not been met. From the evidence of the parties, the work undertaken by ED Fast Track was originally undertaken within the ED.

[48] The evidence presented was that currently, in the absence of Dr Trewick and others who are rostered to work in ED Fast Track, the duties are undertaken in the ED. The very name suggests ED Fast Track is part of the ED, rather than being a department in its own right.

[49] It appears, from an uncontested reference in the submissions of counsel for the DHB, that clause 19 has been in the past two collective agreements, the first of which came into force in 2011.

[50] That being so, the requirement of clause 19.1 for agreement among the employer, the affected employees in ED and the Association must have been met during, or around the time of the negotiation for the 2011 collective agreement. No evidence was presented on this matter.

[51] Nor was it clear whether Dr Trewick who, in January 2012, accepted the offer to lead what is now ED Fast Track, was included in that agreement of affected employees. The timing suggests he would, or should, have been included. If he was, that in my view fulfils the clause 19.1 requirement for agreement on terms of work. If he was not, that was an oversight on the part of the DHB for which Dr Trewick should not be adversely affected.

Conclusion

[52] The work performed by Dr Trewick in the MEC and ED Fast Track is, and has been, shift work in terms of clause 19 of the MECA that is binding on the parties. The parties will now discuss and calculate the arrears of wages due to Dr Trewick. Leave is reserved for them to revert to the Authority if they are unable to reach agreement on those calculations.

Costs

[53] The issue of costs is reserved.

Trish MacKinnon
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