

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 107  
3098852

BETWEEN            NEW ZEALAND NURSES  
                                 ORGANISATION  
                                 Applicant

AND                    AROHANUI HOSPICE  
                                 SERVICE TRUST  
                                 Respondent

Member of Authority:     Michael Loftus

Representatives:         Jock Lawrie, counsel for the Applicant  
                                 Alastair Hall and Joelle Avery, counsel for the  
                                 Respondent

Investigation Meeting:    On the papers with input up to and including 13 May 2021

Date of Determination:    23 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

- [1]     This is a dispute about the public holiday entitlement of part time employees.
- [2]     The applicant, NZNO, seeks on behalf of certain members a declaration that:

A part time employee, employed by Arohanui and covered by the terms and conditions of the MECA, who does not work the same, set days each work (sic) / fortnight but rather works a different combination of days each week / fortnight as set by roster and published under clause 6.6 of the MECA shall be entitled to the benefit of public holiday provisions such as payment of relevant daily pay for a public holiday, in accordance with the formula provided under the second limb of clause 12.5 of the MECA.

[3] The respondent, Arohanui, is of the view it is correctly operating and interpreting the applicable collective employment agreement.

### **The Authority's investigation**

[4] By agreement of the parties the issue is to be determined on the papers. These included briefs from a Union Organiser and one of NZNO's members, Arohanui's Chief Executive and its Payroll Officer, submissions and considerable documentary evidence.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received though there is discussion of the latter given this is a dispute and the submissions are crucial.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

### **Background**

[7] NZNO is a union which is party to a multi-employer collective employment agreement (MECA) covering members employed within a number of hospices nationwide.

[8] Arohanui in Palmerston North is one of the employer parties.

[9] The MECA provides for the employment of part-time employees as follows:

*Part-time employee' means an employee, other than a casual employee, who is employed on a permanent basis but works less than the ordinary or normal hours prescribed in this MECA<sup>1</sup>. Any wages and benefits e.g. leave will be pro rata according to the hours worked unless specifically stated otherwise in this MECA."*

[10] The ordinary or normal hours are 80 per fortnight.

[11] Clause 12.1 of the MECA provides for the observance of public holidays with the list comprising the 11 normally expected (at least prior to the addition of Matariki as a public holiday) and is followed by various clauses specifying entitlements for those who work those days.

[12] Included therein is clause 12.5 which concerns part-time employees. It reads:

*“Where a part-time employee’s days of work are fixed, the employee shall only be entitled to public holiday provisions if the day would otherwise be a working day for that employee.*

*Where a part-time employee’s days are not fixed, the employee shall be entitled to public holiday provisions if they worked on the day of the week that the public holiday falls more than 40% of the time over the last three months. Payment will be relevant daily pay.”*

[13] A dispute has arisen between the parties as to the interpretation, application and operation of clause 12.5, particularly as it relates to a group of part time employees engaged within the in-patient unit who do not work the same set days each week or fortnight. Instead these employees work a different combination of days in accordance with a roster, with such a practice being permitted by another of the MECA’s clauses.

[14] It is Arohanui’s position that rostered part time employees are entitled to the benefit of public holiday provisions such as payment of relevant daily pay for a public holiday only if the employee is rostered to work on the actual day a public holiday falls.

[15] NZNO claims such employees are entitled to the benefit of public holiday provisions such as payment of relevant daily pay for a public holiday in accordance with the formula provided under the second limb of clause 12.5 of the MECA and that entitlements might accrue whether or not the employee was rostered on the actual holiday.

[16] It is claimed by the union that while a nurse might work on the day of the week upon which a public holiday falls over the weeks leading up to it that employee might then be rostered off on the actual holiday and not be paid for it.

[17] It would appear from the evidence the issue arose with NZNO seeking to address the entitlements of a member who sought payment for holidays over the 2018/2019 Christmas / New Year period as opposed to the grant of an alternate day. Considerable correspondence then followed though the parties were unable to agree.

[18] That led to Arohanui approaching a Labour Inspector who provided an opinion on employee entitlements in August 2019. The Inspector appears to have concluded the underlying issue was what constituted *an otherwise working day* and approached the matter by applying the factors listed in s 12 of the Holidays Act 2003. Having taken those factors into

account the inspector opined that if the employee was not rostered to work *then the day would not be an otherwise working day and as such the employer does not have to provide the rights and benefits as set out in the Holidays Act 2003.*

[19] It would also appear a key factor in reaching this conclusion was that while the MECA required that rosters be published not less than 14 days in advance, Arohanui produced its three months out. It followed that this *would indicate otherwise working days are known [and then] if the employee was not rostered on the day that was a public holiday there would be no expectation by either party that the employee would work on the day concerned.*

[20] It would probably be fair to say this opinion has influenced Arohanui's view and led to the current application.

## **Discussion**

[21] While s 174E of the Act allows for submissions not to be recorded I consider it useful in a matter such as this to provide a brief, albeit incomplete, precise of the key points as it provides a useful framework on which to base a conclusion.

[22] Before proceeding to the substantive issue Mr Lawrie comments on the Labour Inspector's right to determine what would otherwise be a working day which is enshrined in statute.<sup>1</sup> That said, it is also noted, quite correctly, that the Authority is not bound by that and may make its own determination.<sup>2</sup>

[23] Comment is also made about Arohanui's assertion the parties agreed to abide by the Labour Inspector's opinion and NZNO's rejection of this proposition.<sup>3</sup> On this I conclude NZNO is correct given both a lack of supporting evidence and the union's input to the Labour Inspector which shows it clearly held a contrary view. In any event, this disagreement need not be determined as the parties cannot agree to set aside a statutory entitlement and that would be the result should I agree with the union and reach a different conclusion to that of the Inspector.

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<sup>1</sup> Section 13 of the Holidays Act 2003

<sup>2</sup> Section 79 of the Holidays Act 2003 and *Progressive Meats Limited v Meat and Related Trades Workers Union of Aotearoa Inc*, WC18/06 WRC 4/06 15 September 2006 at [26]

<sup>3</sup> Paragraph 3.3 of the Statement in Reply

[24] Comment is then made about the Inspector's conclusion with comment that the finding an employees' days are fixed by means of the roster would, in turn, completely overlook and nullify the second limb of the clause 12.5 of the MECA.

[25] It is submitted the clause is clear and addresses the question of how to determine what would otherwise be a working day. To illustrate this a breakdown of the witness employee's roster for the 13 weeks (three months) preceding Good Friday 2019 is provided. It shows she worked 6 of the 13 Fridays which is just over 46%. 46% exceeds 40% and ipso facto she should have had Good Friday 2019 paid as a public holiday.

[26] For Arohanui it is submitted resolution of the dispute will primarily revolve around the word *fixed*.

[27] In its summary of its submissions Arohanui says:<sup>4</sup>

- (a) The Respondent's position is that there are four different categories of part-time rostered employees, and that three of those four categories of rostered part-time employees should not be entitled to public holiday provisions under the Fixed Entitlement because their days of work *are* fixed – either because they have fixed days of work; a fixed pattern of work; or the days of work are fixed according to a roster. That is to say, no public holiday entitlement, because the particular holiday would not otherwise have been a working day for them.
- (b) Importantly, all of these employees (fixed days of work; a fixed pattern of work; or the days of work are fixed according to a roster) know, a substantial period of time in advance, whether they will be required to work a public holiday or not, and therefore whether that day would otherwise be a working day for them.
- (c) The Respondent accepts that the fourth category of part-time rostered employees, the “gap fillers” referred to in the evidence, will be entitled to the calculation referred to at clause 12.5 – the Floating Entitlement.

[28] This argument that fixed may occur in a number of ways, including by the roster fails to convince. That is because it is not what the second portion of clause 12.5 says. It links the concept of *not fixed* to the day of the week on which the public holiday falls. That can only be

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<sup>4</sup> Paragraphs 6 to 8 of the closing submissions

the calendar day given the next part of the provision which refers to having worked on **that** day (emphasis is mine) in excess of 40% of the time in the preceding three months.

[29] The approach is also inconsistent with what is being argued; namely that the clause only applies to the *gap fillers*. Gap fillers are, in reality, casual employees who are expressly excluded from being covered by the clause by virtue of the definition of part time employee.

[30] Having considered the material before me I am persuaded by NZNO's submission. Indeed, I have to question whether or not the Inspector's opinion on which Arohanui relies was even validly proffered. Section 13 of the Holidays Act 2003 titled *Labour Inspector may determine what would otherwise be working day* provides the section only applies *if an employer and employee cannot agree under section 12 on whether a day would otherwise be a working day for the employee*. As submitted by NZNO the parties have agreed, via the MECA, on how the question of what would otherwise be a working day is to be determined so arguably the Inspector's opinion could only apply to those the clause does not cover which are employees whose days are not fixed and who have been with Arohanui for less than the stipulated three months.

[31] For the rest, the MECA provides a clear answer. If the employee has, over the preceding three months, worked on the calendar day upon which the holiday falls more the 40% of the time (ie: 6 or more such days) then the day shall be considered a public holiday and the employee shall receive the applicable benefits.

### **Conclusion and orders**

[32] For the above reasons I make the declaration sought by NZNO; namely that:

A part time employee, employed by Arohanui and covered by the terms and conditions of the MECA, who does not work the same, set days each work (sic) / fortnight but rather works a different combination of days each week / fortnight as set by roster and published under clause 6.6 of the MECA shall be entitled to the benefit of public holiday provisions such as payment of relevant daily pay for a public holiday, in accordance with the formula provided under the second limb of clause 12.5 of the MECA.

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed NZNO may lodge, and should then serve, a memorandum on costs within 14 days of the date of issue of this determination. From that date Arohanui would then have 14 days to lodge any

reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

**Michael Loftus**  
**Member of the Employment Relations Authority**