

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 354  
3117752

BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PUKENGĀ HERE TIKANGA MAHI INCORPORATED First Applicant
AND	E TU Second Applicant
AND	ACCESS COMMUNITY HEALTH LTD Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Peter Cranney, counsel for the Applicants Chloe Luscombe, counsel for the Respondent
Investigation Meeting:	8 April 2022
Submissions received:	29 April 2022 from Applicants 22 April 2022 from Respondent
Determination:	1 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicants, New Zealand Public Service Association Te Pukenga Here Tikanga Mahi Incorporated (PSA) and E Tu seek to have the Authority resolve a dispute between the parties which has arisen over the operation and interpretation of provisions in the collective agreement. The Applicants and the Respondent, Access Community Health Limited (Access), are parties to a multi-union collective agreement, dated 1 June 2018 to 31 March 2021 (the collective agreement).

[2] This dispute has arisen in relation to how work is scheduled and whether the regular letters offering additional terms and conditions (s 61 letters) are consistent with requirements of the collective agreement. Access has introduced a new term, “Preferred Times” to the s 61 letters to assist with when it schedules its support workers any replacement “guaranteed hours” and it is this term and concept that the Applicants take issue with.

[3] The collective agreement requires that the number of guaranteed hours is required to be set out in the s 61 letters and a base roster is attached which provides the detail of the dates and times of the appointments with clients which is essentially when the work is undertaken. Rosters are provided two weeks in advance.

[4] The question that arises is whether rosters that record preferred times, which is a span of availability that is greater than the time span of guaranteed hours is consistent with the collective agreement.

### **The Authority’s investigation**

[5] For the Authority’s investigation I heard evidence from six witnesses. Written witness statements were lodged from Sharon Guise, Michelle Field, Tania Cutelli, Helen Amey and Melissa Woolley on behalf of the Applicants and Androulla Kotrotsos gave evidence on behalf of the Respondent. All witnesses answered questions under oath or affirmation from me and the parties’ representatives. The representatives also provided written submissions.

[6] 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.

### **Issues**

[7] The issues requiring investigation were whether using a span of availability referred to as preferred times to roster support workers guaranteed hours is consistent with the collective agreement between the parties and therefore whether the information in the s 61 letters was correct.

## **Background**

[8] Access is a provider of community health care. While this workforce has traditionally consisted of workers paid on a piecemeal basis as assignment workers, in 2014 the Director General of Health commenced a work stream to explore the impact and affordability of transitioning to a regularised workforce. A regularised workforce was described as one which has:

- the majority of workers employed on guaranteed hours
- training to enable Level 3 New Zealand Certificate qualifications within two years of commencing work consistent with the service needs of the population
- wages paid on the basis of the required levels of training of the worker
- a case-mix/caseload mechanism to ensure the fair and safe allocation of clients to home care workers at a safe staffing level.

[9] In 2016, a settlement agreement was concluded between the unions, the funders, and the employers in this sector including the Applicants and Access and the parties have sought to transition to a regularised home and community-based support workforce, although the Authority was told this is a work in progress. The evidence was that the union parties and various industry parties had discussed an eventual move to “fixed shifts” as part of “regularisation” of the workforce, but this has not occurred to date.

[10] Ms Kotrotsos, General Manager, Access, explained that the “regularisation” of the workforce and move to guaranteed hours was about making sure that support workers had “surety” of a minimum income – by way of a minimum number of hours they must be paid for every fortnight.

[11] The collective agreement reflects this intent at clauses 4.1(b) and 4.1(c):

- (b) Access Community Health will allocate new clients to existing support workers who are working less than full time hours on a fair and equitable basis rather than employing new staff.

(c) Access Community Health is committed to working towards increasing security of hours for support workers. The parties acknowledge that there will always be a need for some casual staff due to the nature of the work.

[12] Access employs approximately 3000 support workers, and roughly 46 per-cent are members of one of the two Applicants and are employed on the collective agreement. Support workers go into the homes of people who need care and assistance to support them to continue to live within their own homes. The type of work they do varies but includes:

- (a) Personal cares, such as helping clients out of bed, showering and dressing clients;
- (b) Medication management, including supervising clients in taking their medication at specific times of the day;
- (c) Domestic assistance, including vacuuming, dusting, cleaning bathrooms and kitchens;
- (d) Assisting with preparation of meals, and helping clients with eating;
- (e) Taking clients to the supermarket and on other errands.

[13] Community support work is funded primarily by District Health Boards, the Ministry of Health and ACC. The client is the person Access delivers health care to, but in most cases, Access receives payment from one of the funders. The funding model is fixed and Access has contracts with the funders to provide services to the clients they refer to Access.

[14] The model of care is a client centric one. The work is premised on Access delivering the support its clients need, when they need it, to enable them to live fulfilled lives within their community. Access says this means, for example, being able to help them shower at the time the client needs the shower, not at the time that suits Access. They say that is an important and integral part of what they do.

[15] The client base is also fluid, with 84 per-cent of their clients being elderly. That sadly means that some die, but it also means Access frequently lose clients as they move into rest homes or family members decide to care for them. ACC clients are often short term as they are approved to receive care for short periods to enable them to rehabilitate from an injury. And then even amongst the clients who Access retains, because it uses

a client centric model, they can move their cares around to suit their lives. For example, moving showers to later in winter, and back again for summer, or to a different time of the day or week to suit their lifestyle.

[16] It is for this reason that Access says that a fixed days and times approach would simply not work within this sector because the clients and their needs are not at fixed times or days of the week. However, it is against that backdrop, Access is seeking to efficiently schedule its workforce to cover fluctuating levels of work, in a way that complies with the collective agreement, gives the support workers certainty of guaranteed minimum hours, but is also meeting its business needs.

[17] The Applicants say that the introduction of a span of availability or preferred times is inconsistent with the words and scheme of the collective agreement to the extent the introduction of it “does violence to the contractual language.” They say with the flexibility the employer benefits from in using a preferred times model, the support workers lose certainty and surety of minimum income. They are also no longer just working within a span of agreed guaranteed hours, they must be available to have their guaranteed hours scheduled in within their wider span of preferred times.

[18] The Applicants also say that when a support worker is to work within their preferred time that is now determined unilaterally by the employer each fortnight and that cannot be consistent with the collective agreement. Preferred time also appears to be additional to optional times which is another span of availability in which support workers in have said they may wish to pick up additional hours and Access says they are free to decline work if it is offered to them in this time period.

#### *Relevant clauses of the collective agreement*

[19] In terms of hours of work, Access must offer support workers who have regular clients guaranteed hours which will be set to agreed times and days of the week within the usual fortnightly roster period. The agreed number of guaranteed hours are required to be specified in a separate letter of offer or section 61 letter along with a base roster containing the agreed days and times for those guaranteed hours to be rostered within.

[20] Clause 1.5 sets out the definition of “Guaranteed Hours”:

“Guaranteed Hours” means the base (minimum hours a support worker is employed for and guaranteed on an ongoing basis. This will be the minimum numbers of hours they will be rostered for work on a weekly/fortnightly basis as agreed and recorded in the s 61 letter of offer and subsequent variation.

[21] Guaranteed hours are further described at clause 4.2:

#### 4.2 Guaranteed Hours

Support workers with guaranteed hours will receive rosters 14 days in advance outlining the clients they will be supporting within their guaranteed hours and any additional hours agreed for that period at the time of the roster being provided.

Note: changes may occur following the roster being provided consistent with the following clauses:

- (a) Support workers who provide support to Regular Clients (as defined in this agreement) will be offered guaranteed hours which will be set to agreed times and days of the week within the usual fortnightly roster period. Support workers with guaranteed hours will have the agreed number of guaranteed hours specified in a separate letter of offer or section 61 letter, along with the base roster containing the agreed days and times for those guaranteed hours to be rostered within.
- (b) Support workers with guaranteed hours will be expected to carry out any rostered work within the guaranteed hours at the days and times as agreed and recorded in the letter of offer/Section 61 letter.
- (c) If a support worker cannot perform any rostered work within their guaranteed hours total, the support worker must advise the Coordinator as soon as possible, and it will likely mean the support worker will need to apply for leave (e.g. annual leave, lieu days). This will depend on the manager's discretionary decision in the circumstances.  
...
- (d) Where the support worker and Coordinator (or manager) agrees, a rostered appointment may be changed to a different day or time. This will be considered on a case by case basis.
- (e) Over a fortnightly roster period, if a support worker is not rostered for the total number of guaranteed hours during the days and times agreed, the support worker will be paid for their guaranteed hours at the applicable hourly rate (gross) and any additional hours worked.

[22] Adding additional hours to the rosters of support workers with Guaranteed Hours is covered at clause 4.3:

#### 4.3 Support Workers with Guaranteed Hours – Additional Hours

Support workers with Guaranteed Hours may be offered additional work in addition to any guaranteed hours. A support worker will not be obliged to accept any additional hours offered.

Additional agreed hours are not guaranteed and will only be offered when Access Community Health has the additional work available. A support worker may decline any offer of additional hours, but once accepted by a support worker, they become “additional agreed hours” for the relevant fortnight roster period.

[23] When work is cancelled, clause 4.5 applies:

#### 4.5 Cancellation of work

If a rostered appointment cancellation occurs within an employee’s Guaranteed Hours:

- (a) Where a rostered appointment is cancelled (by any party other than the support worker) and Access Community Health receives 48 hours or less notice, Access Community Health will endeavour to find replacement work at the same time. The support worker will be expected to attend the new appointment as required, within their guaranteed hours. If replacement work is not available in these circumstances, the support worker will be paid as if the work had been completed at the applicable hourly rate (gross) for the cancelled appointment. It is agreed that this payment constitutes reasonable compensation for the cancellation of work.

[24] If a cancelled appointment is able to be replaced with another appointment at the same day and time then clause 4.5 goes on to provide:

...the support worker will be expected to attend the new appointment as required. If no replacement visit is available, the support worker will continue to be paid their guaranteed hours (and any additional hours they work) at their applicable hourly rate until such time as the process contained in clause 4.6 (Permanent Changes in Guaranteed Hours), is completed.

[25] If a rostered appointment that was within any Agreed Additional Hours is cancelled with 48 hours or less notice, and then clause 4.5 provides:

If a rostered appointment cancellation occurs within an employee's Additional Agreed Hours:

Where a support worker has accepted additional hours, and there are subsequent cancellations to those agreed hours with 48 hours or less notice, Access Community Health will seek to find replacement appointments which the support worker will be expected to work if scheduled. If cancellation is 48 hours or less, and replacement work is not able to be scheduled, Access Community Health will pay the support worker the applicable hourly rate for the cancelled appointment.

If notice of more than 48 hours is provided in the case of a cancelled appointment (during additional hours), the support worker can choose whether or not they will accept any replacement hours offered, and there will be no payment owing for the cancelled appointment. If Access Community Health cannot find replacement work in these circumstances, the support worker will not be paid for the cancelled additional work.

[26] When there are permanent changes in Guaranteed Hours clause 4.6 applies:

4.6 Permanent Changes in Guaranteed Hours

If a support worker's Regular Clients change and replacement work is not available, Access Community Health will take all reasonable steps to find replacement work for the support worker before proposing any reduction to the support worker's guaranteed hours.

If Access Community Health proposes to reduce a support worker's guaranteed hours, Access Community Health will consult with the support worker over a period of at least a week. Following consultation, if the support worker's guaranteed hours are to be reduced, the support worker will be given two weeks' notice before any change happens. The support worker will continue to be paid for their guaranteed hours during the consultation and notice period.

If during the consultation period the support workers previously agreed days and times change, this along with any changes in the support workers number of guaranteed hours will be recorded in an updated section 61 letter and signed off by the worker and an Access Community Health representative.

If a support worker works an average of 5 or more additional hours per week for more than 6 weeks, by mutual agreement these additional hours should become guaranteed hours, and the section 61 letter will be varied accordingly.

### *First system*

[27] The parties confirm they agree the first system adopted by Access complies with the collective agreement, although the Applicants say it was regularly breached, however the evidence in support of the breaches was not strong.

[28] Under the first system, in order to comply with subclause (a) of 4.2 of the collective agreement, the support workers were given a printed-out roster showing the times they were expected to work that corresponded with the times their clients have their cares scheduled and a letter under s 61 of the Act offered them the number of guaranteed hours agreed to. Once the support worker signs the s 61 letter, it is considered that there is mutual agreement to those agreed guaranteed hours for that fortnight in accordance with the specific hours and times they are scheduled to work recorded in the base roster.

[29] The Applicant says this system is compliant because the information in the s 61 letter complied with subclause (a) of 4.2 of the collective agreement, namely the agreed number of guaranteed hours and a base roster containing the agreed times and days that the guaranteed hours would be rostered within were specified.

### *Second system*

[30] The second system introduced a span of hours of availability called preferred times. Support workers are required to be available to work their guaranteed hours within the span of preferred times.

[31] The span of preferred times informs Access when it can schedule the total number of guaranteed hours. Some of the Applicants' witnesses said the span of preferred times required in order to be scheduled their guaranteed number of hours, could become onerous. For example, to secure 60 hours work a fortnight, a span of availability of approximately 100 hours was required and the guaranteed hours were

not always set to days and times of the week two weeks in advance. Guaranteed hours could also be scheduled in the wider span of preferred times.<sup>1</sup>

[32] There were assertions made by the witnesses that support workers are sometimes not paid for cancelled cares and that they are unable to identify on their payslips what are guaranteed hours and which are additional hours. This comes about because additional hours at different days and times are often used to make up the workers guaranteed hours rather than cancelled cares.

[33] Ms Cutelli is currently working as a support worker for Access. She provided an email from Access that explained the change in rostering brought about by the second system as follows:

The new system has 3 very clearly defined availability times

**Preferred Time (PT)** (colour coded GREEN) These are the times the support worker commits to being available e.g. 8 am to 4 p.m. and Guaranteed hours will fall in this zone. Preferred times always needs to be greater than GH as this time will include travel times and scheduled breaks like lunch breaks. If GH cares are cancelled and we can't offer you a replacement work, you are obliged to accept this or you will not be paid for that GH.

**Optional Times (OT)** (colour coded ORANGE) These times are when you have said you may wish to pick up extra clients short or long term. You are free to accept or decline this work without repercussions. Clients in Optional Times are not Guaranteed Hours. This means if they are cancelled we are under no obligation to pay you for that care (unless it is within 48 hours) or replace it.

**Not Available (NA)** (colour coded RED) We will not call or offer you work on your Unavailable Times. If you would like more work it will only be offered in the PT or OT.

[34] This email helps to demonstrate how the second system works in practice. Support workers must accept work that is within their guaranteed hours and with the introduction of preferred times, if guaranteed hours are cancelled and rescheduled into the wider span of preferred times, they are obliged to accept that work or take leave.

[35] The Applicants says this is not correct and as a result of introducing preferred times, support workers are not correctly offered their guaranteed hours because these

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<sup>1</sup> Brief of evidence, Michelle Field, at [8]-[9].

hours should be set to times and days of the week. Their work pattern is largely built on regular clients and the scheme set out in the collective agreement is such that if a client cancels (more than 48 hours in advance of an appointment) then another client should be offered in the same time slot.

[36] The Applicants submit the collective agreement cannot be interpreted in a way that permits work to be scheduled in preferred times because the concept of guaranteed hours is the mechanism by which hours are to be rostered. Under the collective agreement, workers should have set days and times when they are expected to work. This means the second system is inconsistent with how the scheduling system based on guaranteed hours is set out in the collective agreement.

[37] As a consequence, to the extent that any s 61 letters and base roster record that work is scheduled to be carried out in preferred times, this is a new concept and a term not referred to in the collective agreement and therefore the second system, the Applicants say, does not comply with the collective agreement.

[38] Access submits that both systems (first and second) are compliant with the collective agreement because in both systems:

- (a) the support worker receives a s 61 letter that sets out guaranteed hours;
- (b) the minimum hours that the support worker can be expected to be rostered to work in the applicable roster are provided;
- (c) the hours of work are rostered on 14 days' notice; and
- (d) both parties agree on the hours within which those hours will be rostered, as set out in the base roster as part of the s 61 letter.

[39] Access submits that the critical difference between the first and second systems, is that in the second system, the agreed times and dates within which the guaranteed hours are scheduled, are a span of agreed availability called preferred times. This approach, it says, is consistent with the collective agreement. Guaranteed hours are defined in the collective and are the number of hours agreed to. The specific days and times within which those guaranteed hours and any additional hours can be rostered are scheduled across a span of guaranteed hours and preferred times. Guaranteed hours are necessarily a subset of preferred times. These are agreed in writing and set out in the s 61 letter.

[40] Access says the construction of the collective agreement is broad enough to allow this approach involving an agreed span of hours. Access notes it consulted with the Applicants about the move to a new system, and there has been no breach of its obligations in doing so.

### *Availability*

[41] Ms Woolley is an assistant national secretary of the PSA with oversight of the community public services sector including Access. She says that Access requires union members to make themselves available for far more hours each week than the number of their guaranteed hours and there is no compensation paid by Access for that availability.

[42] Employee availability in an employment relationship must comply with the framework in the Employment Relations Act. Availability provisions are required in an employment agreement when the performance of an employee's work is conditional on the employer making work available and the employee is required to be available to accept any work that the employer makes available.

[43] An availability provision must specify agreed hours of work, including guaranteed hours and relate to a period for which an employee is required to be available that is in addition to those guaranteed hours. There must be genuine reasons for including an availability provision and the employee must be compensated for making themselves available to perform work under such a provision.

[44] Employees are able to refuse to perform certain work and they must not be treated adversely because of any refusal to perform certain work and the rules in relation to cancellation of shifts under an availability provision are set out in s 67G of the Act.

[45] Because of Ms Woolley's evidence and the fact that the concept of a span of hours naturally lends itself to an issue of employee availability, this was raised by the Authority during the investigation meeting. Both parties agreed and made oral submissions that this was not an availability arrangement. The issues with an availability arrangement are obvious in that if the introduction of a span of hours of availability meant support workers had to accept hours offered outside of guaranteed

hours but within the preferred times, compliance with ss s 67D to 67G of the Act would be required.

[46] Availability was also relevant because of the evidence that shortly after the second system was implemented, Access circulated information about the introduction of preferred times that clearly stated support workers could not reject work offered during preferred times. This has now been rectified and that information withdrawn. Ms Kotrotsos gave evidence that this was an error and was not the intention of Access when it introduced the concept of preferred times.

[47] However, the evidence appears to be that the only time when work offered in preferred times must be accepted is when the support worker's total number of guaranteed hours in that fortnight have not been able to be offered in the narrower window of guaranteed hours. So long as the total number of guaranteed hours are scheduled, the support worker has a choice about accepting or rejecting work in the preferred times.

### **Analysis**

[48] In order to address this issue, an interpretation by the Authority of clauses 4.2 Guaranteed Hours, 4.3 Support Workers with Guaranteed Hours – Additional Hours, 4.5 Cancellation of work and 4.6 Permanent Changes in Guaranteed Hours, is required and the relevant clauses are set out above.

#### *Interpretation of collective agreements*

[49] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* set out the approach to be used in contractual interpretation.<sup>2</sup> The focus is on the objective meaning of the words the parties have used. Background material can be helpful as a “cross check” even if the words used appear to be unambiguous. However, what was discussed in prior negotiations is only helpful if it shows what the parties objectively intended the words to mean.

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<sup>2</sup> *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [19].

[50] This approach has been carried through to collective agreements.<sup>3</sup> In *Tertiary Education Union v V-C of Auckland University*, Judge Inglis summarised the principles of interpretation in the context of collective agreements:

[6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context....

[7] The second stage of the interpretive exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made.

[8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts circumstances and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which and agreement was entered into. .... Evidence of what a party subjectively intended or understood their words to mean, or what the negotiating stances was at any particular time, is irrelevant.<sup>4</sup>

[51] The starting point in analysing whether a span of availability is consistent with the collective agreement and then whether the s 61 letters contain the correct information is to examine the words of the clauses that specify what must be set out in the s 61 letters to see whether they are clear and unambiguous.

[52] If I find that, on a plain meaning of the clauses, that the minimum agreed hours of work can only be scheduled into the time span of guaranteed hours, then preferred times would be inconsistent with the collective and the s 61 letter and base roster should not refer preferred times and rescheduled guaranteed hours should not be scheduled in the time span called preferred times.

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<sup>3</sup> *NZ Amlagamated Engineering, Printing and Manufacturing Union v Amcor Packaging (New Zealand) Limited* [2011]. NZEmpC at [12]; *NZ Meat Workers & Related Trade Union Incorporated v Silver Fern Farms Ltd* (formerly PPCS Ltd) [2010] NZCZ 317.

<sup>4</sup> *In Tertiary Education Union v V-C of Auckland University* [2015] ERNZ 979.

*What was the difference between the first and second system?*

[53] In both the first and second system the guaranteed number of hours were specified (in the s 61 letter), together with the days of the week and times of the day that work would take place (in the base roster). The second system introduced preferred times which are a greater number of hours than guaranteed hours. The purpose of introducing a greater span of hours was to provide more efficiency in the way work was scheduled, particularly because the nature of the service that Access provides is flexible and can and often does fluctuate because its clients' needs are always subject to change. Ms Kotrotsos set it out as follows:<sup>5</sup>

One of the ways we try to be more efficient is by ensuring we schedule work in the most efficient way. That means trying to ensure we are minimising cancelled cares and are giving employees the amount of work they want, at the times they want. It is in our best interest to work with support workers to build the number of guaranteed hours they want, so we can retain them, as recruitment and onboarding is expensive, and also this minimises disruption for clients.

[54] Ms Kotrotsos also noted the margins are tight in this industry and work is funded mostly from a small number of Government sources, and the chief pay conditions are set by legislation.<sup>6</sup>

*What must be mutually agreed?*

[55] Clause 4.2(a) provides that support workers who provide support to regular clients will be offered guaranteed hours which will be set to agreed times and days of the week within the usual fortnightly roster period. The significance is that on the basis there is agreement support workers are expected to carry out any rostered work within the guaranteed hours at the days and times as agreed and recorded in the letter of offer/Section 61 letter. If they can no longer perform work at the agreed times, they will likely need to apply for leave (unless work was cancelled within 48 hours). However, if over the fortnightly roster period, they are not rostered for their total

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<sup>5</sup> Brief of evidence, Androulla Kotrotsos at [7].

<sup>6</sup> The Care and Support Workers (Pay Equity) Settlements Act 2017 and the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016.

number of guaranteed hours during the days and times agreed, they are still paid for the guaranteed hours at the applicable hourly rate together with any additional hours worked.

[56] This means that the guaranteed number of hours which will be set to agreed times and days of the week within the usual fortnightly roster period must be agreed.

[57] Of note clause 4.2 goes on to state the following and uses the phrase “rostered within”:

Support workers with guaranteed hours will have the agreed number of guaranteed hours specified in a separate letter of offer or section 61 letter, along with the base roster containing the agreed days and times for those guaranteed hours to be rostered within.

#### *Section 61 letters*

[58] Because of the fluctuating nature of the work, s 61 letters are used to ensure there is an offer made by Access and agreement from the support worker to any additional terms and conditions of the collective agreement. Clause 4.2(a) envisages that the agreed number of guaranteed hours each fortnight will be specified in the s 61 letter and the base roster contains the agreed days and times for those guaranteed hours to be rostered within.

#### *What happens to guaranteed hours when work is rescheduled?*

[59] If an appointment has cancelled within a support workers guaranteed hours, they are entitled to payment, so long as it is cancelled within 48 hours of the scheduled appointment. If Access cannot find a replacement appointment, it must compensate the support worker by way of payment which would equate to what they would have been paid had they carried out the work.

[60] Under the second system I understood the evidence to be that if replacement hours are offered in the greater span of time, being preferred time, but outside guaranteed hours, the support worker has a choice to accept or reject that replacement work. If replacement work is rejected there is no compensation. If this scenario caused

a reduction in wages because of lost guaranteed hours rescheduled into preferred times, this would be inconsistent with the scheme and intent of the collective agreement.

*Are “preferred times” consistent with the collective agreement?*

[61] On a plain reading of the words in the relevant provisions, the words appear to be unambiguous although on the one hand, guaranteed hours are described as the total minimum number of hours it has been agreed the support worker will work in a two week period, I note that the second part of clause 4.2(a) describes how those guaranteed hours are to be scheduled in this way “...along with the base roster containing the agreed days and times for those guaranteed hours to be rostered within”.

[62] That would tend to indicate that there are agreed days and times that are something separate to guaranteed hours and the purpose of them is to provide a span of time within which agreed guaranteed hours can be rostered.

[63] I take the starting point to be that the collective agreement can be interpreted in such a way that a wider span of time is permissible, within which the guaranteed hours could be scheduled, the next step is to apply a cross check against the background to this collective.

[64] I note first that the agreed intent of the parties was to move towards a “regularised workforce” with the purpose of making sure that support workers had “surety” of a minimum income – by way of a minimum number of hours they must be paid for every fortnight. In considering this background, if a wider span of hours was anticipated by the collective agreement, it could not have been intended to operate in such a way that meant support workers missed out on payment for guaranteed hours.

[65] This means that if preferred times operate in such a way that support workers are unable to decline or reject shifts in preferred times, without that impacting on their guaranteed hours and wages for guaranteed hours, preferred times would be operating in such a way that was not consistent with the collective agreement.

[66] Further, in adopting a scheduling scheme that includes preferred times, if that scheme operated in such a way that a span of hours within which guaranteed hours are

to be rostered becomes onerous for the support worker, that would also not be consistent with the collective agreement.

## **Outcome**

[67] I find that the span of availability referred to as preferred times is consistent with the collective agreement so long as the operation of preferred times are agreed and they do not impact on payment to support workers for guaranteed hours and the span of time that preferred times relate to are not onerous for support workers.

[68] It follows that preferred times can be set out as part of the offer from Access to support workers in the s 61 letters so long as the preferred times are agreed, and they do not impact on payment to support workers for guaranteed hours and the span of time that preferred times relate to are not onerous for support workers.

## **Relief/remedies**

[69] The Authority and both parties agreed that remedies will be considered after the Authority has reached a concluded view on how the collective agreement is to be interpreted. Accordingly, both parties are invited to indicate their availability to attend a further case management conference (CMC) to the Authority Officer to schedule a CMC and timetable any further submissions as required.

## **Costs**

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>7</sup>

[71] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

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<sup>7</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

<sup>8</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

Sarah Kennedy  
Member of the Employment Relations Authority