IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 468
3141321

	BETWEEN	DR DONALD TAYLOR Applicant
	AND	WAITEMATA DISTRICT HEATH BOARD First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in person Anthony Russell, counsel for the Respondent
Investigation Meeting:	12 August 2022
Submissions and/or further evidence	15 August 2022 from the Applicant 12 August 2022 from the Respondent
Determination:	16 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Dr Donald Taylor, claims that the Respondent, Waitemata District Health Board, (WDHB), breached his employment agreement by rostering him on night shifts in excess of the maximum number agreed to be worked during the period July 2013 to June 2017.

[2] As a result, Dr Taylor claims that he is owed monies in respect of the excess nights he worked between the period July 2013 to June 2017.

[3] Dr Taylor further claims that this situation has disadvantaged him in employment.

[4] WDHB denies that it has breached the employment agreement against Dr Taylor, or that he is contractually entitled to payment for night shifts worked in excess of what had been agreed between the parties.

[5] WDHB further claims that the limitation periods apply to Dr Taylor's claims, such that his claim cannot succeed.

The Authority's investigation

[6] The Authority received written and oral evidence from Dr Taylor; and for WDHB: from Dr Julie Prior, Medical Officer, Clinical Lead, and Ms Alexandra Boersma, General Manager of Acute and Emergency Medicine, for the WDHB.

[7] I also received supporting documentation and submissions from Dr Taylor and counsel for the WDHB.

[8] 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

[9] The issues requiring investigation are whether or not:

- Any or all of Dr Taylor's claims are time barred;
- The WDHB breached the contractual terms relating to leave between it and Dr Taylor between the period 2013 to 2017;
- The WDHB owes Dr Taylor any payment in respect of night shifts worked in excess of the contractual agreement, and if so, in what sum; and
- Has Dr Taylor been disadvantaged in his employment with WDHB?

Background

[10] Dr Taylor was employed by WDHB as a Senior Medical Officer on a part-time basis in 2005. From 2006 his position was 0.6 of a full-time equivalent (FTE) employee.

[11] Medical Officers (MO) work night shifts in the emergency department of WDHB as part of their contract.

Contractual Provisions

[12] The contractual provisions are found within the confines and boundaries of the applicable collective agreement, which was the ASMS MECA and the Remuneration

Agreement: the 'Remuneration For Medical Officers employed in the Emergency Departments at North Shore & Waitakere Hospitals' Agreement between the DHB and ASMS'. These were entered into in 2008 between the Association of Salaried Medical Specialists (ASMS) and the WDHB (the 2008 Agreement).

[13] The 2008 Agreement was signed on behalf of the WDHB by the General Manager, Adult Health Services, and on behalf of the MOs by the ASMS Senior Industrial Officer. It stated:

> 2. This Agreement replaces the *Remuneration agreement between Waitemata District health Board and Emergency Department MOSS dated 18 September 2004.*
>
> *3.* … In the absence of agreement to the contrary ,,, the following conditions shall continue to apply a 1:3 roster is defined as one weekend 'on' followed by two consecutive weekends 'off ' and medical officers shall not be required to work more than eight nights during the twelve week roster period. ,,,

[14] Since approximately 2009 Dr Prior had written the MO roster as well as the rosters for senior Doctors. Dr Prior said although she had no formal training in rostering, she rostered according to what was fair and reasonable to all.

[15] Dr Prior said that clauses 2 and 3 of the 2008 Agreement were known as the '8 in 12' rule according to which a full-time MO would not be required to work more than 8 nights during the 12 week roster period. This equated to no more than 35 nights per year for a full-time MO, or to 21 nights a year for Dr Taylor who was 0.6 FTE.

[16] This was calculated on the basis:

- 52 weeks in a year ÷ 12 week roster period = 4.33 rosters written each year.
- 8 nights during roster period x 4.33 rosters a year = 34.67 nights a year – no more than 35 nights required each year. (it is rounded to the nearest whole number since MOs cannot work a partial night shift.

The Guidelines

[17] There were guidelines entered into between MOs and WDHBs. Dr Prior said that most recent version of these was the NSH MO – Roster – Guidelines updated in 2011 (the Guidelines). The Guidelines noted that:

> The following roster guideline was written in discussion and agreement with the NSH MO Group. …
>
> The principles are based on the MECA and prevailing employment conditions that form the basis of the contracts. …

> The roster pattern, shift length and distribution of non-clinical shifts has been agreed by the group and WDHB and is based on the provisions in the employment contract, in particular the clinical hours, weekend and night workload.

[18] The Guidelines went on to state:

> ANNUAL LEAVE
>
> Leave calculations are based on 20% (approx. 42/52) leave available guide for the service at any particular point in time and relates directly to FTE allowance.
>
> APPLICATION PROCEDURE
>
> Any leave applied for will be granted to a maximum of the FTE allowance (20% as above): This works out to roughly to 1 FTE leave for every FTE in place (FTE allocated) at time of leave application.…
>
> 20% of total nights covered by rotating MO roster per week can be included in the leave for each week.
> The current roster covers 10 night shifts each week, 20% equals 2 nights.
> Therefore currently the roster can have 2 nights leave per week.
> …
> We have decided that the fairest allocation for leave is on a "first come first served bass" and depends on the number of leave applications and any peak leave period. …
>
> LEAVE PERIODS THAT INCLUDE PUBLIC HOLIDAYS …
> …Leave approval is based on what is reasonable and fair taking into account relevant factors.
>
> LEAVE DURATION:
> Leave approval for applications for a duration of more than 4 weeks leave …. Is based on what is reasonable and fair taking account into account all relevant factors.
>
> LEAVE ON NIGHTS:
> NSH:
> Contractual expectations have been a maximum of 8 nights / 12 weeks. The current 12 week rotating roster includes 7 nights. There are 2 FTE permanent nights that cover 4 nights per week.
> Leave can be taken on nights but must pass the "reasonable" test. Leave on nights is limited to the equivalent of 20% of total number of nights covered by the 12-week rotating roster, this is 2 nights per week total excluding leave for permanent night positions. At any time night shifts may be offered to MO's during their reliever week and can be time weighted. There is no obligation to work these if the 8 nights in 12 weeks has been worked.

[19] The Guidelines further stated:

> With respect to contractual expectation MOSS's work a maximum of 8 nights in 12 weeks.
>
> With 10 weeks leave per year in total (6 weeks Annual Leave, 2 weeks CME leave and 2 weeks TIL) you can take up to 7 night shifts off per year (Pro-rata)

[20] Dr Prior explained that this meant that a maximum of 20 percent of nights could be taken as leave for 1 full-time MO, or 7 nights pro-rata equivalent for Dr Taylor.

2013 Roster

[21] In 2013 a new roster was introduced after discussion and consultation. The new roster replaced the previous fixed rotating roster which gave some predictability to MOs of their shift patterns throughout the year from year to year.

[22] Dr Prior explained that leave on nights was approved on a 'first come first served' principle. This meant that if a MO requested leave on a week which included night shifts, some nights were given as leave up to 20 percent pro rata, with only one doctor allowed to be off a night shift at a time.

[23] Any nights approved as leave that were above the maximum of 20 percent allowed were to be made up elsewhere within an individual MOs roster.

[24] The 2013 roster was a flexible rotating roster with a different way of rostering and different working hours. As a consequence, the roster was no longer fixed in advance but allowed more flexibility to roster staff at both Waitakere and North Shore Hospital Emergency Departments and provided better coverage across all shifts.

[25] There was a meeting on 6 December 2012 between the Associate Clinical Director and Dr Prior and MOs (including Dr Taylor). The purpose of the meeting was to discuss proposed changes to the roster from 11 February 2013. The minutes of the meeting state:

> We will continue with 1:3 weekends and 8:12 nights as per contract. …
>
> Julie: informed the group they are entitled to 4 weekends and 7.5 nights per year pro rata as leave.

[26] On or about March or April 2013 the WDHB circulated the document headed: "Roster Rules and Guiding Principles Emergency Department WDHB ED'. That document provided:

> 1.6 There will be a maximum of 8 night shifts in a 12-week period – this will be rostered as either sets of 1 or 2 (preferentially) and sometimes 3 (Fri, Sat, Sun at WTH). …
>
> 2.4 Except for school holidays and the Christmas/Summer leave period will be approved on a first come first serve basis with a 20% FTE allowance. …
>
> 2.8 The overall roster needs to be formulated by one individual … however the leave requests and early planning – nights/weekends erc would be the responsibility of Kate, Julie and Etienne to coordinate and approve before release.

[27] The new roster system was introduced following consultation in July 2013. Dr Prior said that nights would still be rostered according to the underlying night leave principles which had not changed. Nights were given off as leave as fairly as possible across the whole group of MOs.

[28] Dr Taylor said that he started to experience fatigue and started to record the number of nights he was working after July 2013. He asked Dr Prior how she worked out the night shifts and she reassured him he was working the correct number.

Events 2017

[29] In August 2017 Dr Taylor said he counted the number of nights he was rostered on from July 2013 to June 2017 and obtained leave records from the pay office for this period to confirm the details.

[30] Dr Taylor said according to his calculations he had been rostered to work, and had worked, 79 nights shifts, an average of 20 shifts each year which was the maximum number of shifts he was contracted to work assuming he was granted no leave.

[31] He said he had taken an average of 11 weeks leave a year over this period and realised that when he took leave, night shifts were not included in that leave. He was rostered on those night shifts when he returned from leave.

[32] Dr Prior said that Dr Taylor contacted her in August 2017 and again in September 2017 questioning how many nights he had worked over the preceding four years. Dr Taylor raised his concern that he had been rostered for more nights that he was contracted to work, and he wanted all the nights over a 20 percent leave loading removed from his requirement for the following year. Dr Prior said she advised him to discuss this with the Operations Manager at that time.

[33] On 2 October 2017 Dr Taylor wrote the Operations Manager at the time, copying in Dr Prior, and stated:

> It appears that my roster over the last 4 years breaches the long standing agreement that we have around our taking up to 20% of our nights as leave.
>
> … the minutes of the meeting SMOs had prior to the new roster starting. .. The agreement was we could take leave on nights (in roster rules prior, known about and agreed to by WDHB and SMOs) WAS TO CONTINUE. Extract from page 3 of the attached document reads: "Julie: informed the group they are entitled to 4 weekends and 7.5 nights Per year pro rata as leave".
> So we were given a concrete reassurance that we would continue to get up 7.5 nights per year pro rata.
>
> 1 Total number of night for a full time MOSS is 34.7 a year if no leave is taken. So it would be reduced to 27.2 if 20% leave is taken. … so at my 0.6 FTE, I am entitled to take 4.5 nights per year as leave. So my 20.8 nights should be reduced to 16.3 nights per year, conditional on me taking 20% leave,
>
> … I believe I have been over rostered nights since the introduction of the new roster in 2013.

> … To address this, I would like this 13.8 nights over-rostered over the past 4 hours to be taken way from this years and next year's night requirement.

[34] Dr Prior said that subsequently she checked her records and found that Dr Taylor had not worked more than 21 nights in any of the relevant years between 2013 and 2017.

[35] Dr Taylor said that he met with the previous Operations Manager and a representative from the HR department in December 2017.

Events 2018

[36] On 12 February 2018 Dr Taylor met with Ms Boersma, Dr Allen, Associate Clinical Director, a representative from HR, and the ASMS representative. and her team. Dr Taylor said Ms Boersma told him that any night shifts which were included in his leave would be rostered after he returned from leave.

[37] Ms Boersma said she confirmed that she understood Dr Taylor had been granted about 10 percent of his leave on nights overall which she had thought was reasonable.

[38] She said she had noted that the last change to rostering had occurred in 2013 and this had been discussed with the MOs and their feedback sought, adding that the changes were to ensure that nights were fully covered on the roster and to ensure fairness. It was explained that the leave policy has no requirement in it to ensure any particular type of leave is used up or preserved for leave.

[39] Dr Allen said she had commented that the agreement had been in operation for four years and no one else had expressed any concerns about it.

[40] Dr Allen said that she had stated that the discussion she had with the MOs was about staying within a maximum agreed limit of up to 20 percent, which did not mean that everyone could have the maximum 20 percent of nights off on leave on every occasion.

[41] The meeting concluded without an agreement being reached.

[42] Dr Taylor said that on 20 March 2018 he had spoken informally with Dr Allen, and Dr Willem Landman, Emergency Department Clinical Director. He had expressed his frustration with the leave provisions as they affected night shift working. He said Dr Landman had said the situation would be addressed going forward.

[43] Dr Allen said she did not recall the meeting with Dr Landman, however she and Dr Prior worked together to make the roster process more transparent, by drawing up a spreadsheet

to show that if a day's leave was taken, there would be a 0.17 reduction on night shifts taken off.

[44] On 18 June 2018 Dr Taylor said he received a letter from Ms Boersma advising him that his night shifts would be reduced by 20 percent which meant that (applying rounding) that one year he would work 17 nights, the following year 16 nights.

[45] In the same letter Ms Boersma said she stated that "the phrasing up to 20 %" was not a direct quote from a document, but said she now knew that it was from the Guidelines during the period 2013 – 2017 which Dr Prior was both aware of, and applied, when composing the rosters for that period.

[46] In an email to Ms Boersma and others dated 30 June 2018 Dr Taylor advised: 'I will not be working nights shifts from now till my balance of owed nights is used up". This was reiterated in a letter dated the same date.

[47] Ms Boersma replied by letter dated 6 July 2018 advising Dr Taylor that if he did not report for his night shifts, disciplinary action could be taken against him.

[48] Dr Taylor accompanied by the ASMS representative met with Ms Boersma, and representatives from HR on 16 July 2018. Ms Boersma said she acknowledged Dr Taylor's reluctance to work nights, and advised that WDHB had in good faith agreed to allow him to apply a full leave loading to nights going forward.

[49] Ms Boersma sent a letter to Dr Taylor dated 23 July 2018 outlining the outcome of the meeting. The letter stated:

> … our stance remains unchanged in that you have not worked more nights than required under the MECA and associated Remuneration agreement between the union and Waitemata DHB, which you are bound by. As such, you do not have an accumulated night leave balance owed to you and thus, you are required to work your rostered night shifts unless you have pre-approved leave …. I explained that as a part-time employee on 0.6 FTE you are required to work no more than 21 nights a year and that the organisation had complied with this.

Personal grievance

[50] On 14 August 2018 Dr Taylor wrote to Ms Boersma raising a personal grievance. Dr Taylor stated: "I believe I have a personal grievance because you have required me to work more nights than we mutually agreed to with the introduction of the new roster in July 2013 ."

[51] Ms Boersma responded by letter dated 21 August 2018 stating that WDHB did not accept that Dr Taylor was unjustifiably disadvantaged, but offering to attend mediation.

[52] Mediation was held in September 2018 but did not resolve Dr Taylor's historical claims for the period 2013 – 2017.

[53] After various communications between the parties, a representative from ASMS contacted Ms Boersma by letter dated 28 August 2020 attaching a legal opinion from a barrister in respect of Dr Taylor's claim dated 25 August 2018 which advised that in his opinion, there was a breach of contract.

[54] The parties attempted to resolve the matter, but were not successful in doing so, and on 31 May 2021 Dr Taylor filed a statement of problem with the Authority alleging that the WDHB had breached its contract with him.

Are any of Dr Taylor's claims time barred as a result of the application of the Limitations Act 2010?

[55] Limitation periods affect an employee's ability to raise claims in the Authority.

(a) The Disadvantage claim

[56] An unjustifiable disadvantage is a personal grievance.

[57] Personal grievances must be raised within a period of 90 days: "beginning on the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee". [1]

[58] From the point at which the personal grievance has been raised, the employee has three years to commence the action in the Authority pursuant to s 114(6) which states:

> No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[59] Dr Taylor raised his personal grievance with WDHB on 14 August 2018. The parties attended mediation but this did not resolve the matter. The Statement of Problem filed with the Authority on 29 May 2021 claimed a breach of contract and sought a compensation payment for that. There was no claim in respect of an unjustifiable disadvantage in the Statement of Problem.

[60] In respect of the issue as to whether or not the personal unjustifiable disadvantage claim is out of time, I note that Dr Taylor raised the personal grievance on 14 August 2018.

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[1] Section 114(1) of the Employment Relations Act 2000.

[61] Section 114 of the Act allows the Authority a discretion to allow a personal grievance to be raised outside of the statutory 90 day time limit set out a s 114(1), stating in s 114 (4):

> On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave …

[62] However there is no corresponding discretion provided to the Authority in s 114(6) of the Act which states:

> No action may be commenced in the Authority or in the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[63] Since the claim of unjustifiable disadvantage was only raised in the letter from Dr Taylor raising a personal grievance on 14 August 2018, I find it is out of time pursuant to s 114(6) of the Act.

[64] I determine that Dr Taylor's claim for unjustifiable disadvantage has been raised outside of the statutory time limit set out in s 114(6).

(b) The breach of Contract claim

[65] Dr Taylor is claiming a breach of contract in respect of the period July 2013 to June 2017. This is not a personal grievance. Pursuant to s 142 of the Act, actions which are not personal grievances cannot be raised in the Authority or court more than 6 years after the date on which the cause of action arose.

[66] Dr Taylor raised his claim in the Authority on 29 May 2021. From that date any claim extends backwards for 6 years, i.e. to 29 May 2015.

[67] Accordingly I determine that the period to which Dr Taylor's claim for breach of contract relates is in respect of the period 29 May 2015 to June 2017.

Has the WDHB breached the contractual agreement regarding night shift working?

[68] This is a contractual claim, therefore the wording of the agreements between the parties is fundamental to determining Dr Taylor's claim that he has been over-rostered night shifts.

[69] I find there are two contracts between the parties.

(i) The 2008 Agreement

[70] The 2008 Agreement refers to night shift working in clause 3, which states that the conditions relating to a 1:3 roster are defined as one weekend followed by two consecutive

weekends off, and that MOs would not be required to work more than eight nights during the twelve week roster period.

[71] Based on the evidence I find that this clause has not been breached by WDHB.

(ii) The Guidelines

[72] It is therefore necessary to consider the Guidelines. These were written: "in discussion and agreement with the NSH MO group".

[73] A contract as defined by the Oxford English Dictionary online is : "A mutual agreement between two or more parties that something shall be done or forborne by one or both; a compact, covenant, bargain; *esp.* such as has legal effects."

[74] I therefore consider that the Guidelines are a contract between the WDHB and the MO group and should be considered to see if they confer a contractual entitlement on Dr Taylor to 20 percent of rostered nights off as leave.

[75] The Guidelines state that the leave expectations are: "based on the 20 percent of leave guide available for the service" and that: "20% of total nights covered by rotating MO roster per week can be included in the leave for each week. … Therefore the currently the roster can have 2 nights leave per week."

[76] I find that the wording 'available for the service' and '20% of total nights covered … can be included':

a) applies to the MOs collectively rather than individually; and

b) indicates by the words 'can be' that this is permissive rather than mandatory on the WDHB i.e. it cannot be enforced upon the WDHB.

[77] As an MO, Dr Taylor could apply to take nights as leave. The Guidelines state that leave will granted on a 'first come, first served' basis, provided the leave request passes the 'reasonable' test".

[78] Dr Taylor applied for leave during the period July 2013 to June 2017 and the evidence is that these applications were granted. Dr Taylor did not have to work any nights which fell within those leave periods, however he was rostered to work the nights at a later stage.

[79] The contractual rights arise from the 2008 Agreement and the Guidelines. The 2008 Agreement set out the contractual term that MOs would not be required to work more than eight nights during the twelve week roster period.

[80] There is no evidence that Dr Taylor was required to work the pro rata equivalent of more than eight nights during the twelve week roster period.

[81] The Guidelines state that up 20 percent of nights can be granted as leave within the roster which applied to all MOs, however there is no contractual term in the Guidelines that the WDHB must grant 20 percent of night shifts as leave to Dr Taylor personally rather than to the MOs as a group.

[82] I determine that the WDHB has not breached the contract between it and Dr Taylor.

Is Dr Taylor owed any monies in respect of nights worked in breach of the contractual provisions?

[83] I have determined that the WDHB did not breach the contractual requirements and accordingly no money is due to Dr Taylor in respect of nights worked in breach of the contractual provisions.

Has Dr Taylor been unjustifiably disadvantaged in his employment with WDHB?

[84] This aspect of Dr Taylor's claim has been determined to have been raised out of time.

[85] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[86] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant 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.

[87] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[88] 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.[2]

Eleanor Robinson
Member of the Employment Relations Authority

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