

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 622
3285220

BETWEEN JEREMY EWE
Applicant

AND THE CHIEF EXECUTIVE OF
ORANGA TAMARIKI –
MINISTRY FOR CHILDREN
Respondent

Member of Authority: Peter Fuiava

Representatives: Albert Vahaakolo for the Applicant
Alyn Higgins, counsel for the Respondent

Investigation Meeting: 13 June 2025 in Manukau and by audio-visual link

Submissions and information received: Up to, and including, 7 July 2025 from the Applicant
25 June 2025 from the Respondent

Determination: 3 October 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This is a claim for wage arrears. For 17 years, Jeremy Ewe worked as a residential worker at Oranga Tamariki's Youth Justice North Facility in South Auckland, Korowai Manaaki (Korowai). He says that for the period from 14 May 2020 to 3 May 2021, he is owed wages by the Chief Executive of Oranga Tamariki – Ministry for Children (OT or the Ministry) for offering work to casually-employed workers instead of staff such as himself who were employed on a permanent-variable-hour (PVH) basis.

[2] OT disputes that PVH employees are entitled to payment of wages for any shifts worked by casual employees that have not first been offered to PVH employees including Mr Ewe. It further denies that there are any outstanding leave or wage

payments owed to him and says that what work was available during the above period, he declined to do and consequently the ‘no work, no pay’ principle applies.¹

What was the issue and how did the Authority investigate?

[3] During a case management conference with the representatives on 12 March 2025, it was agreed that the sole issue for the Authority’s investigation was whether OT owes Mr Ewe any wages for the period from 14 May 2020 to 3 May 2021.²

[4] For my investigation, Mr Ewe provided me with a written witness statement. For OT, witness statements from then residence manager of Korowai, Kyle Kuiti, manager residence operations, Soane Mokoi, and team leader logistics, David Moala, were provided.

[5] For ease of convenience for all parties, the investigation meeting was held in Manukau and leave was granted for Mr Kuiti, Mr Mokoi and Mr Moala to attend the investigation meeting by audio-visual link. In giving their evidence via AVL, there were no audio or visual issues of note.

[6] All witnesses answered questions under oath or affirmation from me and the parties’ representatives. 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.

What are the relevant facts?

[7] Mr Ewe commenced employment with OT on 5 April 2004 as a casually-employed Residential Worker at Korowai. In 2009, his employment status changed to PVH (Permanent Variable Hours). According to a letter of offer from Korowai (4 May 2009), it was explained to Mr Ewe that if he accepted the change to PVH, he would be permanently employed but his actual hours would remain “variable and that there is no guarantee of the number of hours [of] work offered”.

¹ *Mana Coach Services Limited v The New Zealand Tramways and Public Transport Union Inc* [2015] NZEmpC 44.

² Minute of the Authority, 12 March 2025, at [1].

[8] Towards the end of Mr Ewe’s employment his circumstances changed. It is understood that he had the first of two heart attacks in 2016. In October 2020, he suffered his second transient ischaemic attack or stroke which left him with ongoing right-sided weakness. In conversations with staff, including with Mr Kuiti, Mr Ewe made it known that due to his health, he did not want to “work on the floor” with the rangatahi (youth). He was subsequently re-deployed to co-ordinate and supervise visits to Korowai which he did Monday to Friday in the AM or morning hours as it was understood that he had a morning paper run for the NZ Herald and had caregiving responsibilities in the evening to his wife who was not mobile and had health issues of her own.

[9] The terms and conditions of Mr Ewe’s employment are set out in his employment agreement namely The Oranga Tamariki – Ministry for Children and Public Service Association Collective Employment Agreement 2 December 2018 – 30 June 2021 (the Agreement). Clause 13 of the Agreement defines what is meant by a PVH employee:

13 Permanent variable hours employees

Definition

Casual employees who have been appointed to a “Permanent Variable Hours” position have permanent employment status. The permanent variable hours employment category recognises the nature of the relationship that Oranga Tamariki has with those employees, which:

- maintains the flexibility and the variability of working hours which is attractive to the individuals; and
- reflects the work patterns and business need related to this workforce.

“Permanent Variable Hours” conditions may only apply to the following six core roles:

- Tracker/minder
- Escort
- Mentor
- Contact (Access) Supervisor
- Family Home Reliever
- Established positions within the National Contact Centre
- Residential (Casual) Worker

[10] Clause 13.2 of the Agreement set out specific provisions that apply specifically to “Permanent Variable Hours” employees. This included cl 13.2.1 which relevantly states:

13.2.1 Hours of work

- The number of hours of work are not guaranteed
- ...
- In allocating and accepting hours of work, managers and employees shall have regard to the employee's health and safety inclusive of reasonable break periods
- Employees are not required to be available to accept work as provided for in s 67D of [the Act].

[11] On 4 May 2020, Mr Mokoi emailed a colleague stating that he had reminded Mr Ewe that the available shift work he had were all night shift due to a recent intake of permanent staff. Mr Ewe was also advised that the current staffing level sat at 22-24 permanent staff on the floor and taking into account the number escorts there were, staff numbers sat anywhere from 22-28 for AM shifts. Mr Mokoi's email demonstrates that AM shift work, which was the work that suited Mr Ewe, was well covered.

[12] Mr Mokoi stated in his brief of evidence to the Authority that in his conversations with Mr Ewe, he had asked him what his availability to work was like and he stated that he was only available for AM shift work from Monday to Friday. However, Mr Mokoi advised him that Monday to Friday was usually covered due to escorts being on site.

[13] A letter from Mr Kuiti to Mr Ewe (24 September 2021) records that at a meeting in June 2021 with Mr Ewe's representative, Mr Vahaakolo, Mr Ewe was asked when he might be available to be placed back on the roster. The issue had arisen because Mr Ewe had shared with Mr Kuiti that since his two heart attacks, he (Mr Ewe) felt that he no longer wanted to work with the rangatahi because of being "grumpy" and that he would not be available to work at that time.

[14] Medical retirement was raised with Mr Ewe but Mr Vahaakolo requested more time for Mr Ewe to consider it. On that basis, it was agreed that Mr Ewe would not be put on the roster until 11 June 2021. Mr Kuiti further stated in his letter that as a PVH employee, Mr Ewe was not required to accept work and that he had not performed any for OT since 25 March 2020. In the Ministry's view, it was no longer reasonable for him to be employed on a permanent variable hour basis if he did not intend to perform any work for OT in the future.

[15] On or about 5 May 2022, an email/file note from Mr Kuiti to Mr Vahaakolo records the commencement of a voluntary medical retirement process for Mr Ewe and that other “non-agreed” points would go to mediation.

[16] On 20 July 2022, Mr Ewe’s employment with OT ended due to medical retirement.

What is the relevant law?

[17] An employer’s obligation to provide work to an employee depends on the specific terms of the employment agreement, the nature of the work and the circumstances of the employment relationship. Mr Ewe was employed as a permanent variable hours’ employee for the Ministry. Mr Ewe understands what this means because when I questioned him about cl 13.2.1 in the Agreement, he stated that he may not get work all the time and that his employer was not required to provide him with a minimum number of hours of work.

[18] The only difference between Mr Ewe’s employment as a PVH employee and a casual employee who works on an as-needed basis was that he was a permanently employed. However, even so, his actual hours of work remained variable and there was no guarantee of work. Put differently, while being a PVH employee gave Mr Ewe both the security of permanent employment and flexibility of work, there was no expectation or guarantee of a minimum number of hours of work that OT needed to provide him.

[19] The COVID-19 pandemic affected Korowai the same way it did with other detention facilities across the motu. From May to July 2020, visits to Korowai were suspended due to Covid and a high profile escape incident in July 2020 triggered a major review of the facility. It was during this time that Mr Kuiti arrived at Korowai to provide much-needed leadership and to implement practice changes.

[20] Limited visits resumed at Korowai between August and December 2020 but were constrained due to a number of factors that included staff shortages and absences. The restrictions on visits to Korowai during 2020 and 2021’s COVID-19 lockdowns affected Mr Ewe’s work at the gatehouse because there were no visits during these Covid-related lockdowns.

[21] At the end of my investigation, I requested OT to clarify two payments made to Mr Ewe on 30 September 2020 of \$722.32 and 23 June 2021 of \$3,111.35. Having regard to Mr Higgins' memorandum of 25 June 2025, these payments are for annual leave.

[22] I am satisfied that the above payments are not evidence of hours worked by Mr Ewe during these periods and nor are they evidence of work being available during May 2020 to May 2021 as contended by Mr Vahaakolo. The explanation for these payments can be found in a letter from Mr Kuiti to Mr Ewe (28 June 2021) which relevantly states:

a) Outstanding Pay issue:

You claim that there is a payment owing to you from the period of the Covid 19 lockdown, that is, between 26 March 2020 - 13 May 2020.

...

• **Summary of outcome**

In relation to the payment, you claimed was owing to you from the lockdown period, we reviewed this and confirmed that your fortnightly average hours worked was approximately 75 hours.

On that basis, we agreed that in accordance with the position Oranga Tamariki agreed for all permanent variable hours staff during lockdown, you should have been paid at a rate of 75 hours per fortnight for the duration of the lockdown period.

This resulted in a payment to you of \$3,181.14 (before tax and deductions).

At the time of writing this letter, I understand this payment has been made to you. We therefore consider this matter to be resolved.

b) Annual leave used in 2020

From the period 26 March 2020-22 April 2020 112 hours of annual leave was deducted from your entitlement, in lieu of you receiving a payment in accordance with the guidance about PVH employees. The Ministry has agreed that 112 hours of annual leave will be credited back to your annual leave balance.

Again, we consider this matter to be resolved.

[23] There is evidence that Mr Ewe was offered work by Mr Mokoi but because he did not wish to work on the floor with rangatahi following a second heart attack in 2020, Mr Ewe was re-deployed to supervising and co-ordinating visits which was work impacted by Covid when visits to Korowai were suspended. There was also Mr Ewe's

desire to look after his wife in the evening which meant that he could not do PM shift work for OT either. While his fidelity to his wife's care is laudable, OT cannot be held responsible when it offers work to Mr Ewe but for one reason or another, he is not in position to undertake that work.

[24] Finally, the Agreement does not expressly state that if there is work available, priority should be afforded to PVH employees over staff who are employed on a casual or as-needed basis. A practice at Korowai may have arisen that has given Mr Ewe and Mr Vahaakolo that impression but it is not a term or condition in the Agreement.

[25] The information and evidence before me indicates that what work was available between May 2020 to May 2021 was limited to work on the floor with rangatahi and PM shift work neither of which Mr Ewe could do because of his personal circumstances for which OT is not responsible. For these reasons, Mr Ewe's application must be declined and is unsuccessful.

What about costs?

[26] The Authority's Practice Direction, effective 1 February 2024 sets out in one document an outline of the steps parties appearing before it can expect which includes the award of reasonable costs and expenses.³ There are certain categories of cases where there is a presumption that parties bear their own costs. The present case falls within one of these categories: disputes about the application, interpretation or operation of a collective agreement.⁴

[27] For this reason, my preliminary view regarding costs is that these should lie where there fall. However, if OT wish to make further submissions, it may lodge a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum, Mr Ewe will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

³ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

⁴ Practice Direction pg.5 at 6.

[28] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

Peter Fuiava
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.