

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 13
5318993

BETWEEN CAROL BAKER
 Applicant

AND ST JOHN CENTRAL
 REGIONAL TRUST BOARD
 Respondent

Member of Authority: K J Anderson

Representatives: D Andrews, Counsel for Applicant
 R Childs and M O'Brien, Counsel for Respondent

Investigation Meeting: 2 August 2011 at Hamilton

Submissions Received 17 August 2011 from Applicant
 22 August 2011 from Respondent

Determination: 17 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A dispute has arisen in relation to the employment status of the applicant, Ms Baker. She asserts that she is a full time permanent staff member working for St John; whereas the respondent, St John Central Regional Trust Board (St John), says that Ms Baker is not a permanent staff member, rather she is a casual employee. Ms Baker asks that the Authority find on the evidence available, that she is a permanent staff member and if the Authority finds that is so, then she claims the usual entitlements for full time permanent employees. These largely relate to the statutory holiday entitlements in accordance with the Holidays Act 2003 and the applicable collective employment agreement. Ms Baker also asserts that she would be entitled to sick leave in accordance with the Holidays Act 2003 and the terms and conditions of the collective employment agreement. In the event that the Authority finds that

Ms Baker is a permanent employee and entitled to the various benefits that she seeks, she asks that these payments be backdated to the beginning of 2007; when she asserts that she was placed on a regular duty roster.

[2] The Authority has heard evidence from Ms Baker in relation to her claims. For the respondent, the Authority has received evidence from Mr Brent Nielsen, the ex-Regional Operations Manager, John Semmens, Operations Team Manager – Tokoroa, Grant Pennycook, Regional Operations Manager, Norman Riedinger, District Operations Manager, Craig Scott, Clinical Standards Officer and Courtenay Walker, Solicitor, Kensington Swan. The Authority has received various documents in support of the evidence of the respective parties and submissions have also been received. All of the evidence and respective materials has been closely considered, albeit it may not be specifically referred to in this determination.

Background facts and evidence

[3] Ms Baker has been involved with St John since April 2004 when she enrolled at the Putaruru ambulance station as a volunteer. As a volunteer, she accompanied qualified St John officers when they were called out to perform their various services.

[4] Ms Baker began to gain some qualifications and from on or about February 2005, she became a paid officer employed on a casual basis. That is, she was available on an on-call basis as required and paid for the time that she worked. Mr Nielsen was the Regional Operations Manager for the Midland Region of St John from 2002 to 30 November 2010. His evidence is that volunteers used to fill the “as and when required” role. Then at some point, additional funding became available and it was decided to employ some casual staff rather than rely on volunteers.

[5] On or about March 2005, the Putaruru station manager (at the time), Ms Trish Andrew, asked if Ms Baker wanted to cover some of her on-call shifts as a casual paid officer (CPO). The evidence of Mr Riedinger, the District Operations Manager for St John, is that Ms Andrew worked during the day and was on-call at night but had authority to pass her on-call shifts onto other staff. Having agreed to do on-call work, Ms Baker was given a pager and if paged, she could come and do the job available, or alternatively, if she did not want the job, she was able to decline it.

[6] As of 7 March 2005, Ms Baker was employed as a CPO under the terms and conditions of a St John *Individual Employment Agreement – Casual Agreement*.

Clause 2 of the agreement sets out the positions and the duties that applied to Ms Baker. Sub- clause 2.1 provides that:

Casual work is defined as work and employment in which the employee has no guaranteed hours or days of work and where the employee, subject to availability works as and when required by the employer in order to meet the demands of peak workloads or short term absences. You agree that the nature of casual work often means that notice of such work can be relatively short. We shall endeavour to provide as much notice as practicable and recognise that you may have prior commitments, which can result in you only being available for casual work from time to time. Where a particular operational need enables us to offer you regular or full time work on successive days or successive weeks, such work shall not give rise to any expectation by you for regular ongoing work and we shall be under no obligation to provide regular ongoing work to you beyond that particular operational need. This agreement shall apply to each separate period of casual employment/engagement until terminated by either party.

[7] The specific details of the terms and conditions of Ms Baker's employment are set out in the First Schedule to the agreement. First, it informs that Ms Baker is employed in the position of casual paid ambulance officer. The date of commencement in the agreement is 3 July 2006, which seems to be somewhat at odds with the evidence that has been given by Mr Riedinger and Ms Baker as to when she entered into the employment agreement, but nothing rests on this. The schedule also provides that the usual place of work for Ms Baker is Putaruru station. The schedule also provides the pay rate and in regard to holiday pay, it is stated that:

Holiday pay shall be paid following the completion of each separate period of casual employment/engagement calculated at 8% of your gross earnings.

[8] In relation to sick leave, the schedule provides that:

After completing the conditions stated under clause 8.1 of the agreement, you shall receive 5 (five) days sick leave per annum.

[9] Clause 8.1 of the employment agreement provides for sick leave:

If you have completed six months continuous employment with us, or over a period of six months have worked for us for:

- (a) At least an average of 10 hours a week during that period, and
- (b) No less than one hour in every week during that period or no less than 40 hours in every month during that period

you will be entitled to five days sick leave in each ensuing period of 12 months.

[10] The clause then continues to inform as to the circumstances under which sick leave may be taken.

[11] The evidence of Mr Riedinger is that when Ms Baker commenced work as a CPO, there were two other CPOs at the Putaruru station and that they could potentially be offered casual work at any time. Mr Riedinger says that when casual work was available, the full time employee at the Putaruru station would telephone the CPOs to see who was available and the first person who was contacted and willing to do the work, would be given it. It appears to be accepted by Ms Baker that when she was employed at the Putaruru station, her employment status was as a casual worker as clearly set out within the *Casual Employment Agreement*.

Patient transfer services – Tokoroa

[12] The evidence of Ms Baker is that she became a patient transfer officer (PTO) “quite by accident”. Ms Baker says that Mr Tony Andrew, then the night time PTO at the Tokoroa station, asked her if she would be interested in “covering a few nights here and there” related to his roster at the Tokoroa station, as he was pursuing a national diploma to become an ambulance officer. Ms Baker says that she did not have a job interview, rather she simply assisted Mr Andrew during a one day shift as a PTO during which he showed her how to do his job. It appears that a position became available for a day time PTO and Mr Andrew was appointed to this role, with the effect being that the night time PTO role that he had been carrying out, required a replacement. Ms Baker was offered this role by Mr Andrew, albeit it appears he may not have had any authority to appoint his replacement.

[13] The evidence of Ms Baker is that she was then placed on a two-on/two-off roster at the Tokoroa station. There was also another PTO on the roster, Ms Donna Davidson. Ms Baker says that as a result of being placed on the roster, she resigned from her employment at the local rest home. This was on or about 28 February 2007.

[14] While the evidence is somewhat unclear, the Authority understands that as of somewhere about the end of February 2007, Ms Baker was fulfilling two roles. First, as a CPO at the Putaruru station and the additional role as a night time PTO at the Tokoroa station. But both roles were on an as required basis except the Tokoroa position had Ms Baker and Ms Davidson sharing the work on a rostered basis, which seems to have given all concerned more certainty about who would be available to be

called out, in the event that a patient transfer was required. The oral evidence of Ms Baker is that she “*never thought about*” whether the PTO work was casual or otherwise and she simply took over Mr Andrew’s night time duties. In response to a question from the Authority relating to why it had taken her so long to raise the status of her employment (February 2007 to April 2011), Ms Baker referred to some events that apparently occurred in 2009 whereby she had occasion to look more closely at her employment arrangements. However, Ms Baker was unable to give a tangible explanation as to why she had not raised the matter of her employment status much earlier with St John before proceeding to the Authority. Nonetheless, I must add that such delay does not make her claims any less worthy of an objective consideration by the Authority.

[15] Relevant to how Ms Baker succeeded Mr Andrew in the night time PTO role is the evidence of Mr Scott, who was the Operations Team Manager at the Tokoroa station from November 2004 to July 2008. Mr Scott explained that his role (then) involved running the daily operations at the Tokoroa station.

[16] The evidence of Mr Scott is that he recalls that Ms Baker: “... *occasionally did patient transfer services night work for the Tokoroa station on a casual basis while working at the Putaruru station to fill in for employees who were unavailable*”. Mr Scott also informed that Mr Andrew was a casual employee at the Tokoroa station and did some on-call night patient transfer work. Mr Scott says that if Mr Andrew was unavailable, he asked Ms Baker if she wanted the casual night shift work. Mr Scott explained that, as a result of Mr Andrew obtaining a permanent day time Monday-Friday ambulance officer role at the Tokoroa station, he ceased doing casual night time patient transfer work and this effectively made more casual work available for Ms Baker.

[17] Mr Scott explained that Mr Andrew did not have authority to offer Ms Baker permanent employment and in any event, St John has a “*detailed process*” pertaining to offering permanent employment, including advertising the position, short listing applicants, interviews and reference checks, before a position would be offered. Mr Scott attests that Ms Baker was never offered permanent employment while he was the Operations Team Manager at Tokoroa station.

[18] In regard to the duty roster at the Tokoroa station, Mr Scott says that as a result of being approached by Ms Baker and Ms Davidson, it was agreed that they

would record their availability on the same roster as the permanent employees in order to avoid being called at times when they were definitely not available, but this was not a St John initiative or requirement. The evidence of Mr Scott is that:

Before the casuals arranged an availability roster amongst themselves, if a PTS job came in, I would telephone the casuals and the first person who was available and willing to do a job would get the work.

[19] Finally, Mr Scott says that casual employees are still able to decline work that is offered despite an indication that they are available as recorded by the roster.

[20] On or about 28 October 2008, Mr Semmens succeeded Mr Scott as the Operations Team Manager at the Tokoroa station. The evidence of Mr Semmens is that, around mid-2009, Ms Davidson moved to Taupo and subsequently another casual employee, Ms Belinda Rogers, covered some of the on-call work that was available. Subsequently, as the result of a request from Ms Baker and Ms Rogers, their rostered time, in regard to their availability, was modified to four nights on and four nights off. This also aligned their availability with the roster used for permanent employees. Mr Semmens also explained the current arrangements for the rostering of all employees, whether of permanent or casual status. Mr Semmens says that:

Although the roster board contains an overview of the month, it can change at any time. In the case of casuals and volunteers, even if their name is on the availability roster, they can take their name off the roster and/or still decline jobs at the time they are offered work.

[21] Mr Semmens gave two examples of when Ms Baker had declined work, albeit I accept the evidence of Ms Baker that she is nearly always available to work when required.

Union membership and the collective employment agreement

[22] As evidenced by the *Membership Application Form* dated 22 February 2007, Ms Baker became member of the Ambulance Officers Workplace Union (the Union). The Authority notes that, among the other details provided by Ms Baker, she ticked the appropriate boxes effectively confirming that she was a casual PTO. It is the understanding of the Authority that, as a member of the Union, Ms Baker's terms and conditions of employment were provided by the *Patient Transfer Officers and Ambulance Officers Collective Employment Agreement* (the CEA). At clause 8.10 of the CEA, there is a definition for casual employees:

CASUAL EMPLOYEES – shall mean those engaged for work on a short term, irregular or on call basis. No ongoing fixed hours or days of work, and no guarantee of continuous or ongoing employment. Each engagement shall be independent of the other. Casual officers are those staff who choose to make themselves available on an as and when required basis at their own discretion and who consequently get paid only for their availability and for the time spent on a call. Holiday pay shall be paid at a rate of 8% of gross weekly earnings and incorporated into weekly pay. A casual employee will not be entitled to redundancy compensation at the end of any period of casual employment.

[23] At clause 26 of the CEA, there are comprehensive provisions pertaining to casual employees. The following provisions appear to be of some relevance in regard to Ms Baker's circumstances:

- 26.2 Currently, the utilisation of casual employees applies to stations with on call. Casual employees are employed to enhance cover where there is difficulty funding and justifying full time employees due to low workload. Where there is no local casual employee cover available for time normally covered by a casual employee, such availability will need to be covered by a combination of the volunteer employee on an unpaid basis, casual employees from another location, the station manager as per their responsibilities for cover, or as a last option – no cover.
- 26.3 Employees may be employed on a casual basis to provide cover of the "on call" portion of the roster at two person stations. This would apply only as and when the permanent full time employee rostered on duty chooses to be unavailable, is unable to do so, and wishes to utilise the employment of a casual employee. It is envisaged that casual employees would primarily be recruited from the pool of local casual and volunteer staff already utilised at stations. The casual employee employment and payment is for the first ambulance officer on the ambulance and does not apply to (volunteer) double crewing.
- 26.4 It is solely up to the discretion of the full time employee to utilise the casual employee in the case of covering the on call portion of the roster. The full time employee has at all times, the right to work the on call portion of their roster, subject to NZTA legislation and health and safety requirements and will be influenced by workload patterns.
- 26.5 If the casual employee is for whatever reason, unable to carry out their shift and no other casual employee or volunteer is available, the full time employee rostered on for that shift must provide the on call cover for that shift – subject to NZTA legislation and health and safety considerations.

[24] At clause 26.9, among other matters, it is provided that:

While the casual employee is available for response, the employee is free to undertake other activities.

Analysis and conclusions

[25] The basic argument for Ms Baker is that her employment status changed from being a casual employee to that of a permanent employee when she was placed on the duty roster at the Tokoroa station in 2007. Ms Baker also says that another factor is that she joined the Union in 2007 and from then, her terms and conditions were provided by the CEA.

[26] The submissions for Ms Baker (and St John) also refer the Authority to *Jenkinson v. Oceana Gold (NZ) Ltd*¹. In particular for Ms Baker, the attention of the Authority is drawn to the Court stating in *Jenkinson* that:

The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[27] Linking the above extract to the circumstances pertaining to Ms Baker, it is submitted that the primary obligation between the two parties is the fact that Ms Baker had been put on a duty roster. But I conclude that the fact that Ms Baker had her name included on the regular duty roster is not conclusive, on its own, of any particular mutual obligations between the parties, apart from ensuring that, in the event that on-call work became available on a particular evening, then the employee who had indicated their availability for that specific date, would be given the work. I accept the evidence for St John that Ms Baker and her on-call colleagues (Ms Davidson and later Ms Rogers), were included on the roster as a result of their initiative rather than a requirement of St John. But obviously, the inclusion on the roster was mutually beneficial for all concerned, as it was probably more efficient than the previous regime of a permanent staff member having to ring around to ascertain who might be available in the event that a night time patient transfer was required.

¹ [2009] ERNZ 225

² Clauses 4, 8.13, 13.4, 30.1 and 33.1

[28] The submissions for Ms Baker refer to various clauses of the CEA². The argument advanced is that the respective clauses place certain obligations upon Ms Baker and St John and there is no distinction between permanent and casual employees, but I find this approach to be somewhat disingenuous given all the circumstances.

[29] However, returning to the findings of Couch J in *Jenkinson*, it seems to me that the following statement has particular relevance to the circumstances of Ms Baker:

The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship but if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[30] While the position of St John is that there is no obligation on Ms Baker to carry out any of the work that is offered, it seems to me that while Ms Baker has turned down work on the very odd occasion, the practical reality of the situation is that the night time patient transfer operations depend, to a large extent, upon Ms Baker (and her colleagues) being available on a consistent and regular basis. Indeed, one suspects that if Ms Baker was not regularly available, then someone else could be engaged to replace her as an on-call employee. This is particularly evident from the record of the hours worked by Ms Baker since being employed as a PTO at the Tokoroa station. As Judge Couch held in *Jenkinson* (at para.[37]):

In this case, the fact that the parties have described Ms Jenkinson's employment as "casual" is one of the relevant matters to be taken into account but the more important inquiry must be into the true nature of the relationship. If the result of that inquiry is that the nature of the relationship is at odds with the label given to it by the parties, substance should prevail over form.

[31] In *Rush Security Services Ltd t/a Darrien Rush Security v. Samoa*³, the Chief Judge of the Employment Court (at para.[25]) stated that:

Regularity of work and continuity of the employment relationship may be indicative of ongoing as opposed to casual employment.

³ [2011] NZEmpC 76, 1 July 2011

[32] As referred to in *Samoa*, the Court has had occasion to find that the regularity of the work available to the employee can be a persuasive factor in determining that the employment was ongoing and not casual. This is due to the pattern of work being sufficiently regular and continuous⁴.

[33] In *Jenkinson*, the Court referred to a series of indicia that has been developed in Australian cases when determining whether there was an ongoing employment relationship where the employment has been otherwise described as casual. These include:

- (a) The number of hours worked each week;
- (b) Whether work is allocated in advance by a roster;
- (c) Whether there is a regular pattern of work;
- (d) Whether there is a mutual expectation of continuity of employment;
- (e) Whether the employer requires notice before an employee is absent or on leave;
- (f) Whether the employee works to consistent starting and finishing times.

[34] An examination of the work patterns of Ms Baker from February 2007 to June 2011 (inclusive) shows that while there are variations in regard to the hours that she worked on any given night call out, an analysis of the annual, monthly and weekly hours worked shows a remarkable regularity; as illustrated below:

(a) **Total hours worked (February to December 2007 – 11 months):** 620

Hours each month (average): 56

Hours each week (average): 13

(b) **Total hours worked 2008:** 656

Hours each month (average): 55

Hours each week (average): 13

⁴ *Canterbury Hotel IUOW v. Fell t/a Leeston Hotel* [1982] ACJ 285 and *Avenues Restaurant Ltd v. Northern Hotel IUOW* [1991] 1 ERNZ 420

- (c) **Total hours worked 2009:** 777
Hours each month (average): 65
Hours each week (average): 15
- (d) **Total hours worked 2010:** 845
Hours each month (average): 70
Hours each week (average): 16
- (e) **Total hours worked 2011 (six months):** 322
Hours each month (average): 54
Hours each week (average): 12

[35] Given this regularity of working hours over the period of the more than four years that Ms Baker has worked as a PTO at the Tokoroa station, I cannot help but conclude that the work pattern has been sufficiently regular and continuous to make her employment ongoing rather than casual.

[36] Another factor that falls for examination is whether there is a mutual expectation of continuity of employment. Because of the work patterns that have been established over more than four years, it seems to me that it is reasonable to conclude that the parties do have a mutual expectation of some continuity of employment. That is, St John has a regular requirement for the services of Ms Baker as a night time call out PTO and Ms Baker now has a reasonable (and established) expectation that she will obtain work, on a regular basis, of 12-16 hours each week.

Determination

[37] In summary, while I accept that the argument for St John is (among other things) that there is no certainty as to exactly when a night time patient transfer will be required and hence there is a randomness about the work that is available to Ms Baker, the analysis provided by St John reveals that the work available is regular, not spasmodic and reasonably predictable, to such an extent that I find that the true

nature of Ms Baker's employment relationship with St John is at odds with the "label" that has been given to it and that "*substance should prevail over form*"⁵.

[38] Therefore, I conclude that Ms Baker's employment status points more towards her being in a permanent part-time role rather than being a casual employee.

[39] But the above finding is not to say that Ms Baker is entitled to receive any given number of hours of work in any week, month or year. Rather, it has to be accepted that the work available to her is part-time with a certain degree of uncertainty in regard to how much work will be available, albeit the past four years or so have shown that there is a reasonable consistency in the pattern of work each year.

Remedies

[40] Given the finding that the employment of Ms Baker is of a permanent part-time nature rather than casual, in the event of such a finding that Ms Baker is not a casual employee, she says that she should be entitled to various entitlements pursuant to the Holidays Act 2003, namely, annual leave, sick leave, public holidays and bereavement leave. However, given that Ms Baker only usually works on the occasions that night time patient transfers are required, certain entitlements such as sick leave and public holidays would be conditional on such events falling on what would otherwise be a working day (or night).

[41] The substantive issue to be addressed is the matter of annual leave entitlements for Ms Baker and given the particularly unique nature of this dispute and the fact that Ms Baker has received an additional payment of 8% in her hourly rate to provide for a holiday pay component, I do not believe it would be equitable or a matter of good conscience for any order to be made pertaining to the payment of past holiday entitlements. This is particularly so when the average working week for Ms Baker has consisted of 12-16 hours over the past four years and hence she has always had the ability to have time off for which she has already been paid. Rather, I recommend that the parties commence discussions for the purpose of ensuring that the respective requirements of the CEA and the Holidays Act 2003 are met in regard to future entitlements due to Ms Baker given the finding regarding her employment status. These discussions will most likely involve entering into a written agreement that recognises the applicability of the relevant provisions of the CEA, the Holidays

⁵ *Jenkinson*

Act 2003 and the particular circumstances pertaining to the patient transfer work that Ms Baker is employed to carry out.

[42] While the Authority trusts that the parties will be able to reach a mutual agreement about what is required without further assistance, it may be appropriate to involve the Mediation Service of the Department of Labour and the right is reserved for the parties to return to the Authority for an appropriate direction accordingly, should such be required; but I would imagine that the parties should be able to reach a sensible understanding about their mutual requirements.

Costs

[43] Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority. In the event that a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority