Determination Number: AA 22/05
File Number: AEA 702/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Robyn Mist (Applicant)
AND	Waikato District Health Board (Respondent)
REPRESENTATIVES	Tracey Gallagher, for Applicant Doug Alderslade / Paul White, for Respondent
MEMBER OF AUTHORITY	Ken Raureti
INVESTIGATION MEETING	18 November 2004
DATE OF DETERMINATION	26 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Ms Mist is named as the applicant in this matter. However, the Service and Food Workers Union and the Waikato District Health Board agreed that Ms Mist was "representative" in nature in that the matter relates to a dispute over the application and interpretation of a term or terms of her employment which are covered by a collective agreement. That coverage extends to approximately 15 – 20 other staff working in the same area, doing the same hours and performing substantially the same duties.

[2] Ms Mist was employed as a Kitchen Assistant whose duties were varied but centred around the preparation, serving, and distribution of food/meals to patients and others in the hospital, and the cleaning up after. The start and finish times of the staff in question were:

4.15pm – 8.15pm (charge aids only)
4.30pm – 8.00pm
5.00pm – 8.30pm

[3] The above hours were generally fixed, with the different start and finish times reflecting slight variations in the requirements of the job, for example an employee working on the "tray line" would start at 4.30pm and finish at 8.00pm, while those working on the wards serving meals to patients would start at 5.00pm and finish at 8.30pm. The work and hours of work described above is referred to as the *night belt*.

[4] The nub of the problem is; the SFWU is of the opinion that the *night belt* workers are shift workers as per the relevant clause in the CE, and are therefore entitled to extra leave for working shifts. The WDHB's opinion is that they are not shift workers and hence the entitlement does not apply.

[5] The entitlement to extra leave for shift workers is covered by clause 19 ANNUAL HOLIDAYS, of the applicable collective agreement.

Sub-clause (3) of the CA provides:

"(3) Extra leave for shift workers – "Shift work" is defined as the same work performed by two or more employees or two or more successive sets or groups of employees working successive periods.

Employees who are shift workers may be granted up to one week (five working days) additional annual leave on completion of 12 months' employment on shift work (or pro rata according to proportion of the year on shift work) in accordance with the provisions outlined below:

(A) Any shift work performed during a period which is not overtime that meets any of the following criteria qualifies for additional leave:

(a) the shift work performed each day:

(i) extends over at least 13 continuous hours, and
(ii) is performed by two or more workers working rostered shifts, and
(iii) the shift involves at least two hours of work performed outside the hours of 8 a.m. to 5.00 p.m..

(b) the shift work does not extend over at least 13 continuous hours each day but at least four hours of the shift work are performed outside the hours of 8 a.m. to 5.00 p.m.

(c) the shift work performed:

(i) is rostered and rotating, and

(ii) extends over at least 15 continuous hours each day, and

(iii) not less than 40% of the hours worked in the period covered by the roster cycle is outside the hours of 8 a.m. to 5.00 p.m.

The following additional leave is granted:

Number of qualifying shifts Per annum	**Number of days additional leave per annum**
121 or more	5
96 – 120	4
71 – 95	3
46 – 70	2
21 – 45	1

Background

[6] The preparation, serving and distribution of food and meals to patients and others in the hospital is performed by *day belt* workers who commence at 6.30am, and finish at 3.00pm, and *night belt* staff who work between 4.15pm and 8.30pm. No work is performed between 3.00pm and 4.15pm.

[7] Ms Mist was employed under seven collective agreements and is currently employed under the Waikato District Health Board Domestic Workers Collective Agreement, term 1 March 2004 to 28 February 2007. It is superfluous to address each individual collective agreement/contract as the clause has remained essentially the same.

New Payroll System.

[8] In September 1998, the WDHB implemented a new payroll system. Prior to the implementation of the 1998 system, kitchen assistants and cooks never received shift leave. Not long after the introduction of the new system, some workers noticed that they were accruing shift leave so they raised it with their operations manager (approximately March 1999). The WDHB said it was a payroll system error. To correct the error required adjustments to the system and the annual leave balances. The staff agreed to the removal of the accrued shift leavefrom their records.

[9] In November 1999 it was realised that the error had not been corrected. On 8 December 1999 Payroll adjusted the employees annual leave balances, and confirmed it with them in writing.

[10] As indicated earlier, the nub of the dispute is whether *night belt* workers are entitled to extra shift leave. To have such an entitlement they must perform shift work, and meet any of the criteria of sub-clause 19 (3) (A) (a), 19 (3) (A) (b), or19 (3) (A) (c). The union indicates that the *night belt* workers are shift workers, and they meet the criteria under 19 (3) (A) (a).

Principles of interpretation.

[11] The representatives have each referred me to the history of the relevant clause, the various authorities and the law pertaining to contract interpretation, and guidance of the definitions of *shift, shift work* and the meaning of the word *successive* which features twice in the dictionary the parties themselves created when defining *"Shift work"*.

[12] To resolve the question of entitlement requires an interpretation of the collective agreement. An authoritative approach to the principles of interpretation were comprehensively discussed by Judge Colgan in *ASTE Te Hau Takitini o Aotearoa v Hampton, Chief Executive of Bay of Plenty Polytechnic* which were summarised by Judge Shaw in *Chief Executive of the Inland Revenue Department v Parkes*.as:

> *The role of the Court is to determine the rights and obligations of the party rather than to fix terms and conditions of employment (s101 (d) of the Employment Relations Act 2000).*
>
> *The Courts decision must not be inconsistent with any applicable collective agreement (s189 Employment Relations Act 2000).*
>
> *The process of interpretation begins with the words used and continues if necessary by cross-checking this interpretation against the factual matrix or surrounding circumstances.*
>
> *Evidence of preliminary negotiations, drafts, or what the parties thought the words meant is not relevant. The enquiry is about "what a reasonable person in the field knowing all the background would take them to mean"*
>
> *The interpretation should not be narrowly literal but in accord with business commonsense to fulfil the purpose of the contract.*

[13] For economy, and simplicity of resolving the question of entitlement to the extra shift leave, I considered the clause in its entirety and then decided to determine the dispute in relation to the qualifying criteria of sub-clause 19 (3) (A) (a) which negated the need to determine the question of *is the work shift work.*. Sub-clause 19 (3) (A) (a) reads:

> *(A) Any shift work performed during a period which is not overtime that meets any of the following criteria qualifies for additional leave:*
>
> *(a) the shift work performed each day:*
>
> *(i) extends over at least 13 continuous hours, and*
> *(ii) is performed by two or more workers working rostered shifts, and*
> *(iii) the shift involves at least two hours of work performed outside the hours of 8. a.m. to 5.00 p.m..*

Determination

[14] The operational hours of the *day belt* workers are 6.30 am through to 3.00pm. No work is performed by any kitchen staff between the end of the *day belt* workers day and the earliest commencement time of the *night belt* workers period of work being 4.15pm which is for Charge Aids only, or 4.30pm for other workers.

[15] The first qualifying criteria of 19 (3) (A) (a) (i) requires that the shift work *extends over at least 13 continuous hours.* The Concise Oxford Dictionary [Fifth Edition] defines *"continuous"* as

> *(Of material things) connected, unbroken; uninterrupted in time or sequence;*

[16] The Eighth Edition of the Concise Oxford Dictionary defines *"continuous"* as

> *adj. unbroken, uninterrupted, connected throughout in space or in time.*

[17] The words used in *(a) (i)* are plain and unambiguous. The plain ordinary meaning of *continuous* is characterised by continuity, *unbroken, uninterrupted in time, connected throughout in space or in time.* Applying the plain meaning to the words of the first qualifying criteria, the work performed by the *day belt* workers and *night belt* workers is broken. It is interrupted in time by 1 ½ hours between 3.00pm and 4.30pm.

[18] Whilst I am inclined to the view that the work of the *night belt* is shift work, that work which is performed each day does not *extend over at least 13 continuous hours,* **therefore those workers working the *night belt* are not entitled to the extra leave for shift workers.**

Costs.

[19] Costs are reserved.

Ken Raureti
Member of Employment Relations Authority