

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 484
3234079

BETWEEN RAHULKUMAR BABUBHAI PATEL
Applicant

AND DUNEDIN COMMUNITY CARE TRUST
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
Diana Hudson counsel for the Respondent

Investigation Meeting: 9 July 2024 in Christchurch

Submissions Received: 9 July 2024 from the Applicant
19 July 2024 from the Respondent

Date of Determination: 16 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rahulkumar Babubhai Patel worked for the Dunedin Community Care Trust (DCCT) as a full time salaried, service manager in Christchurch between 8 November 2021 and 31 October 2022.

[2] During the period of his employment Mr Patel says he was obligated to make himself available to deal with work matters at all hours and on all days, including public holidays and should be compensated for such as if he had the status of an ‘on call’ worker and be paid an allowance.

[3] DCCT say there was no express expectation Mr Patel should make himself available outside his core working hours and no provision in his employment agreement to pay an on-call allowance. DCCT says an ‘on call’ allowance was introduced in October 2022 as a policy measure and Mr Patel was paid such.

Issues

[4] The issues I am required to resolve are:

- (i) Was DCCT obliged to retrospectively pay Mr Patel an on-call allowance or make any other provision to compensate him for making himself available outside his agreed working hours.
- (ii) If a finding is made that an allowance should have been paid, was Mr Patel unjustifiably disadvantaged and what remedies are appropriate.
- (iii) If any remedies are awarded to Mr Patel, should they be reduced by application of s 124 of the Act (consideration of contribution).
- (iv) Costs of these proceedings.

The Authority’s investigation

[5] At the investigation meeting I heard evidence from Rahulkumar Babubhai Patel and for DCCT their chief executive, Michael Brummitt and operations manager Trevor Lewis.

[6] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions on identified issues. Whilst I record that I have carefully considered all material placed before me, I do not record all evidence and submissions received. The discussion below in attributing recollections and assertions made by witnesses draws from their written statements, the parties’ submissions and attached documentation. For jurisdictional and procedural reasons, the Authority investigation of this employment relationship problem addresses the substantive issues “however described” by the parties.¹

¹ Employment Relations Act 2000, s 160(3).

What caused Mr Patel's employment relationship problem?

[7] Mr Patel commenced employment as a full-time service manager with DCCT on 8 November 2021, in Christchurch. Mr Patel's initial job was to establish a DCCT presence in Christchurch to run an individual residence based, care service for adults with complex care issues. The job involved organising and managing caregivers providing 24-hour care arrangements. Mr Patel says a sizeable portion of his work occurred outside his agreed working hours. This work according to Mr Patel, included arranging shift cover for care givers; covering shifts himself; attending emergency call outs; responding to staff calls when on duty; arranging urgent repair work and attending to clients' family calls.

[8] Mr Patel says up until November 2022, he was not paid for additional work until DCCT introduced payments for being on an 'on call' roster. Thereafter, Mr Patel was placed on the on-call roster that explicitly included weekend cover.

[9] Mr Patel's employment ended on 27 March 2023 and at this time, he had an unresolved dispute with DCCT for wage arrears he considers were due for making himself available on an 'on call' basis.

The individual employment agreement hours of work provision

[10] Mr Patel's individual employment agreement (IEA) signed on 10 October 2021, specified a salary of \$90,000 per annum for a full-time position and the hours of work clause attached as a "Schedule A" indicated: "The employee shall work on average, no less than 80 hours per week". However, the letter of offer Mr Patel received on 7 October 2021 indicates: "This position is for no less than 80 hours per fortnight commencing on 8th November 2021". It is apparent despite Mr Patel suggesting otherwise, that the former hours' exposition was a mistake and the latter letter of offer and employment agreement provision (cited below) expressed the correct expectation on average working hours.

[11] Other relevant provisions of the IEA included under the heading "Role", cl 1.3:

If you are a permanent full-time staff member you are expected to devote your full time and energies to the position. For this reason, together with the need to protect our business interests and avoid conflicts of interest, you are

not allowed to engage in any other business activities without our prior written consent. We will not unreasonably withhold such consent.

[12] Under the heading “days and hour of work” at cl 3:

3.1 The minimum number of hours of work for the employee shall be as set out in Schedule A.

3.2 Staff shall not be rostered more than 40 hours a week, with 2 consecutive days off each week and at least an 8 hour break between full 8 hour shifts, unless by mutual agreement. A week shall be defined as Monday to Sunday.

3.3 A full time employee is one who normally works not less than 40 hours per week.

3.4 Casual employees provision N/A.

3.5 If you are late to work without a valid reason or leave work early without permission from your direct supervisor they may exercise discretion and deduct time accordingly. Repeats of late behaviour may result in disciplinary action.

3.6 If from time to time it is necessary for hours to be extended or changed in order to satisfy the needs of the person supported or to meet operational requirements of the organisation then the employer will have discretion as to those hours with reasonable consideration being given to the employee’s external circumstances.

[13] I note despite the heading referring to ‘Days’ of work, none were specified. Mr Patel says he made himself available 24/7 and considered that was his employer’s expectation and practical requirement given the 24/7 nature of the service.

[14] Another observation is that despite cl 3.1 above specifying the ‘minimum’ hours of work being set out in schedule A, that schedule only refers to ‘average’ hours.

[15] Part of the problem was the written terms of employment are imprecisely drawn and as can be seen, largely directed to the situation of rostered workers. In s 67C(2) of the Act guidance is provided on what ‘must’ be specified in an IEA, to set out: “Agreed hours of work”. Section 67C(2) indicates this is to include “any or all” of the following:

- (a) the number of guaranteed hours of work;
- (b) the days of the week on which work is to be performed;
- (c) the start and finish times of work;

(d) any flexibility in the matters referred to in paragraph (b) or (c).

[16] It is apparent that the wording of the IEA including its incorporated schedule, does not comply with s 67C(2) of the Act's requirement for how hours of work should be addressed in an IEA.

[17] Mr Patel was also given access to a vehicle and provided with a mobile phone for work use. In addition, as part of DCCT's policy and procedures manual (expressly incorporated by cl 10 of Mr Patel's IEA) there is a "Leave and Work Hours" policy that was again largely directed at rostered employees but, it has a provision headed: "Minimising potential negative effects of working extended hours" that relevantly included at cl 2.10.3, the following guidance:

- Normal working hours for a full time staff member has been set at 80 hours per fortnight. No staff are to work over 100 hours per fortnight, including no staff consistently working more than 90 hours in consecutive pay periods.
- Staff will have two days off each week and at least one of those two days off being consecutive in a pay period.
- Where a shift needs to be covered at short notice, either through illness, accident or some exceptional circumstances, no staff member has an employment obligation to cover the shift.

Position description.

[18] Mr Patel had a position description that he countersigned. It first noted he reported to the operations manager and that his role was responsible for: "... the deployment, management, and support of the staff team, ensuring they are well trained and are constantly striving to provide quality outcomes for all" .

The working environment

[19] In practice, DCCT says Mr Patel was allowed to manage his own working time as he saw fit and he was not required to record hours worked. The operations manager he reported to (Mr Lewis) was located in Dunedin but they had a weekly 'catch up' session, and weekly management team meetings involving Mr Patel and Mr Lewis were convened and documented.

[20] DCCT's general view expressed in submissions was that:

The role held by the applicant of Service Manager had no on call component to the role, that the applicant was at no time required to be on call and that no entitlement therefore arises. His hours of work were a minimum of 40/week, generally to be worked Monday-Friday between the hours of 8am-5pm, but with flexibility for the applicant to self manage his actual hours worked.

[21] While acknowledging Mr Patel may on occasions have covered a shift, DCCT asserted “he was able to do so during his normal working hours or adjust his hours to compensate for the shift cover time.” DCCT also contended that the IEA wording was “clear” and counsel cited c 3.2 above as support for a view that hours and days were defined.

[22] Counsel for DCCT cited cl 6.2 of the IEA, that states: “There is no provision for overtime and all hours worked will be paid at the standard remuneration as detailed in Schedule A.” Counsel also cited the above cited proviso in the “Leave and Work Hours – Policy No:42” that provided where a shift needed short notice cover “no staff member has an employment obligation to cover the shift”.

[23] In addition, DCCT’s counsel traversed whether s 67D (Availability provision) of the Act applied and concluded it did not as Mr Patel had not provided sufficient evidence to show he was required to be on call.

Initial assessment

[24] As above, I have found the IEA to be imprecisely drafted and observe cl 3.2 is of no assistance as it clearly is confined to rostered workers. Likewise, it is arguable that the cited Policy No:42 is also directed to rostered workers. However, cl 6.2 is a provision that clearly provides all hours worked are included in the remuneration arrangement agreed which for Mr Patel was a salaried arrangement as distinct from rostered hourly paid workers. While this may appear to resolve the issue, a reservation I have is that the expectations placed on Mr Patel are not precisely described and it is somewhat of an incongruous state of affairs too despite the ‘no overtime’ clause, then to include Mr Patel on an on-call roster and remunerate him for such from November 2022.

[25] While Mr Patel in evidence acknowledged he had some flexibility during his normal ‘office hours’ (including to occasionally attend childcare responsibilities) and he normally worked Monday – Friday, he says he was expected to make himself available and work outside

these days including times when this meant working at the weekend or to cover rostered shifts. Whereas DCCT appears in their submissions, to draw a distinction between overtime (i.e. additional hours above normal) and being 'on call.'

[26] I agree, on call denotes a situation when a worker leaves work and has to return or be available outside normal hours. Nevertheless, DCCT deny that in the latter circumstance there was an obligation placed on Mr Patel to cover staff who had failed to turn up for rostered duty.

[27] On the latter issue, Mr Patel provided an email exchange of 3 November 2022, between his co-worker to Mr Lewis (that Mr Patel is copied into and the email is headed "RE: Excessive hours") in which Mr Lewis indicates while not ideal, team leaders and managers due to "ongoing staff shortages" may "happen" to cover shifts "as there is no other choice". Later in the email over a subheading "Oncall", Mr Lewis says "You have both gone over and above what would normally be expected in covering on call" and he then posits the introduction of a rostered on call system where "neither of you will have to more than one week each 6 weeks" would resolve matters.

[28] In evidence Mr Lewis conceded Mr Patel had covered shift absences but says these were undertaken during his normal working hours "or the expectation and instruction was always if he did work outside of his normal hours 40 hours per week, he should take the time back'. Mr Brummitt in contrast pointed to no records being available of times Mr Patel covered rostered shift staff absences. However, it was evident that although not recorded as Mr Patel believed he did not have to record such, that at least some rostered shifts were covered and the question becomes when and how many.

[29] Mr Lewis claimed awareness of Mr Patel taking time off to pick his children up from school and other family business (he is a solo parent supported by his mother) but no pay was deducted and no issues arose.

[30] Mr Patel is claiming an amount of \$17,380 for times he says he was on call for the period 8 November 2021 to 31 October 2022 at a daily rate of \$45. It was unclear how Mr Patel came to the latter figure which seemed excessive in his estimation of how many days he would have been on call.

Finding

[31] In all of the circumstances I do not find Mr Patel to have made out a case that his agreed terms of engagement including his individual employment agreement, required DCCT to pay him an on-call allowance and s 67D of the Act is not triggered. The terms of the IEA while being unclear on hours of work and days when such work be undertaken, sufficiently provide that Mr Patel's total salary was compensation for all duties he undertook including those outside his normal office hours.

[32] I, however, do not consider that the employment agreement's salary provision despite it not providing for the payment of overtime in his normal role, extended to covering the times Mr Patel covered rostered shifts. I consider such were a separate engagement and when Mr Patel undertook this essentially relief work, he was acting as a care worker and should have been appropriately remunerated at an applicable hourly rate. In applying the discretion, I have under s 160(3) of the Act where I am "not bound to treat a matter as being a type described by the parties" I make the following orders.

Orders:

- (i) Dunedin Community Trust is to, in consultation with Rahulkumar Babubhai Patel, identify and agree on rostered cover shifts Mr Patel undertook while in their employ and provide remuneration for such on the basis of the prevailing care worker's hourly rate for the hours worked.
- (ii) Should the parties be unable to reach an agreement on the number of shifts worked or the compensation for such, they can both make submissions to the Authority by no later than 25 October 2024, and the Authority will determine the matter.

Costs

[33] Costs are reserved.

[34] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Rahulkumar Babubhai Patel may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that

memorandum Dunedin Community Care Trust 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.

[35] The parties can expect 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.²

David G Beck
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1