

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 173/10
5280690

BETWEEN

KAY WEINGOTT
Applicant

AND

WAIRARAPA DISTRICT
HEALTH BOARD
Respondent

Member of Authority: P R Stapp

Representatives: Jock Lawrie, Counsel for the Applicant
Hamish Kynaston, Counsel for the Respondent

Investigation Meeting: 29 June 2010 at Wellington

Further information
submissions and
supplementary
submissions by: 28 July 2010

Determination: 28 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Weingott commenced her employment with the DHB as a casual employee in February 2008 as an enrolled nurse. She says that over time it appeared to her that her hours were consistent and regular, and she sought to clarify and confirm from the DHB that her role was more permanent. She never received a reply to her query.

[2] She says she did have a subsequent unrelated discussion with Mr Fred Wheeler (Clinical Support Services Unit Manager) about her ongoing work and says that he indicated that there wasn't anything to worry about and that she would be okay until March. He denied giving her any indication that her position was permanent.

[3] It is common ground that when Ms Weingott was employed she was employed as an enrolled nurse to be a casual as and when required. She was included on the respondent's rosters. However from 23 March 2009 Ms Weingott was not included on the draft and posted rosters. This has given rise to the current employment relationship problem over the period February 2008 until 22 March 2009 about the nature of her position with the DHB.

The Issue

[4] Is Ms Weingott's employment casual employment or did she become a permanent part-time employee of the DHB?

[5] Is this matter able to be distinguished from the principles laid down in *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 225?

[6] If there is a personal grievance what are the remedies?

The facts

[7] During the preparation for the Authority's investigation meeting the parties have been able to reach an agreed statement of facts and reads as follows:

Agreed statement of facts

Introduction

1. *The parties agree the facts set out in this agreed statement. Certain matters have been left out which the parties were unable to agree. The parties may adduce further evidence by way of context, or to add to the facts as stated in this agreed statement.*

Parties

2. *The applicant is Kay Weingott, an enrolled nurse.*
3. *The respondent is Wairarapa District Health Board (the DHB).*
4. *Ms Weingott works for the DHB and is a member of the New Zealand Nurses Organisation (NZNO).*

Issue

5. *The issue for the Authority is whether, over time, the nature of Ms Weingott's employment changed from one of casual employment to permanent part-time employment. The period under review in this regard is from February 2008 up to and including 22 March 2009.*

Commencement of employment

6. *Ms Weingott completed two days of compulsory induction on 13 and 14 February 2008, and first undertook Enrolled Nurse duties for the DHB on 4 March 2008, in the DHB's rehabilitation unit.*
7. *Ms Weingott has worked mainly in the rehabilitation unit, but has also worked in other wards in the DHB.*
8. *The parties' employment arrangements were documented in a letter dated 18 February 2008 (document 1) ("the appointment letter"). The appointment letter confirmed, amongst other things:*

"This is a casual position, and as such you will be added to the casual pool contact list from Wednesday 13 February 2008, you will be contacted the work as and when required after this date."

9. *The letter also confirmed that the hours to be worked were, "0-80 hours per fortnight, as and when required" and that:*

"Performance and development review:

A performance planning and development review will take place three months after commencement.

... Holiday pay:

Holiday pay shall be paid at a rate of 8% in accordance with the Holidays Act 2003.

Sick Leave:

You will be entitled to sick leave as provided in the Holidays Act 2003 and the collective employment agreement. Where you are sick for three consecutive days the Wairarapa DHB may request that you produce a medical certificate.

In the event of ongoing sick leave, the Wairarapa DHB may request, and shall receive a copy of the independent practitioner's report and all other related correspondence. This information may be used to assess your suitability for ongoing sick leave entitlement and/or suitability for ongoing employment. ...

Your terms and conditions for the first 30 days of your employment will be based on an Individual Employment Agreement, which has the same terms and conditions as the relevant Collective Agreement. The Collective Agreement, which covers the area of work that you perform is called District Health Boards - \NZNO Multi-Employer Nursing\Midwifery Collective Employment Agreement (MECA). During this period of time you will have an opportunity to consider whether you wish to become a party to (sic) MECA, which will require that you become a member of the Union. The Union which represents employee's (sic) in this collective is the New Zealand Nurses Organisation (NZNO).

...

On your first day at work please bring your qualifications that are relevant to your appointment, ie. practicing (sic) certificate, tertiary qualifications, drivers (sic) license (sic). Copies of these documents

will be made for your personnel file and the originals will be returned to you.”

10. *The employment letter also enclosed a job description (document 2).*

The MECA

11. *Ms Weingott has been a member of the NZNO since she started working at the DHB. The parties are bound by the District Health Board\NZNO Multi-Employer Nursing\Midwifery Collective Agreement, 1 April 2007 – 31 March 2010 (MECA) (document 3). The MECA has continued in effect by virtue of s.53 of the Employment Relations Act 2000.*

12. *Clause 5 of the MECA defines “casual employee” as:*

“An employee who has no set hours or days or days of work and who is normally asked to work as and when required. Casual employees cannot be used to replace genuine permanent or temporary situations except to meet business requirements when no other alternative is available.”

13. *Regarding part-time employees:*

- (a) *Clause 5.0 of the MECA defines “part-time employee” as:*

“An employee, other than a casual employee, who is employed on a permanent basis but less than the ordinary or normal hours prescribed in this MECA. Any wages and benefits, eg leave, will be pro rate according to the hours worked unless specifically stated otherwise in this MECA.”

- (b) *Clause 6.2 of the MECA provides that:*

“Employees will normally work 8 hours a day\shift in duration, except the part-time employees by mutual agreement between the employer and the employee, may work shifts of no less than 4 hours.”

- (c) *Clause 6.6 of the MECA sets out the rosters or combination of rosters to apply under the MECA and provides that:*

“A part-time employee may work within the rosters described above.”

14. *Regarding full time employees:*

- (a) *Clause 5.0 of the MECA defines:*

“Full-time employee” as:

“An employee who works not less than the “ordinary” or “normal” hours set out under “hours of work” in this MECA.”

- (b) *Clause 6.1 of the MECA provides that:*

“The ordinary working hours of an employee employed full-time shall be 80 per fortnight.”

15. Regarding rostering, clause 6.0 of the MECA provides that:

“... in designing the implementing shift rosters to meet service needs, the employer shall ensure the disruption, personal health effects and fatigue associated with shift work are minimised for the group of workers involved. Rosters shall be jointly developed and reviewed by the employer, representatives of the effected employees and NZNO. Attention is drawn to the rostering guidelines in each DHB. The employer will endeavour to ensure safe starting levels and appropriate skill mix in work areas. There shall be a programme of regular monitoring of staffing levels and skill mix. Any identified staffing deficiencies shall be addressed ...”

16. Clause 6.5 of the MECA provides that:

“Rosters will be published not less than 28 days prior to the commencement of the roster, provided that less notice may be given in exceptional circumstances. Rosters posted will show duties of a minimum 28 day period. Changes in rosters, once posted, shall be by mutual agreement.”

17. Clause 6.12 of the MECA further provides that:

“As a general principle, when additional shifts are required, preference will be given in the first instance to part-time employees.”

The DHB's Roster System

18. *Permanent full-time and part-time nursing staff work rostered shifts as determined by the DHB. They can be required to work morning, afternoon and night shifts, or, in the case of part-time staff, part-shifts of at least four hours' duration by mutual agreement (refer to clauses 6.2 and clause 6.6 of the MECA) over the roster period.*
19. *The DHB also operates a “casual pool”, which consists of a number of individuals that the DHB considers are employed on a casual basis (“designated casual employees”).*
20. *When preparing the roster, the DHB's relevant Clinical Nurse Manager “populates” a draft roster first with permanent staff.*
21. *The permanent staff must obtain approval if they do not want to be rostered for a particular roster or shift, for example to take annual holidays, or if they want to request specific shifts. This approval must be obtained as early as possible but in any event before the roster is posted (ie more than 28 days in advance, as per the requirement in clause 6.5 of the MECA).*
22. *Once a roster has been populated with permanent employees, the Clinical Nurse Manager looks to fill the remaining gaps in the roster. To do this, the Clinical Nurse Manager or Duty Nurse Manager first contacts permanent part-time employees to see if they want additional shifts, and then designated casual employees. (The Duty Nurse Manager in practice assumes primary responsibility for liaison with designated casual employees.) If a designated casual employee accepts a particular shift or shifts, his or her name is then entered into the roster.*

23. *Once all shifts have been populated, a final roster for each ward is posted in accordance with the 28-day requirement in the MECA.*
24. *Once the roster is posted, permanent employees cannot decline to work a particular shift or shifts for which they have been rostered. Permanent employees may only swap shifts with another permanent employee after obtaining the approval of the Clinical Nurse Manager. Permanent employees can also be required to work in different parts of the hospital from those rostered, depending on “safe staffing levels and appropriate skill mix” as per the MECA.*
25. *Designated casual employees, unlike permanent employees, do not need approval to rule out their availability for particular shift, shifts or roster.*
26. *Further, designated casual employees can, on 24 hours’ notice, decide not to work a shift for which they have been rostered. They do not need approval to do this and do not need to provide a reason.*
27. *The DHB can also withdraw all very offers of work to designated casual employees on 24 hours’ notice if, for example, the mix of skills on a particular shift changes due to the unexpected absence, or there are changes in occupancy or acuity.*
28. *The Day Bed Manager, in conjunction with the Clinical Nurse Manager, oversees the rosters for all wards on any given day and manages the relationship between the number of beds (or patients) in each ward and the number and make-up of staff needed to cover those beds. Where gaps in a roster arise at short notice (for example due to sick leave), the Day Bed Manager or Clinical Nurse Manager contacts permanent part-time employees and designated casual employees to try and fill those gaps.*
29. *Ms Weingott has worked all of the shifts for which she has been rostered, other than for sickness. Ms Weingott has both accepted and declined additional shifts offered to her at short notice.*

Personal grievance

30. *On 17 February 2009, Laura Thomas of the NZNO wrote to Mr Fred Wheeler, the DHB’s Clinical Support Services Unit Manager, raising an employment relationship problem on Ms Weingott’s behalf (document 4).*
31. *Mr Wheeler responded in a letter dated 20 February 2009 (document 5).*
32. *The DHB and Ms Weingott met to discuss the issue on 9 March 2009, but were unable to resolve their employment relationship problem.*
33. *Ms Thomas wrote to Mr Wheeler on 2 April 2009 (document 6), raising a personal grievance on Ms Weingott’s behalf. Ms Thomas stated that by removing Ms Weingott from the roster the DHB had unjustifiably disadvantaged/unjustifiably dismissed Ms Weingott.*
34. *The parties attended mediation on 3 April 2009, but were unable to resolve the matter.*

35. *There was further correspondence between the parties in which the parties maintained their respective views regarding Ms Weingott's employment status (document 7-9).*
36. *The parties attended mediation on 20 October 2009, but the matter was not resolved.*
37. *On 11 November 2009, Ms Weingott filed a statement of problem in the Authority.*

Days and hours worked by Ms Weingott

38. *A record of the shifts worked by Ms Weingott for the period under review [was] attached as a schedule, Schedule 1. The parties have been unable to agree whether Ms Weingott worked on Wednesday, 23 July 2008 (which the DHB considers is correct) or on Thursday 24 July 2008 (which Ms Weingott considers is correct). The Schedule reflected the difference of view.*

The applicant's case

[8] The applicant agreed with the issues for determination. Whilst the appointment letter signed at the commencement of employment provided for a "casual position", over time it varied to the extent that its essential nature changed. This was supported by:

- a. The written terms are indicative of an on-going employment relationship between the parties.
- b. The letter of appointment provides for on-going terms: such as performance planning and sick leave.
- c. The job description for continuous quality improvement, and regular performance appraisal meetings, participation in regular team meetings, on-going education and maintenance of monthly statistics.
- d. The appointment letters and job description provide for Ms Weingott to work in different parts of the hospital: "Place of Work" requires duties to be carried out in various departments as required and Key Responsibilities requires a pro-active involvement in a multi disciplinary team where work could be in all areas of the hospital when requested and could include rostered and rotating shifts. These

requirements should prevail over the conflicts in evidence from witnesses.

- e. The provision that the applicant could be required to work rotating shifts if required is the same for permanent staff.
- f. The true nature of the relationship is strongly indicative of on-going employment: the terms of the casual employment provision for the applicant to be offered further work where the applicant has been given set hours or days of work.

[9] The Authority has been asked to assess the evidence that the applicant had regularity of work and continuity of employment in the absence of any set hours or days of work. The applicant has relied on (1) a record of 218 shifts worked during 13 months where 38 shifts were worked on a Monday, 25 on a Tuesday, 23 on a Wednesday, 36 on a Thursday, 21 on a Friday, 41 on a Saturday and 43 on a Sunday. (2) There was a pattern of work on Mondays, Thursdays, Saturdays and Sundays notwithstanding a majority of the work was undertaken on Saturdays and Sundays. Work on an average of 3 shifts each week over a 13 month period is sufficient to establish a regularity of work. (3) The regularity and extent of the work supports the applicant's work being consistent and predictable and therefore the inference can be established that she had set hours or days of work. (4) The applicant also worked afternoon shifts of no less than 4 hours and that this accords with provisions relating to permanent part-time employment under clauses 5.00 and 6.2 and 6.6 of the MECA.

[10] Next it was submitted that the applicant was not normally asked to work as and when required because: (1) her hours were mutually agreed. (2) Her hours were notified by way of a posted roster. (3) Posted hours were required not less than 28 days prior to the commencement of the roster. (4) The applicant had a genuine expectation of work from the rosters posted in advance. (5) The applicant undertook all shifts for which she was rostered and as such accepted each roster being an offer of work for each shift.

[11] Other factors supporting on-going or permanent employment include: (1) the rostering off process where the applicant would have to seek approval and where the applicant would record her unavailability in the Leave Diary. (2) Designated casual employees are entitled with 24 hours notice not to work a shift and as such it is

incongruous for the respondent to claim that the applicant recorded her unavailability as a “courtesy”. (3) The respondent never informed the applicant that such a process above was required. (4) The evidence supports the applicant’s genuine expectation to work including the right to decline varied offers of work, that any variation to a roster was by mutual agreement the same as for permanent employees.

[12] The above is supported by;

- a. Ms Weingott liaising with the Clinical Nurse Manger and not the Duty Nurse Manger who had the primary responsibility for liaising with the casual pool.
- b. Ms Weingott appearing to have been given some preference for additional shifts in accordance with the same preference permitted for permanent part-time employees.
- c. Notice for termination of employment is at odds with the arrangements for casual employees.
- d. There was a practice of obtaining approval to swap shifts as required for permanent staff.
- e. Representations were made to Ms Weingott that she was a “core staff member”.

[13] Mr Lawrie submitted that Ms Weingott was removed from the posted roster after 22 March 2009 when 10 new health care assistant positions within the Rehabilitation Unit were established on 16 March 2009. The first the applicant knew of this was from a work colleague and the decision was presented as a fait accompli. He submitted that there was no formal process followed by the respondent. It was submitted that Ms Weingott was dismissed and it was not sufficient for the respondent to rely on her being aware that shifts would no longer be available because of the change. Mr Lawrie pointed out the requirements under s 4 (1A) (c) of the Act that requires access to information and an opportunity for an affected staff member to comment before any decision is made. He further submitted that no management of change process was followed by the respondent in regard to the requirements under clause 24 of the MECA. He says there was no consultation with Ms Weingott, no notification of a staffing surplus and no application of options available under clauses

24.2, 24.3.2 and 24.3.4 of the MECA. The employer's action was substantively unjustified and unfair, he submitted.

[14] Ms Weingott is seeking reinstatement to a position with not less than 16 hours per week or alternatively not less than two 8 hour shifts (0.4 FTE) as a permanent part time employee, lost remuneration wages and holiday pay and she is seeking compensation.

The respondent's case

[15] The respondent has submitted that the intention of the parties was clearly that they entered into a "casual" employment relationship for flexibility that suited them both. It has denied that Ms Weingott could be considered as a permanent part time employee.

[16] The respondent's case has been presented on the basis that Ms Weingott was able to determine where, when, how often and for how long she worked for health and other personal reasons.

[17] It says she worked reasonably frequently, but that all the work was on her terms when she dictated when she would be available to accept offers of work and that she declined work that was offered to her.

[18] It denied there was any discernable pattern of work, and says that she was offered work "as and when required". This is supported by the parties' employment agreement where the employment started as casual. There was an absence of mutual obligations assumed during the period Ms Weingott was employed as to the offer and acceptance of work. The lack of regular and consistent days and hours of work. She did not have a regular shift pattern. She was employed on short notice hours rather than a roster.

[19] In summary, Mr Kynaston submitted that Ms Weingott's employment was casual:

- a. There was no obligation on Ms Weingott to accept any offer by the respondent to work and she declined to work shifts.

- b. Ms Weingott's availability would be pencilled into the roster and she would be asked what shifts she wanted to work. Permanent employees work where they are rostered.
- c. Ms Weingott dictated where she would work. Permanent employees are required to work in different areas according to their scope of practice and skill mix.
- d. Ms Weingott could withdraw her acceptance to work in 24 hours without reason and without needing to get approval. Likewise the respondent could withdraw the offer in 24 hours without any reasons. Permanent employees have to seek approval and complete a Leave Request form.

[20] In the event that a decision is made that her employment is not casual the respondent has denied Ms Weingott's claims and the remedies sought. In particular it has submitted it would not be practicable to reinstate Ms Weingott because it is contrary to the respondent's policy governing the employment of enrolled nurses, and there is no FTE position for the applicant.

Determination

[21] There is no doubt that the original intention of the parties was for a casual employment relationship. The employment arrangements were documented in a letter dated 18 February 2008. This confirmed a casual position and that Ms Weingott would be contacted to work as and when required. As a member of NZNO Ms Weingott was covered by clause 5 (Casual Employee) of the MECA. She agreed to the terms. I agree that this shaped the parties' expectations. Indeed the parties had no agreement on such things as a minimum number of hours or days per week or per fortnight; that Ms Weingott would work on certain days; that the DHB had to offer Ms Weingott work; and that Ms Weingott had to accept work offered to her by the DHB. The respondent says that the elements of the relationship never changed, whereas Ms Weingott says the real nature of her employment changed over time to be permanent part time.

[22] I hold that the respondent has satisfied me that the real nature of the relationship remained casual for the following reasons:

- a. The original intention of the parties was for a casual employment relationship because of the contract entered into at the time. The employment agreement was never changed. The “casual” employment relationship was entered into to provide flexibility that suited both parties.
- b. The original intention that was agreed in writing was never varied in writing and that would have been expected if the employment relationship did change.
- c. Ms Weingott was able to determine where, when, how often and for how long she worked for health and other personal reasons.
- d. Ms Weingott worked reasonably frequently, but that all the work was on her terms when she dictated when she would be available to accept offers of work and that she declined work that was offered to her.
- e. Ms Weingott did not have a regular shift pattern. She was employed on short notice hours rather than a roster.
- f. Ms Weingott’s availability would be pencilled into the roster and she would be asked what shifts she wanted to work. Permanent employees work where they are rostered. Permanent employees are required to work in different areas according to their scope of practice and skill mix.
- g. Ms Weingott could withdraw her acceptance to work in 24 hours without reason and without needing to get approval. Likewise the respondent could withdraw the offer in 24 hours without any reasons. Permanent employees have to seek approval and complete a Leave Request form.
- h. Separate engagements based on the method of payment under the MECA.

[23] On the basis of the above I do not accept that the factors relied upon by Mr Lawrie in [8] and [12] above become determinative of the employment relationship over time because of the underlying arrangements existing between Ms Weingott and the DHB that accorded her casual status. In this regard I have not been satisfied that any arrangements existing to support Ms Weingott's role are inconsistent with casual employment.

[24] The case can be distinguished from principles laid down in *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 225. *Jinkinson* requires that any decision on such a matter be based on the "true nature of the relationship". Judge Couch referred to a list of factors to help in the analysis of an employment relationship and expanded on the regularity and continuity of employment often used. The list referred to by Judge Couch is:

- 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 start and finishing times.*

[25] Taking into account all matters the parties' description of their relationship is not to be treated as determinative. In Ms Weingott's case the following are relevant:

- a. Ms Weingott was offered shifts in advance of the roster being posted when her name would be pencilled in and before shifts were finalised.
- b. The DHB is a provider of essential health services and must ensure patient safety, compared with *Jinkinson* that related to the mining industry.

- c. There is a casual pool of employees at the DHB.
- d. The flexibility and delivery of services are distinguishable from *Jinkinson*. Ms Weingott did not have a regular shift pattern. She was not included in the roster as matter of routine practice, but was pencilled into a draft roster to fill gaps where there were any absences of permanent employees.
- e. Ms Weingott's hours were provided at short notice rather than rostered hours and thus can be distinguished from forming a pattern.
- f. Ms Weingott's agreement was sought to accept a shift or shifts before the roster was posted. The practice did not presume, expect or require Ms Weingott's availability, I hold.
- g. There were no requirements for Ms Weingott to work overtime and to be available for any stand by duties. There is common ground that she declined to work some shifts at short notice.
- h. Ms Weingott was not required to complete leave request forms, to seek approval or to give any notice for leave, despite her exercising any courtesy to give notice of her unavailability at any time.

[26] I hold that Ms Weingott did not have fixed or regular hours or days of work. Although Ms Weingott worked reasonably frequently during the time under review I accept that it is explained by:

- a. Additional work was created prior to the start of two graduates recruited to work in the Rehabilitation Unit when positions were held open by the DHB until January 2009.
- b. Two permanent employed nurses employed in the Unit were absent on extended sick leave in 2008. Work was created for Ms Weingott while they were away.

- c. Staff were redeployed from the Unit to work in other areas of the DHB due to shortages in those areas.
- d. The nature of the engagements.

[27] Thus, I conclude that whilst the evidence appears to support Ms Weingott working frequently during the period under review any pattern is subjective, but has to be based on her availability for work. Any pattern therefore is influenced by Ms Weingott's own availability, and I therefore find that it can not be determinative of the employment relationship.

[28] Ms Weingott says that she worked the same four days: Monday, Tuesday, Saturday and Sunday. I accept that there is no pattern because she made her self available for half shifts and this was reflected by Ms Weingott's limitations on the days and hours she would work.

[29] I accept that the arrangements reflect that the DHB needs to have access to a pool of casual workers to provide it and staff with flexibility in meeting their arrangements. The alternative is for rostering and rotating shifts used for permanent employees. The different arrangements are expressly provided for with the definitions of casual and permanent part time arrangements.

[30] I conclude that Ms Weingott was a casual and her role remained as a casual employee.

[31] I now turn to the changes that were made and when Ms Weingott was not offered further work on the rosters and without any reasons.

[32] I accept that the DHB had genuine reasons not to call Ms Weingott:

- a. The two permanent staff on sick leave returned to work.
- b. The two graduate Registered Nurse positions that had been held open in 2008 were filled and the people concerned started in January 2009.
- c. Fewer permanent employees left the DHB from 2009 compared with previous years.

- d. The DHB increased the number of Health Care Assistants employed on a permanent basis.

[33] Also, I am satisfied that Ms Weingott was aware of the pending changes in the Rehabilitation Unit because Ms Aynslie O'Reilly the clinical care manager told her on or about late February/early March she would not be on the 23 March/April roster. She had heard that a number of health care positions had been advertised in early to mid-February 2009. She also had discussed the matter with the NZNO at the time. I do not find that the DHB was deliberately withholding information, but it did fail to include her in the changes. I accept Ms Weingott's evidence that she was given no reason at the time by Ms O'Reilly, and there was no consultation process followed by the DHB in respect to Ms Weingott's position. In this regard I accept Ms Weingott's evidence that the outcome was a 'fait accompli'. The respondent implicitly conceded that there was no process followed in respect of Ms Weingott's position.

[34] As no process was properly followed the DHB has breached its obligation to provide Ms Weingott with access to information relevant to the continuation of her employment as a casual, and to provide her with an opportunity to comment before the decision was made, and was unfair. This is because although she was a casual she had worked frequently and there would be an impact on her employment due to the proposed changes. Since she was covered by the MECA in her role the employer's obligation would require consultation at least under the MECA in the management of change as it related to Ms Weingott's role and position.

[35] For the above reasons Ms Weingott has a personal grievance. The DHB as a fair and reasonable employer would have done more to consult Ms Weingott and include her in discussions and to give her the opportunity to be included in any input into any options because there would be an impact on her employment. It is not practicable to reinstate Ms Weingott because of staffing requirements and the nature of her position that she held with the DHB, I hold.

[36] I hold that Ms Weingott does not have a contractual basis to claim an average of 16 hours per week because:

- a. She worked various hours during the periods of her claim.
- b. Indeed she worked more often over 16 hours per week.

c. The contractual terms of her role.

[37] The nature of her position did not entitle her to permanent hours. Next I find that there has been no lost wages. Ms Weingott is entitled to compensation for hurt, humiliation and injury to feelings in regard to not having any consultation, input into the decision and opportunity to comment on options relating to the impact on her employment. This would be a modest amount having regard to the evidence. I award Ms Weingott \$3,000 compensation for hurt and injury to feelings. For completeness there is no deduction for any contribution because Ms Weingott did not contribute to the situation giving rise to her personal grievance.

[38] The claims for holiday pay are dismissed because of the nature of the employment and that two days worked were not days that would be otherwise be working days for Ms Weingott when she was not required to work Public Holidays.

[39] The Wairarapa District Health Board is to pay Kay Weingott \$3,000 compensation under s 123 (1) (c) (i) of the Act for hurt and injury to feelings.

[40] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority