IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 34
ARC 15/12

IN THE MATTER OF	a challenge to determination of Employment Relations Authority
BETWEEN	CAROL RIRA BAKER Plaintiff
AND	ST JOHN CENTRAL REGIONAL TRUST BOARD Defendant

Hearing: 4 and 5 March 2013
(Heard at Hamilton)

Counsel: Henderikus Haan, advocate for plaintiff
Michael O'Brien and Rosemary Childs, counsel for defendant

Judgment: 15 March 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Miss Baker was employed by the St John Central Regional Trust Board (St John) from early 2005 to 2012. Her employment status is in dispute, as is the extent of her entitlements to annual leave, sick leave and time in lieu. These issues had earlier been the subject of an investigation by the Employment Relations Authority (the Authority). The Authority determined[1] that Miss Baker was a permanent, rather than a casual, employee but did not grant the remedies she sought. Miss Baker challenges the latter aspect of the Authority's determination, the defendant the former. The challenge and cross challenge proceeded in this Court on a de novo basis.

[1] [2012] NZERA Auckland 13.

The facts

[2] The defendant is a charitable organisation that operates independently from the government. It services communities throughout New Zealand. It is organised into three geographical regions. The St John Central Regional Trust Board is the defendant in these proceedings.

[3] In addition to the provision of emergency and general ambulance services, St John also provides a number of other services, including transporting patients for arranged hospital admissions and to hospital outpatient clinics and transferring patients between hospitals and from hospital to home (patient transfer services – PTS). PTS are provided by patient transfer officers (PTOs). St John utilises both permanent and casual PTOs to meet its PTS requirements. Mr Pennycock, the Regional Operations Manager, gave evidence that due to the fluctuating demand for PTS resources at night, casual employees are used in this area of the operation, while permanent PTOs are used during the day. Permanent PTOs are required to hold a National Diploma of Ambulance Practice, which means that they can also carry out front-line ambulance work if required. Miss Baker does not hold this qualification.

[4] It is evident that Miss Baker has given a number of years of service to St John. While she left paid employment with the defendant in 2012 she has nonetheless continued to provide volunteer services to it. She has done this because, in her words, she "loves the job." It is clear that she appreciates the value of the services St John provides to the community and wishes to contribute to them.

[5] From around March 2005 Miss Baker worked on a casual basis while at the Putararu Ambulance Station as a casual paid officer (CPO). She had previously been a volunteer at the station, from around April 2004. Mr Reidinger, formerly the District Operations Manager, gave evidence that when casual work was available, the full-time employee at Putararu would telephone the CPOs to see who was available and that the first person contacted who indicated their availability would undertake the work at hand. While Miss Baker had been given a pager she was not

required to attend to any paged job. She remained free to decline the job, including if she was unavailable for any reason.

[6] Miss Baker accepts that she was a casual employee during her time at the Putararu Station. However, she says that she subsequently picked up work at the Tokoroa Station, and became a permanent employee there. Her evidence was that Mr Andrews, a night time patient transfer officer (PTO) at Tokoroa, would offer her casual shifts while he was studying towards a diploma. She says that when he was appointed to a permanent day time role he essentially offered her his role and that she became a PTO via this unconventional route. Mr Scott, who was the Operations Team Manager – Tokoroa at the time, was adamant that she had not been offered permanent employment at Tokoroa. I accept that it is more likely than not that this is so. No role was advertised, no interview was carried out, Mr Andrews had no authority to offer Miss Baker a role, and no documentation was before the Court that supported such an "appointment". Mr Andrews did not give evidence.

[7] Mr Nielsen (the then Regional Operations Manager) wrote to Miss Baker on 30 June 2006, noting that no employment agreement was held on the file. He enclosed two copies of a proposed casual employment agreement. It remains unclear whether the signed agreement was returned.

[8] Miss Baker undertook some night time PTS work for the Tokoroa Station while working at Putararu Station. Mr Scott's evidence was that when Mr Andrews was not free he (Mr Scott) would ask Miss Baker if she wanted to take the casual shift. Mr Andrews subsequently gained permanent employment at the station, and no longer undertook casual night patient transfer work. That meant that there was an increased availability of such work. Miss Baker spoke to Mr Scott and indicated her availability for casual on-call night patient transfer work. Mr Scott agreed to this, indicating that she should liaise with the other casual CPO (Ms Davidson) over availability issues.

[9] It is evident that Ms Davidson and Miss Baker discussed issues relating to availability and how this might best be managed. They went to see Mr Scott around the beginning of 2006 to ask whether they could record their availability on a two-

person roster. He told them it was up to them to sort out these issues with each other. They subsequently recorded their availability on the same roster that was used for permanent employees. The roster was prepared a week in advance, and made available to the NorthComm communications centre (NorthComm). I accept that this was a step that Miss Baker and Ms Davidson took, and was not an initiative proposed or driven by the defendant.

[10] Prior to this initiative, Mr Scott would ring around the casuals to determine who was available to work. His evidence, which I accept, was that there was a range of options available in terms of ensuring adequate resources for particular jobs and that the station was not wholly reliant on casual staff to accept work. He said that casual staff were entitled to decline work, and that this frequently occurred even in circumstances where they had indicated their availability. His evidence was that if this occurred, he would telephone around other St John staff and, if necessary, use the duty front line emergency ambulance staff to carry out patient transfer work.

[11] Miss Baker's evidence was that she was given a pager at the beginning of 2007. The pager was designed to alert her to incoming jobs. In October 2008 Mr Semmens took over Mr Scott's role as Operations Team Manager at the Tokoroa Station. By this time Miss Davidson had left and another casual employee (Ms Rogers) was involved in casual on-call work. Miss Baker and Ms Rogers approached Mr Semmens and a change was made to the roster, to reflect availability on a four nights on/four nights off basis. The roster also included reference to permanent employees. Mr Semmens was not available to give evidence (having passed away) but his statement in the Authority was admitted by consent. His statement records 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.

[12] Miss Baker became a member of the Ambulance Officers Workplace Union (the Union) in early 2007. She recorded on a membership application form that she was a casual PTO. The membership application form records, above the signature line, that Miss Baker had read the form, understood it, and accepted it. From this

date she was subject to the Patient Transfer Officers and Ambulance Officers Collective Agreement (the Collective Agreement).

[13] The Collective Agreement relates to permanent, fixed term, and casual employees. It is clear that not all provisions apply to each. There are a number of provisions that relate specifically to casual employees. Others cannot sensibly be read as having any application to such staff.

[14] Clause 8.10 of the Collective Agreement provides that:

> 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 at a rate of 8% of gross weekly earnings and incorporated into weekly pay.

[15] Miss Baker was aware that she could turn down work, including where she had indicated her availability to work and that she did so on occasion. The fact that she was free to decline any job offered to her was reiterated by the defendant in August 2010, when Mr Nielsen wrote to her (through her lawyer) stating that:

> As a casual employee, [Miss Baker] may accept or decline any work on this roster as she sees fit.

[16] Later that year the position was again reinforced, during a meeting with Miss Baker to discuss the driving hours' requirements of the Land Transport Act 1998. She acknowledged that she could decline work when contacted by NorthComm. A file note of the meeting (dated 8 November 2010) records Miss Baker as a casual patient transfer officer. Her signature appears on the file note. Numerous timesheets, which Miss Baker had signed, were before the Court. These also record Miss Baker's status as a casual employee.

[17] The plaintiff suggested that there was little difference between the work undertaken by night time and day time PTOs. Mr Pennycook is the current Regional Operations Manager, and is involved in the delivery of ambulance, patient transfer services, event and prime services. He had a different perspective on the comparable

nature of the roles. As he explained, the normal course was for patient transfers to be booked during the day. This meant that the workload during the day was more predictable, justifying the appointment of permanent PTOs. This contrasts with the position during the night, when few pre-planned transfers occur and when call outs are unpredictable. As Mr Pennycook said, some nights no patient transfer work is required. At other times there is a high demand for it. I accept Mr Pennycook's evidence in relation to the significant distinctions between night time and day time work, and that this impacted on the resources that needed to be applied to each.

[18] Miss Baker accepted in evidence that the work she undertook was random, in the sense that she could not predict when jobs would come in (if at all) and that night PTOs were not required to stay at the station between jobs. This contrasted with the position of day time PTOs, who were required to remain at the station between transfers.

Analysis

[19] The thrust of the case advanced on behalf of Miss Baker is that her employment status changed when she was placed on the roster at Tokoroa Station in 2007.

[20] It is well established that a determination as to a person's employment status requires an assessment of the real nature of the employment relationship.[2] A number of characteristics have been considered by the Courts in assessing whether employment is casual, including:[3]

- Engagement for short periods of time for specific purposes;
- a lack of regular work pattern or expectation of ongoing employment;
- employment is dependant on the availability of work demands;
- no guarantee of work from one week to the next;
- employment as and when needed;

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[2] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].
[3] *Lee v Minor Developments Ltd T/A Before Six Childcare Centre* AC 52/08, 23 December 2008 at [43].

- the lack of an obligation on the employer to offer employment or on the employee to accept another engagement; and

- employees are only engaged for the specific term of each period of employment.

[21] In *Roy Morgan Research Pty Ltd v Commissioner of State Revenue (Taxation)*[4] the Victorian Civil and Administrative Tribunal held that:

> Whilst there is no fixed and exhaustive definition of what a casual employee is, the most significant factor is that the employer need only offer employment to the casual employee if it wishes to do [so] and the employee need only accept the offer if he or she wishes to do so.

[22] This approach was echoed by the Employment Court in *Jinkinson v Oceana Gold (NZ) Ltd*,[5] where it was observed that:[6]

> 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.

[23] The nature of the obligations owed by each party to one another and, in particular, an absence of any obligation on the employer to offer employment and, conversely, the employee to accept any particular engagement, is therefore an important factor in determining whether a person is a permanent or casual employee.

[24] Miss Baker was not obliged to accept work, as she accepted in evidence. Indeed from time to time she declined work even though she had previously indicated her availability. In *Clark v Oxfordshire Health Authority*[7] the English and Wales Court of Appeal held that a nurse, who had no obligation to accept hours offered (and likewise the employer had no obligation to offer work), was effectively a casual employee. The nurse had worked casual engagements for the Health Authority for over three years, and was employed on an "as and when required" basis, with no guarantee of work being available. Although the nurse gave evidence that she had never refused work, the Court was nevertheless satisfied that it was open for her to refuse work if she wished to do so.

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[4] [2006] VCAT 1204 at [47].
[5] [2009] ERNZ 225.
[6] At [41].
[7] [1998] IRLR 125 (EWCA).

[25] The inclusion of an employee on a roster may be relevant to an assessment of employment status, but the context in which this has occurred will be important. In *Barnes (formerly Kissell) v Whangarei Returned Services Association (Inc)*[8] the Employment Court had regard to a roster in determining that the contractual arrangement between the parties had assumed features of regularity and permanence.[9] And a similar arrangement was said to amount to an offer of work in *Jinkinson*.[10] However, neither case is analogous to the circumstances of the present one. In both *Barnes* and *Jinkinson* the employees were unable to refuse work after having been placed on the roster. It was accepted that Miss Baker remained able to do so.

[26] The defendant's evidence, which I accept, was that the roster was designed to reflect availability, and to provide a first port of call for NorthComm in terms of potential staff members to contact to attend call outs. It was not, however, a mechanism for recording who would be undertaking the work, and (unlike the position in *Barnes*) a number of back up options were available and utilised if work was declined. As Mr Riedinger said, if there was no available casual PTO, NorthComm would contact the station manager, who would contact other St John staff. As a last resort, a front line vehicle would be used to do the patient transfer work. And the Collective Agreement expressly dealt with situations where no casuals were available under cl 26.[11]

[27] The roster did not mean that Miss Baker was allocated work for particular dates, rather that she had indicated her availability during those times but remained free to turn down any job that arose. While the roster was prepared a week in advance, it could change at any time. Casuals and volunteers could remove themselves from the roster and, even if they did not take this step, they could nevertheless decline any jobs.

[28] Nor did Miss Baker have any restrictions placed on her during the period she had indicated her availability. The only restriction that was highlighted in evidence

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[8] [1997] ERNZ 626.
[9] At 636.
[10] At [65].
[11] See, for example, cls 26.2, 26.5.

related to the need to comply with the maximum driving hours contained within the Land Transport Act 1998. This meant that Miss Baker might be required to turn down a job if it was offered, depending on the number of hours she had accumulated during a particular period, but no other restrictions were placed on what she could, or could not do, during this time. She was effectively a free agent, and could go out for the night, or overnight, if she wished.

[29] Miss Baker was not required to give notice if she wanted to take leave, make herself available for work, or give notice of termination. And whereas permanent day time PTOs could be disciplined for refusing to respond to a particular job, there was no suggestion that there would be any disciplinary outcome if Miss Baker declined to do so. Rather, it was acknowledged that no such action could be taken.

[30] In *Jinkinson*[12] and *Rush Security Services Ltd trading as Darien Rush Security v Samoa*,[13] it was accepted that if a pattern of work is consistent and highly predictable this may reflect a permanent, rather than casual, employment relationship. In *Jinkinson* the employee was found to have worked "extensively and consistently"[14] on rostered regular days and hours throughout a 19 month period, averaging more than 45 hours of work per week. In *Rush Security Services Ltd*, the employee worked pursuant to a roster on average more than 50 hours a week, including most Saturdays and Sundays on 12 hour shifts.[15] In *Lee v Minor Developments Ltd T/A Before Six Childcare Centre*,[16] the employee was initially employed to work for 21 hours per week, seven hours a day, three days a week. Her hours subsequently increased to seven hours a day, four days a week. And in *Barnes*, the employee was rostered each week for regular days and hours, as sole charge of a bar for two nights a week.[17] In each of these cases the employee was held to be a permanent, rather than a casual, employee. However, the facts of these cases materially differ from the circumstances of the present case.

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[12] At [63]-[64].
[13] [2011] NZEmpC 76 at [30].
[14] At [63].
[15] At [29].
[16] Above n 3, at [9], [16].
[17] *Barnes* at 629.

[31] Detailed evidence was given on behalf of the defendant in relation to the number of hours worked by the plaintiff over time. That evidence established that the days and hours that Miss Baker worked fluctuated dramatically from week to week, ranging from 0 to 47.85 hours per week, with the number of days per week worked ranging from 0 to 6 days per week. It is also clear that the hours actually worked bore little resemblance to the hours Miss Baker had indicated her availability for on the roster. This reinforces the unforeseen nature of the work being done and its lack of predictability from one day to the next, underscoring the stated rationale for the utilisation of casual staff. As counsel for the defendant pointed out, Miss Baker's ability to carry out patient transfer work was contingent on her availability coinciding with the unforeseen need of St John to do a patient transfer job.

[32] The plaintiff's advocate, Mr Haan, noted by way of reference to *Jinkinson*,[18] that Miss Baker was paid an on-call allowance, previously called a retainer, during the period she indicated her availability. I accept that that is a relevant factor in determining employment status. However, it is not determinative.[19] Miss Baker remained able, despite the payment of the allowance, to decline jobs for any reason. The evidence was that the allowance reflected an agreement between the defendant and the Union that casual employees were a necessary part of the defendant's operations.

[33] Night time patient work is ad hoc. It predominantly involves acute cases and emergency work. It is, by its nature, unpredictable. I accept the defendant's evidence that there is a genuine need for casual staff members to be able to undertake this work, in the context of the flexibility it demands. This is reinforced by the contractual arrangements entered into between the defendant and the relevant District Health Boards, who pay according to the patient transfer work that is actually undertaken. I accept too that if the defendant was not able to operate in this way, it would have significant resourcing implications. However, I do not accept that this factor is of direct relevance to a determination of Miss Baker's employment status.

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[18] At [61].
[19] See, for example, *Canterbury Hotel Etc IUOW v Sellers (t/a Carlton Mill Lodge)* [1991] 3 ERNZ 620 at 628.

[34] The documentation reflects that Miss Barker was described, and described herself, as a casual employee. The way in which the parties have described the relationship is relevant, but not determinative. However, it reinforces the conclusions I have otherwise reached.

[35] Balancing the factors identified above, I am satisfied that Miss Baker was a casual employee. For this reason the defendant's cross challenge succeeds.

Remedies

[36] I turn to consider the plaintiff's claims for back pay; annual holidays; sick leave; days in lieu and penalties.

[37] Miss Baker claims full pay based on every time she indicated her availability on the roster, in addition to the allowance that she received.

[38] Clause 11.5 of the Collective Agreement provides that part-time, fixed term and casual employees are to be paid for the actual hours worked, plus any applicable on-call allowances. I cannot accept that Miss Baker was working during the entire time she indicated her availability. While arising in a different context, the Court of Appeal's approach to determining what constitutes "work" for the purposes of the Minimum Wage Act 1983 in *Idea Services Ltd v Dickson*[20] is informative. There the Court emphasised the significant restraints on the employee during sleepover periods and concluded that Mr Dickson was working throughout.[21] Miss Baker, in comparison, accepted in evidence that she preferred to stay at the station after doing a job but that there was no requirement to do so. And she accepted that she did not have to stay at home during her indicated period of availability. The only apparent restraint on her was that she must not accept jobs that would result in her exceeding the maximum allowable driving hours. She was otherwise able to do as she pleased.

[39] Section 28 of the Holidays Act 2003 provides that an employer may regularly pay annual holiday pay with the employee's pay where the work is so intermittent or

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[20] [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192.
[21] At [10].

irregular that it is impracticable for the employer to provide the employee with four weeks' annual leave.[22] I have already dealt with issues relating to the irregularity and unpredictable nature of the work that Miss Baker undertook. It is clear that Miss Baker received 8% of her gross earnings as holiday pay during her time as a casual employee with the defendant, and she did not seek to contend otherwise or suggest that she had not otherwise agreed to such an arrangement. It was an identifiable component of her pay, as reflected in the pay slips she received. The defendant complied with its obligations under s 28 of the Holidays Act.

[40] Miss Baker claims sick leave and unspecified days in lieu for the period of her employment. Section 12 of the Holidays Act provides that:

> (1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.
>
> (2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.
>
> (3) The factors are—
>
> > (a) the employee's employment agreement:
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> > (b) the employee's work patterns:
> >
> > (c) any other relevant factors, including—
> >
> > > (i) whether the employee works for the employer only when work is available:
> > >
> > > (ii) the employer's rosters or other similar systems:
> > >
> > > (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
> >
> > (d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.
>
> (3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or bereavement leave falls during a

[22] Holidays Act 2003, s 28(1)(a)(ii).

> closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.
>
> (4) For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.

[41] There are difficulties with the position advanced by the plaintiff. Firstly, there was no evidence as to the days Miss Baker says she would otherwise have been entitled to sick leave or a day off in lieu. Secondly, it is not possible to determine whether any such days (which have not been identified) would "otherwise" have been working days, including having regard to the issues relating to unpredictability of the plaintiff's work referred to above. Accordingly, the plaintiff has not made out these claims.

[42] The plaintiff sought penalties. I do not accept that the defendant has breached any of its obligations to the plaintiff and in these circumstances there is no basis for an award. Even if the defendant had been wrong to treat the plaintiff as a casual employee, I would not have imposed a penalty in the circumstances and having regard to the sort of conduct that generally attracts such awards.[23]

[43] For these reasons the plaintiff's challenge is dismissed.

[44] The defendant asked that costs be reserved. If they cannot otherwise be agreed, they can be the subject of an exchange of memoranda with the defendant to file and serve any memorandum and supporting material within 20 days of the date of this judgment and the plaintiff filing and serving within a further 20 days.

Christina Inglis
Judge

Judgment signed at 10am on 15 March 2013

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[23] See, for example, *Xu v McIntosh* [2004] 2 ERNZ 448; *Prins v Tirohanga Group Ltd (formerly Tirohanga Rural Estates Ltd)* [2006] ERNZ 321.