IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 99
EMPC 258/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INC Plaintiff
AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Defendant

Hearing:	27 May 2020 (heard at Auckland)
Appearances:	B Manning, counsel for the plaintiff D Traylor, counsel for the defendant
Judgment:	6 July 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The Association of Professionals and Executive Employees Inc (APEX) has amongst its membership, phlebotomists,[1] some of whom have worked part-time for many years for the Counties Manuku District Health Board (the DHB). At issue is the extent of their sick leave entitlements.

[1] A phlebotomist collects blood and other samples from patients for laboratory testing or for blood banks.

[2] Under a sequence of collective employment agreements (CEAs), part-time phlebotomists' entitlement to sick leave is a pro-rata proportion of the entitlement of a full-time employee (FTE). How is the entitlement to be calculated? In effect, APEX contends that hours worked by an FTE are to be apportioned; the DHB contends that it is both the hours worked by an FTE and the number of days of sick leave allocated to an FTE which are to be apportioned.

[3] The Court must resolve the dispute by considering orthodox interpretation principles which must focus on the language used in the relevant CEAs assessed in its background context and on some provisions of the Holidays Act 2003 (the HA).

[4] The issue comes before the Court as a de novo challenge to a determination of the Employment Relations Authority, which rejected the interpretation of the sick leave clause which had been advocated by APEX.[2]

Relevant history

[5] Initially phlebotomists employed at the DHB were members of the New Zealand Medical Laboratory Workers Union (the NZMLWU), which was a party to a series of relevant CEAs.

[6] On 29 August 2017, the NZMLWU amalgamated with APEX. Members of the former Union, including phlebotomists, became members of the latter. NZMWLU was dissolved as an incorporated society, and its registration was cancelled.

[7] By operation of s 56(3) of the Employment Relations Act 2000 (the Act), APEX became bound by, and is entitled to enforce, the CEAs to which NZMLWU had been party.

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[2] *Association of Professionals and Executive Employees Inc v Counties Manukau District Health Board* [2019] NZERA 407 (Member Tetihaha).

[8] Before the Court are a series CEAs and multi-employer collective agreements (MECAs) going back to 2000.[3] From 2002, the relevant sick leave provisions were similar. Counsel's submissions focused on the 2016 version, which stated:

> **14.0 SICK LEAVE**
>
> 14.1 CONDITIONS
>
> 14.1.1 Where an employee is granted leave of absence because of sickness or injury not arising out of and in the course of employment (in this clause referred to as "sick leave"), the employee shall be entitled to payments at the relevant daily pay as prescribed in the Holidays Act 2003 and pursuant to Section 71 of that Act, for the first five days in each 12 month period. Thereafter they shall be paid at the normal rates of pay (T1 only).
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> 14.1.2 On appointment with the employer, a full time employee shall be entitled to five working days sick leave on ordinary pay (i.e. T1 rate). On completion of each subsequent six months, he/she shall be entitled to a further five working days, with a maximum entitlement of 260 working days.
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> 14.1.3 The production of a medical certificate or other evidence of illness may be required pursuant to the provisions of Section 68 of the Holidays Act 2003.
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> 14.1.4 Sick leave is to be debited on an hour for hour basis.
>
> 14.1.5 Part-time employees are entitled to sick leave on a pro rata basis but not less than the minimum provided for under the Holidays Act 2003.
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> 14.1.6 Casual employees have no entitlement to sick leave.

[9] Clauses 14.2 and 14.3 describe further sick pay arrangements, but those are not relevant for present purposes. Other provisions of the 2016 MECA which are relevant are:

a) The definition of a full-time employee, which is:

> ... an employee who works not less than the "ordinary" or "normal" hours set out under "hours of work" in this agreement.

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[3] Covering the periods 2 December 2000 to 1 December 2001, 5 July 2002 to 30 September 2003, 1 October 2003 to 31 March 2006, 7 May 2007 to 30 November 2009, 1 December 2009 to 31 December 2011, 1 January 2012 to 7 August 2014, 8 August 2014 to 4 September 2016, and 7 September 2016 to 6 September 2019.

b) The applicable "hours of work" provision for full-time employees is 40 per week and not more than eight hours per day, with two consecutive days off.

[10] Prior to March 2013, the part-time phlebotomists worked 20 hours per week over five days; from then on, they worked 25 hours per week over five days.

Statutory context of the sick leave provision

[11] Clause 14 refers to provisions of the HA.

[12] The stated object of the HA is to "promote balance between work and other aspects of employees' lives". It provides employees with minimum entitlements to various forms of leave, including sick leave "to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured".[4]

[13] Section 6 of the HA states that each entitlement provided by the Act is a minimum entitlement, but an employer is not prevented from providing an employee with enhanced or additional entitlements. Employment agreements, however, which exclude, restrict or reduce an employee's entitlements under the Act are of "no effect to the extent that it does so".[5]

[14] Sub-part 4 of the HA contains provisions for sick leave and bereavement leave. The stated purpose of the sub-part, as expressed in s 62, is to provide all employees with a minimum entitlement to paid leave in the event of their sickness or injury, or of the sickness, injury or death of certain other persons.

[15] Section 63(2) of the HA relevantly states that employees are to be provided with sick leave for each 12-month period of continuous employment, beginning from the end of the employee's first six months of that employment. Thereafter, s 65(2) operates to provide an employee with five days' sick leave for each subsequent 12-month period.

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4 Holidays Act 2003, s 3(c).
5 Section 6(3)(a).

[16] Section 71(1) of the HA provides that an employer must pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave taken that would otherwise be a working day.

[17] The terms "relevant daily pay" and "average daily pay" are defined in s 9 and s 9A of the HA. Section 9 defines "relevant daily pay" as the amount of pay that the employee would have received had the employee worked on the day concerned and includes overtime and certain other payments. Section 9A may be used alternatively and defines "average daily pay"; it provides an averaging formula which uses gross earnings for 52 calendar weeks, and the number of whole or part-days when those earnings were obtained; the formula excludes days when an employee did not work, apart from a paid holiday, or paid leave.

The provision of sick leave to phlebotomists in practice

[18] From 2002 to 2011, the DHB applied the sick leave provisions to mean that part-time phlebotomists were entitled in each six-month period to sick leave of five days, with payment for each working day being based on the employee's relevant daily pay. From the point of view of NZMLWU, this was the correct approach.

[19] Thus, sick leave for a phlebotomist employed for four hours per day for five days per week was calculated at 20 hours for each six-month period, being five days at four hours per day. This meant that the sick leave available to a 0.5 FTE was exactly half the sick leave available to a full-time phlebotomist.

[20] However in 2010/2011, the DHB reviewed this approach because it concluded there were several unintended consequences. One of these related to the way sick leave was recorded and reported by the payroll system. To that point, the sick leave entitlement for employees who had a specified sick leave entitlement had been recorded in hours rather than in days.

[21] A further issue for the DHB was that the payroll system had a default assumption that a full-time employee's entitlement to 10 days of sick leave per 12-month period was the equivalent of 80 hours of sick leave per 12-month period.

[22] A problem could arise for an FTE who worked more than eight hours per day. For example, an FTE who worked 10 hours per day would, based on a 10-day per year sick leave entitlement, receive 100 hours of sick leave for a 12-month period. However, the system defaulted to the standard 80-hour entitlement for an FTE. That gave rise to a risk that when such an employee took a day of sick leave, 10 hours would be deducted from their sick leave balance, with the effect they received only eight days of sick leave per year.

[23] The witness who have evidence on these matters, Ms Allison Enright, who at the time was the DHB's Employment Relations Manager, said that this issue required manual "work arounds" to ensure all employees received their correct entitlements.

[24] She said that a further unintended consequence arose for part-time employees. Part-time employees with a specified sick leave entitlement received that entitlement on a pro-rata basis. Thus, a 0.5 FTE received half the sick leave entitlement of a full-time employee. However, if the part-time employee worked fewer than eight hours per day, he or she would receive a greater sick leave entitlement in days than they should have.

[25] To illustrate this problem, she said a part-time employee who worked four hours per day, five days per week, would have their sick leave entitlement recorded in the payroll system at 40 hours per 12-month period, because that was half the default full-time entitlement of 80 hours. When that employee took a day of sick leave, their sick leave balance was reduced by the period of their absence, four hours. Ms Enright said that the effect of this was to provide a 0.5 FTE employee, 10 days of sick leave, rather than what she said was their contractual entitlement of five.

[26] Ms Enright also said that expressing the employees' sick leave entitlements in the payroll system as a number of hours was inconsistent with the relevant contractual provisions, and with the provisions of the HA, both of which refer to sick leave entitlement in days.

[27] A project team considered these issues. Emails were sent to, amongst others, Dr Deborah Powell, who was at the time the National Secretary of both APEX and

NZMLWU. It was noted that the system of reporting sick leave would change from hours to days in order to better reflect the contractual and statutory provisions which were expressed in days. No reference was made to the effect of any change on part-time employees, such as phlebotomists.

[28] Shortly before the intended changes were implemented on 11 April 2011, another email was sent to managers and staff, but not to Mr Brian Raill, a registered medical laboratory scientist, who was the NZMLWU delegate. In any event, no reference was made to the fact that the changes would alter the calculation of sick leave entitlements for part-time employees, such as phlebotomists.

[29] From then on, and whilst the part-time employees worked four hours per day for five days per week (0.5 FTE), the DHB calculated the entitlement for part-time employees at 2.5 days at four hours per day, being 10 hours for each six-month period. This was 25 per cent of the entitlement allocated to an FTE. When daily hours increased to five hours per day (0.625 FTE), the entitlement was 39.06 per cent of the entitlement allocated to an FTE.

[30] I shall return to these calculations later. The short point is whether days of sick leave allocated to a full-time employee should be apportioned in the pro-rata exercise. APEX says it is not correct to apportion the FTE allocation of days; the DHB says it is. Understandably, both are agreed that hours worked should be pro-rated.

Submissions

[31] Mr Manning, counsel for APEX, submitted in summary:

a) The ordinary and natural meaning of cl 14.1.5, construed in the context of the contract as a whole, is that part-time employees are entitled to sick leave in direct proportion to the sick leave to which full-time employees are entitled under cl 14.1.2. Thus, a 0.625 FTE is entitled to 0.625 of a sick leave entitlement of a full-time employee.

b) In the case of phlebotomists working five days a week, five hours per day, the proportionality required by cl 14.1.5 is effected automatically by

the statutory mandate that a day of sick leave be paid at the employee's relevant daily pay, that is say five hours pay. Consequently, under the MECA, they are entitled to 10 days sick leave per annum (as is a 1.0 FTE), but paid out at their relevant daily pay, five hours per day.

c) The clause prescribes proportionality. In the end, the sick leave methodology utilised by the employer's payroll system must comply with the contractual requirements, not distort them. Different methodologies may have to be applied to different cohorts of part-time employees.

d) The defendant's criticism that it is wrong to conflate the accrual of sick leave and the payment of sick leave is misconceived. This is because, at least for a part-time worker, it is artificial to separate the number of days worked in a week from the number of hours worked per day. The workers' weekly pay is a function of both, and the two are inextricably linked.

e) The DHB's approach is effectively double pro-rating; it pro-rates the 10 days entitlement of an FTE; and it also pro-rates the part-time worker's daily pay. That approach can be criticised as being an exercise in conflation.

f) Background supports the APEX approach. In particular, the practice which applied until 2011 by which there was in effect a custom and practice, and an estoppel by convention. These considerations suggested that practice should not be altered. That said, discrete causes of action based on these principles were not advanced.

g) The defendant's approach produces a result which cannot, in any common-sense way, be considered proportionate or equitable. The application of employment relations' common-sense is required, and an interpretation which distorts the concept of proportionality is wrong.

[32] Mr Traylor submitted for the DHB, in summary:

a) The pro-rating contemplated by cl 14.1.5 is a pro-rating of the entitlements set out in cl 14.1.2. It is only these two sub-clauses that distinguish between full-time and part-time employees, apart from cl 14.1.6 which is not presently relevant.

b) Therefore, the pro-rating contemplated by cl 14.1.5 must be to the number of days of sick leave provided by cl 14.1.2.

c) An interpretation that did not have the effect of pro-rating the number of days of sick leave entitlement provided by cl 14.1.2 would render cl 14.1.5 of the MECA redundant; and it would be inconsistent with the clear and ordinary meaning of those clauses.

d) The correct starting point is that a full-time employee's entitlement to sick leave is 10 days per 12-month period, and pro-rating must proceed from there. The plaintiff's starting point, namely 10 days of sick leave entitlement per 12-month period, leads to anomalies. Thus, a part-time employee working four hours per day, five days a week, would if the plaintiff's approach is applied, receive 40 hours of sick leave per year. Each time the employee took a day of sick leave, four hours would be deducted from their sick leave balance. That would result in the employee receiving 10 days of sick leave per year – the same number of days as a full-time employee. It is submitted that would defeat the pro-rating required by cl 14.1.5.

e) The changes made by the DHB in April 2011 were a product of a desire to correct an historic misapplication of cl 14 of the MECA, and to avoid ongoing difficulties caused by unintended consequences.

f) In these circumstances, there could not be an established custom and practice, or estoppel by convention.

g) The DHB's approach complies with the HA, in that each part-time phlebotomist in fact receives more than the minimum entitlement prescribed by the Act; and when taking sick leave, each such part-time phlebotomist is paid an amount equal to the relevant daily pay so that there is compliance with s 71 of the Act.

Interpretation principles

[33] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the Supreme Court summarised applicable interpretation principles as follows:[6]

> [60] ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contract has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
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> ...
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> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[34] The same court has confirmed that these principles apply to employment agreements.[7]

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6 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

7 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

[35] In *New Zealand Air Line Pilots' Assoc Inc*, Glazebrook J stated:[8]

> [191] It is true that the text (meaning in the document as a whole) remains centrally important in any contractual interpretation exercise, and if that text has an ordinary and plain meaning, that would normally be assumed to prevail. It is also true that any exercise in contractual interpretation should generally start with the text. Nevertheless that text must still be interpreted in light of the relevant background. As Lord Hoffman said in *Charter Reinsurance Company Ltd v Fagan*:
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> > ... the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.

[36] It is clear from the authorities that context may be established by both pre-contract and post-contract evidence. So, in *Silver Fern Farms Ltd v New Zealand Meat Workers Union*, it was confirmed the parties' consistent conduct in the application of prior instruments may reflect their common contractual intention and thus inform interpretation.[9]

[37] In *Vector Gas Ltd v Bay of Plenty Energy Ltd*, Tipping J held that the pre-contract evidence of the parties' contractual evidence includes the circumstances in which the contract was entered into, and "... any objectively apparent consensus as to meaning operating between the two parties".[10] In the same decision, he also stated that the evidence of subsequent conduct should be admissible if it is capable of providing objective guidance as to intended meaning. He summarised the position thus:

> [31] There is no logical reason why the same approach should not be taken to both post-contract and pre-contract evidence. The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. ...

[38] Both counsel referred to the role of "employment relations common-sense". This was described by Colgan CJ in *New Zealand Airline Pilots Association Inc v Air New Zealand Ltd* as reflecting the "real world" context in which collective agreements

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8 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd,* above n 7 (footnotes omitted).

9 *Silver Fern Farms Ltd v New Zealand Meat Workers Union* [2010] NZCA 317, [2010] ERNZ 317 at [41]–[44].

10 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [27].

are negotiated, settled and drafted.[11] The Supreme Court considered and approved this approach in the same case, stating:[12]

> [75] Chief Judge Colgan introduced this part of the judgment with a discussion of various factors which he said give collective agreements a "unique" character. The factors identified by Chief Judge Colgan included the following:
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> > The "relational" nature of a collective which represents the progression of an employment relationship on an ongoing basis over a lengthy period; the fact that the collective is a creature of statute; and the reality that, generally, collective agreements are not drafted, negotiated or settled by practicing lawyers.
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> [76] To these features, we note an addition that the duty of good faith expressly applies to bargaining for a collective and to bargaining for an individual employment agreement. Further, s 31 of the 2000 Act states that it is an object of pt 5 of the Act, dealing with collective bargaining, to provide "the core requirements of the duty of good faith in relation to collective bargaining". ... It is also necessary to keep in mind the Employment Court's equity and good conscience jurisdiction.
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> [77] If, in referring to "employment relations" common-sense the Employment Court sought simply to capture these features, there could be no objection to that. But, if what was meant was that contracts should be interpreted so they accord with the Court's view of common-sense, rather than the word interpreted in light of the background that is problematic. ...

Discussion

[39] It is necessary to begin with a clear understanding as to the function of the various sub-clauses in cl 14.1, which defines the conditions relating to sick leave.

[40] Clauses 14.1.2, 14.1.5 and 14.1.6 relate to the means by which entitlements for sick leave are given.

[41] Clauses 14.1.1, 14.1.3 and 14.14 relate to steps for debiting a leave balance when an employee is granted leave of absence because of sickness.

[42] Although the primary focus must be on the language used in cl 14.1.5, that clause must be construed in the context of all the subclauses, since together they constitute the "conditions" relating to sick leave.

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11 *New Zealand Airline Pilots Association Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14]–[19].

12 *New Zealand Airline Pilots' Assoc Inc,* above n 7 (footnotes omitted).

[43] Both parties agree that, in assessing the entitlement of a part-time employee, there has to be a reduction, which is calculated by pro-rating the entitlement of a full-time employee; the entitlement of such a person is described in cl 14.1.2.

[44] As already mentioned, the key difference between the approaches of the two parties is that:

a) On the plaintiff's approach, proportionality is achieved by pro-rating only hours of work; so, for a part-time phlebotomist employed for four hours per day for five days per week, the calculation for a 12-month period provides 40 hours of sick leave (10 days times four hours per day).

b) On the defendant's approach, proportionality is achieved by pro-rating not only the hours but also the days of sick leave. So in the above example, the calculation for a 12-month period provides 20 hours of sick leave (five days times four hours per day).

[45] Thus, it can be seen that the effect of the plaintiff's submission is that the expression in cl 14.1.5 must be taken as referring to the T1 rate in cl 14.1.2; while the effect of the defendant's submission is that the expression in cl 14.1.5 is to apportion not only the T1 rate but also the allocation of sick leave days in the same clause – five working days each six months.

[46] A preliminary point relates to the phrase "on a pro rata basis". Applying the dictionary definition of the term means the part-time employees' entitlement must be "proportionate" to that of an FTE.[13] It is inherently unlikely that the parties intended this to mean *any* proportion of an FTE entitlement; it is more likely they intended there would be direct proportionality since that would produce a fair result.

[47] Next, it is plain that the parties were well aware of the mandatory obligations provided by the HA which applied, whether or not they were referred to. Therefore,

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13 Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2008) at 1152.

in cl 14.1.5, there is an express reference to minimum entitlements provided for under the HA, a reference which was introduced in 2007.

[48] Under the HA, the minimum entitlement to paid leave in the event of sickness or injury is five days for each 12-month period after the first six months of continuous employment. That is, there is no pro-rating for a part-timer.

[49] This concept is inherent in cl 14.1.5, because, in the case where sick leave on a pro-rata basis produces an entitlement less than the minimum provided by the HA, the statutory entitlement must be provided. That assessment must proceed on the basis that the number of days provided under the HA is not apportioned. It would be illogical for this approach to be adopted for some of the purposes of cl 14.1.5 but not for other purposes.

[50] There is nothing to indicate the parties intended that a distinction of this kind was to apply. Although the express reference to the HA was not introduced into the clause until 2007, minimum entitlements had been available previously by operation of the statute. The introduction of the express reference to the HA reinforces the fact the parties intended that statutory sick leave entitlement in days would apply.

[51] The next point relates to the assertion made for the defendant that its interpretation avoids conflating entitlement and payment. This point is relevant to the submission made for the plaintiff that the defendant's approach to pro-rating provides an inequitable result. Mr Manning provided a number of scenarios to demonstrate this proposition, but two will suffice:

a) The first scenario relates to a part-time employee working five days a week at four hours per day (20 hours per week, being 0.5 FTE). On the plaintiff's approach, the entitlement is 40 hours per annum, which is 50 per cent of an FTE entitlement. On the defendant's approach, the entitlement is 20 hours per annum, which is 25 per cent of an FTE entitlement.

b) The second scenario relates to a part-time employee works five days per week at five hours per day (25 hours per week, 0.625 FTE). On the plaintiff's approach, the entitlement for a 12-month period is 50 hours per annum (62.5 per cent FTE). On the defendant's approach, the entitlement is 31 hours per annum which is 38.75 per cent of an FTE entitlement.

[52] The relevant calculations are set out in Schedule A to this judgment.

[53] I do not consider that the plaintiff's approach is an illegitimate conflation of entitlement and payment. Any approach which did not take account of the application of sick leave in practice would be artificial. It is inherently unlikely that this was intended by the parties when they agreed these clauses.

[54] I accept the plaintiff's submission that there is no obvious reason for disadvantageous distortions of the kind referred to above. Such an approach does not achieve direct proportionality of an FTE entitlement. There is no evidence that inconsistent results of this kind were intended by the parties. Such an approach would not reflect employment relations' common-sense as described by the Supreme Court.

[55] A further point is that the defendant's approach requires a double apportionment. Hours are units of time which are contained in a broader unit of time: a day. In the present context, it is not logical to apportion both, since such a method does not achieve direct proportionality.

[56] Next, I deal with the defendant's argument that the adoption of the plaintiff's approach, which does not pro-rate the number of days of sick leave entitlement provided by cl 14.1.2, would render cl 14.1.5 redundant.

[57] The defendant's argument proceeds on the basis that the combination of s 71(1) of the HA, and cl 14.1.1, requires sick leave to be paid out in an amount which is equivalent to the employee's "relevant daily pay". It is submitted that, consequently, the phrase "on a pro rata basis" in cl 14.1.5 cannot apply to the rate at which sick leave is paid out; to have any meaning, it can only apply to the part-time employees'

entitlement to sick leave, that is, the number of days per annum prescribed by cl 14.1.2. It is that FTE entitlement which is to be pro-rated.

[58] However, cl 14.1.2 provides an entitlement not only with regard to days of leave but also the applicable rate of pay: the part-time employee is entitled to sick leave "on ordinary pay (i.e. T1 rate)".

[59] This means it is the T1 rate which has to be apportioned for part-time employees, as stipulated in cl 14.1.5. Accordingly, the clause is not otiose. For the reasons outlined earlier, it cannot be concluded the parties intended that the entitlement in days would also be pro-rated.

[60] In summary, to this point, an assessment of the language used in cl 14 strongly suggests that it is hours of work which are to be pro-rated, as would be expected, but not days of entitlement.

[61] The provisional meaning derived from the language of the document should be cross-checked against the contractual context. As summarised earlier, there is evidence that the approach now submitted by APEX to be correct was also regarded by the DHB as being correct from 2002 until 2011. The alteration which was made at that point was primarily driven by payroll difficulties, particularly with regard to employees who worked more than eight hours per day.

[62] The position following the change of approach apparently resolved the payroll problems. But the change then led to debate as to whether the Unions to which the phlebotomists were members were squarely on notice of the change. I find there was not express consultation on the altered approach, which was implemented before its implications were explained and/or understood. Subsequent MECAs have been agreed where the terms and conditions of sick leave remained as before, but I do not consider that can be taken as an acknowledgment by the Unions involved that the DHB's approach was correct; both parties continued to maintain their respective positions.

[63] In summary, the contextual evidence is mixed. Although it is not dispositive, the initial agreed or shared approach tends to suggest that it reflected the terms of the parties' bargain as to sick leave. That was the interpretation which was implemented for some nine years which followed the agreement reached by the parties. This proximate understanding is a more reliable indicator of the parties' intentions. As noted, the post-2011 approach was driven more by payroll issues rather than an acknowledgment that the parties' common understanding had not been implemented.

[64] I do not think that it is useful to weigh the background evidence according to concepts of custom and usage or estoppel as was argued for APEX. It is a case of considering, as noted earlier, whether the post-contract evidence establishes facts or circumstances capable of demonstrating objectively what meaning the parties must have intended. As noted, the initial response of both parties to the terms of clause tends to demonstrate what the parties intended. That response is a confirmatory cross-check to the conclusions reached when interpreting cl 14.1.

[65] Finally, I was referred by both counsel to a range of other examples based on different permeations as to days worked and hours worked. As Mr Manning accepted, the APEX methodology creates anomalous results in some part-time scenarios, and the DHB's methodology creates anomalous results in other part-time scenarios. As he noted, what this serves to demonstrate is the endlessly variable ways in which part-time employment may be structured. This may mean that different methodologies might be required for different situations. One size does not necessarily fit all. Thus, a different payroll approach may have to be adopted in respect of particular configurations, such as an employee working 10 hours per day, in order to avoid an unintended consequence.

[66] The Court, however, is dealing only with the circumstances relating to part-time phlebotomists working either four or five hours per working day, five days per week; and in a situation where the agreed clauses do not require either entitlement or payment arrangements to conform with the restrictions of a given payroll system.

Disposition

[67] A correct interpretation of the cl 14 provisions in respect of part-time phlebotomists requires the hours worked by a full-time employee to be pro-rated to the hours worked by a part-time employee but not the entitlement to days of sick leave. Such an approach reflects the parties' intention that the part-time entitlement is a direct proportion of the full-time entitlement.

[68] I grant the relief sought in the statement of claim, that is:

a) Since 11 April 2011, the defendant has not complied with its obligation to provide to part-time phlebotomists in its employment sick leave on a pro-rata basis in accordance with cl 14.1.5 of the applicable MECAs.

b) The defendant is directed to comply with its obligation to provide to part-time phlebotomists in its employment sick leave on a pro-rata basis in accordance with cl 14.1.5 of the current MECA, as explained in this judgment.

[69] I reserve costs. If these are in issue, the topic should be discussed in the first instance between counsel, noting that Category 2, Band B is agreed between the parties as being the correct classification. Application for costs is to be made within 21 days, with a response given within a like period.

B A Corkill
Judge

Judgment signed at 11.00 am on 6 July 2020

Schedule A

1. **Assume 5 days at 4 hours per day (20 hours per week) – 0.5 FTE**

   a) Plaintiff – 10 days at 4 hours per day = 40 hours pa (0.5 per cent FTE).

   b) Defendant – 5 days at 4 hours per day = 20 hours pa (0.25 per cent FTE).

2. **Assume 5 days at 5 hours per day (25 hours per week) – 0.625 FTE**

   a) Plaintiff – 10 days at 5 hours per day = 50 hours pa (62.5 per cent FTE).

   b) Defendant – 6.2 days at 5 hours per day = 31 hours pa (38.75 per cent FTE).