DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Stephen Parsons
v
Eastern Health
(C2023/4068)

DEPUTY PRESIDENT GOSTENCNIK — MELBOURNE, 9 JANUARY 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)]

[1] Stephen Parsons is a casual employee employed by Eastern Health, engaged as a Patient Services Assistant (PSA) and has been so employed for approximately 9 years. He is also a delegate of the Health Services Union, a registered employee organisation which trades as the Health Workers Union (HWU). In that employment, the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* (Agreement) applies to Mr Parsons. The Agreement covers Eastern Health and the HWU.

[2] Mr Parsons and Eastern Health are in dispute about whether Mr Parsons is entitled to be paid a change of roster allowance prescribed in clause 48.4(a) of the Agreement on any occasion when he performs ordinary duty responsive to an Eastern Health request that he perform ordinary duty at times other than those rostered. Although a casual employee, Mr Parsons is regularly rostered to perform work on various shifts, receiving notice of these shifts in advance. During 2023 Mr Parsons worked a changed roster on two occasions. The first was responsive to a text message he received on 23 April 2023, which relevantly provided: "Stephen can you please call the office? I want to ask if you can start earlier in Theatre. Thanks . . .".[1] The second was responsive to a text message he received on 3 May 2023 which relevantly provided: "hi Stephen, please check roster on for tomorrow's shift. Thank you . . .".[2]

[3] Mr Parsons complied with the text messages and attended work to perform ordinary duties at times other than those previously rostered. Each change was without seven days' notice to perform ordinary duty at other times than those previously rostered.

[4] Pursuant to Schedule 2C of the Agreement, the change of roster allowance for which clause 48.4(a) provides was $24.97 during the relevant period.

[5] Eastern Health maintains that during the fortnight of the 24 April to 7 May 2023 its support services team was "experiencing extreme workforce pressures" as the "result of several factors including up to and over 10% of unplanned leave (furloughed staff with COVID, and other unplanned leave and carer's leave)".[3] In addition, Eastern Health maintains that successful

recruitment to fill vacant shifts was minimal due to low numbers of applicants for both PSA and cleaning roles.[4]

[6] Discussions at the workplace as required by clause 17 of the Agreement have not resolved the dispute. Mr Parsons applied under s 739 of the *Fair Work Act 2009* (Act) for the Commission to deal with the dispute in accordance with the dispute resolution procedure in clause 17. Conciliation under clauses 17.4(c) and 17.6 has been unsuccessful in resolving the dispute. The parties agree that the dispute should be resolved by arbitration with the Commission answering the following question:

> *Are employees covered by the Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025 entitled to the 'Change of Roster' allowance (cl 48.4(a) of the Enterprise Agreement) on any occasion where the Employer requests that an Employee perform ordinary duty at other times than those rostered (subject to clause 48.3) without seven days' notice (except in emergency situations) whether the employee agrees or not?*

[7] Eastern Health maintains the answer to the agreed question is 'no'. Eastern Health's evidence was that it did not compel Mr Parsons to work the changed arrangements and "would never just send a text message changing start times for a shift without having a conversation" about the option of changing the shift times with Mr Parsons.[5] In substance, Eastern Health maintains that if an employee responds to a request to work a changed roster by working the changed arrangement, but is not compelled to do so, a change of roster allowance is not payable.

[8] Eastern Health maintains that it "took the view of discussing the option of changing the shift times with its employees to maintain the good will and provide choice without directing to do so".[6]

[9] Eastern Health also maintains that as the Agreement does not define "emergency situation" and how it would operate within this context "[o]ne could take a view of high levels of furlough and unplanned personal leave would be considered as an emergency situation".[7]

[10] Mr Parsons contends the agreed question for arbitration should be answered in the affirmative. He says that employees covered by the Agreement are entitled to the change of roster allowance in clause 48.4(a) of the Agreement on any occasion where Eastern Health requests that an employee perform ordinary duty on a changed roster without giving seven days' notice and the employee agrees to work the changed roster.

[11] The answer to the agreed question turns on the proper construction of the Agreement. The parties have agreed that since there are no disputed factual issues, the question may be answered on the papers without an oral hearing.

[12] The applicable principles in construing an enterprise agreement are not in dispute and may be briefly stated. The task of construing an industrial instrument begins with a consideration of the ordinary meaning of the words, read in context, and taking into account the evident purpose of the provisions or expressions being construed. Relevant context will include other provisions of the industrial instrument, read as a whole, and the disputed provision's place and arrangement in the instrument. The statutory framework under which the industrial instrument is made, or in which it operates may also provide relevant context, as might an antecedent instrument or instruments from which a particular provision has been derived.

Regard may be had to relevant context and surrounding circumstances to determine whether there is any ambiguity in a provision of an industrial instrument. The language of an industrial instrument is to be understood in the light of its industrial context and purpose, not in a vacuum or divorced from industrial realities. But context is not itself an end, and a consideration of the language contained in the text of the relevant parts of the instrument remains the starting point and the end point in the task of construction. A purposive approach to interpretation is appropriate, not a narrow or pedantic approach.[8]

[13] Clause 48 of the Agreement deals with rosters.

[14] Under the rosters provision of the Agreement, Eastern Health is required at each work location to post in a prominent place a roster at least 14 days before it comes into operation, which is of at least 14 days' duration (clause 48.1). Rosters must set out employees' daily ordinary hours of work, start times, finish times and meal intervals (clause 48.2). Seven days' notice will be given of a change in roster, except in emergency situations (clause 48.3). Rosters will provide at least eight hours between successive periods of ordinary duty (clause 48.8). Although not material to the dispute, provision is made for agreed fixed rosters as an alternative to Eastern Health fixing rosters (clauses 48.5 – 48.7).

[15] Ordinary hours of work pursuant to a changed roster may be worked without seven days' notice of the change having been given but a penalty is attached. Clause 48.4 of the Agreement provides:

> 48.4 **Change of roster**
>
> (a) Where the Employer requires an Employee, without seven days' notice and outside the excepted circumstances in subclause 48.3 above, to perform ordinary duty at other times than those previously rostered, the Employee will be paid in accordance with the hours worked plus a daily change of roster allowance pursuant to Part 1 of **Schedule 2C** and **Schedule 3C** (as applicable).
>
> (b) Provided that a part-time Employee who agrees to work shift(s) in addition to those already rostered will not be entitled to the Change of Roster allowance for the additional shift(s) worked.

[16] There is no dispute and I accept that clause 48 of the Agreement, including clause 48.4, applies to Mr Parsons as a casual employee. This is the effect of clause 23.4, which sets out which provisions of the Agreement do not apply to casual employees. Clause 48 of the Agreement does not expressly state that it does not apply to casual employees. Thus, although a casual employee is a person engaged as an employee after accepting an offer of employment made by Eastern Health on the basis that it makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person (clause 23.1), a casual employee may never the less be rostered to work in accordance with a roster posted pursuant to clause 48. There is also no dispute that changes to Mr Parsons' working arrangements described earlier on the two occasions during the fortnight of 24 April to 7 May 2023 amounted to a change of roster without the requisite notice.

[17] The change of roster allowance for which clause 48.4(a) of the Agreement provides is payable to Mr Parsons "[w]here … [Eastern Health] requires ... [him], without seven days' notice and outside … [of emergency situations] to perform ordinary duty at other times than those previously rostered". Eastern Health's contention will succeed if the word "requires" in

clause 48.4(a) is construed narrowly to mean only the giving of an instruction or connoting something that is compelled – specifying as compulsory. However, although the word undoubtedly has that meaning, when read in context its meaning is not so confined.

[18] *First*, the verb "requires" has variable meanings, including expressing a need for a particular purpose – here a need for an employee to work ordinary hours pursuant to a changed roster.

[19] *Second*, had a narrow meaning been intended, a more precise word to convey a singular meaning, such as "directs" might have been used instead of "requires".

[20] *Third*, the evident purpose of clause 48.4(a) of the Agreement is that absent the exigent circumstances described, an employee is to be compensated for the dislocation caused by working a changed roster absent the requisite notice. The dislocation caused is not lessened merely because the employee works pursuant to a request as opposed to a direction.

[21] *Fourth*, clause 48.4(b) of the Agreement, which provides that a part-time employee "who agrees to work shift(s)" in addition to those already rostered is not entitled to the change of roster allowance for the additional shift(s) worked, lends support to the construction I prefer because it:

- provides an express limited exclusion of a particular kind of agreement to work a changed roster – suggesting that other forms of agreement to work are not excluded; and
- suggests that "requires" in clause 48.4(a) includes a request to work to which there is acquiescence or agreement – otherwise there would be no need to exclude the agreement to work for which clause 48.4(b) provides.

[22] I also do not accept Eastern Health's contention that the circumstances set out in paragraphs [5] and [9] of this decision amounted to an "emergency situation". Workforce pressures and staff shortages doubtless cause rostering difficulties but full force needs to be given to the words used in clauses 48.3 and 48.4(a) of the Agreement to engage the exception. The ordinary meaning of "emergency" is a serious, unexpected, and often dangerous situation requiring immediate action. That which is earlier described hardly meets that description. Perhaps it is for this reason that Eastern Health's contention was only meekly advanced.

[23] In the circumstances I consider that Mr Parsons is entitled to the change of roster allowance for which clause 48.4(a) of the Agreement provides for each of the two occasions earlier specified. I also consider that on a proper construction of the Agreement, the answer to the agreed question is "yes".

[24] The dispute is determined accordingly.

<u>DEPUTY PRESIDENT</u>

Final written submissions:

Applicant, 4 October 2023 and 15 November 2023
Respondent, 1 November 2023

Determined on the papers

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[1] Witness statement of Stephen Parsons, 4 October 2023 at [6].

[2] Ibid.

[3] Witness statement of Jessica Lamb, Support Services Supervisor, 23 August 2023.

[4] Ibid.

[5] Ibid.

[6] Respondent's Outline of Submissions, 1 November 2023 at [10].

[7] Ibid at [11].

[8] *Australian Workers' Union v Orica Australia Pty Ltd* [2022] FWCFB 90 at [18] and the authorities referred to therein; See also *James Cook University v Ridd* [2020] FCAFC 123 at [65] and the authorities referred to therein; *Workpac Pty Ltd v Skene* (2018) 264 FCR 536 at [197].