TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29 application for hearing of industrial dispute

Dr Stephen Bennett
(T12723 of 2006)

and

Minister Administering the State Service Act 2000
(Department of Health and Human Services)

COMMISSIONER JP McALPINE HOBART, 29 July 2009

Industrial dispute - alleged breach of The Salaried Medical Practitioners Industrial Agreement 2003 – application dismissed

REASONS FOR DECISION

[1] On 10 July 2006, Dr Stephen Bennett (the applicant) applied to the President, pursuant to Section 29(1) of the *Industrial Relations Act 1984* (the Act), for a hearing before a Commissioner in respect of an industrial dispute with the Minister Administering the State Service Act 2000, (Department of Health and Human Services) (the Minister) arising out of an alleged breach of a registered agreement – The Salaried Medical Practitioners Industrial Agreement 2003.

[2] The matter was listed for hearing on 15 August 2006 (Conciliation Conference) and 26 September 2006 at the Commonwealth Law Courts, 39-41 Davey Street, Hobart, Tasmania.

[3] A decision to dismiss the matter was handed down on 23 November 2006.

[4] On 26 March 2007 the said decision was subsequently set aside by the Full Bench[1] and the matter referred back to the Commissioner for re-hearing.

[5] The matter was re-listed for hearing on 25, 26 and 27 November 2008 at the Commonwealth Law Courts, 39-41 Davey Street, Hobart, Tasmania.

[6] The applicant had been employed as a medical practitioner with the Clarence Community Health Centre (the Centre) since 1988. From 1988 until 1991 he was employed on a full-time basis. For some 13 years, from 1991 until March 2004, he was employed on a part-time basis for a contracted 36 hours per fortnight; from March 2004 onwards he was contracted for 62 hours per fortnight.

[7] On 10 February 2006 (Exhibit A12) the applicant sought to access a very favourable remuneration package offered, at the time, to those doctors who were employed on full-time contracts. To meet the requirements to qualify for the package the applicant sought to have the hours for which he was then currently receiving wages supplemented with four hours of "time in lieu" (TOIL) he was receiving, converted to wages. The summation of all the hours would have given him the 76 hours per fortnight required.

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[1] T12855 of 2006 Dr Stephen Bennett v The Minister administering the State Service Act 2000 re Appeal of decision T12723

[8] On 28 February 2006 the Senior Medical Officer (SMO), Dr George Cerchez, the applicant's direct Manager, denied the request to convert the four hours of TOIL to salary (Exhibit A13) and instructed the applicant to restrict his hours to the 62 hours for which he was contracted. The instant dispute arose from the Department's refusal to accede to his request and the alleged restriction in hours.

[9] As a consequence of other matters the applicant was suspended from duty on 12 April 2006. His employment was subsequently terminated on 19 March 2007.

[10] The applicable award is the Medical Practitioners Public Sector Award (the award) supported by the Salaried Medical Practitioners Industrial Agreement 2003 (the Agreement).

[11] The applicant alleged a breach of the Agreement in that the Minister did not adhere to the disputes resolution process outlined in Clause 14 – Grievance and Dispute Settlement Procedure of the Agreement. In particular subclause (f) of that clause which states:

> *"Until the grievance/dispute is resolved through any or all of the steps (a) to (e) specified in this clause, work shall continue normally in accordance with custom and practice existing before the grievance or dispute arose …"*

[12] The applicant sought the following remedy:

1. Payment for hours worked related to the "extra duties roster" for November and December 2005 and January, February, March and April 2006.

2. Restoration of rostered hours to 72 per fortnight which consists of 62 contracted hours and 10 "extra rostered hours" from 6 March 2006, with back pay until 19 March 2007.

3. Restoration of at least 7.6 "extra duties roster" hours from 6 March 2006, with back pay until 19 March 2007.

4. Payment in lieu of denied benefits associated with the salaried specialist package commensurate with a full-time employee from 10 February 2006 to 19 March 2007.

5. Interest appropriate for the amount of back-pay.

6. A ruling from the Commission that a successful appeal against the Commissioner's decision in matter T12919 of 2007 will require recognition that the applicant was a full-time employee at the time of termination.

BACKGROUND

[13] Mr Baker, for the Minister, confirmed the applicant was employed as a permanent part-time employee and at the time of the dispute he was contracted to work 62-hours per fortnight. He said the applicant had been contracted to work 38-hours per fortnight until March 2004 at which time he applied to take up some vacant consulting sessions. This resulted in an increase to his contracted hours to 62-per fortnight.

[14] Exhibit M2 is a 'Notification to Fill Vacancy', dated 2 February 2004, where the applicant was offered and agreed to work the extra hours. A comment on the application states:

> *"Dr Bennett would also like a future option of decreasing these hours if need be."*

[15] On 10 January 2005 the applicant accepted a fixed-term contract (Exhibit M3) as Acting SMO which expired in March 2005. A further contract (Exhibit M4) was offered and accepted in March 2005 to expire in May 2005 at which time the applicant took leave for three months. Both contracts stipulated in Schedule 2 at Clause 1 - Hours of Work, that the hours to be worked in the role were 76 per fortnight, which is a full-time workload. Further in the same schedule at Clause 2 - Duties the contract stipulated:

> *"The employee will maintain a record of attendance where hours are worked in excess of normal hours in accordance with the Agreement."*

[16] The applicant argued that the two contracts were not fixed term because they stipulated the end date or *"… earlier depending on the permanent filling of the position …"*

[17] On 29 March 2005, Ms M Le Mesurier, the South East District Manager, emailed the applicant *(Exhibit A3(3) of 2006)* confirming that while he was off on leave she would be re-advertising the SMO position.

[18] The above and future exhibits in this decision noted in italics and concluding with 'of 2006' were handed to the Commission at the first hearing of this application in August and September 2006.

[19] During the period the applicant was on leave the role of SMO was given to Dr Crechez, initially on a three-month part-time contract. The contract was later to be extended.

[20] On the applicant's return from leave on 22 August 2005, he disputed the appointment of Dr Cerchez and challenged the appointment process. He also objected to the appointment being part time. He initiated a number of formal grievances against senior managers who were involved in the appointment of Dr Cerchez and subsequently other grievances against, Dr Cerchez and Ms L Green, the Practice Manager, on a range of other matters.

[21] The applicant stated that when he returned from leave he continued to work the same pattern of hours as he had done prior to his taking leave. The hours coincided with those he worked as Acting SMO.

[22] The applicant stated that there were four elements making up the hours he worked as illustrated in Exhibit A4. The first element was his contracted hours of 62 per fortnight; the second, his participation in an "extra duties roster", normally of 7.6 hours per fortnight; the third was "extra rostered hours" of 10 hours per fortnight; and the last category was overtime on demand. The contracted hours were hours for which he had applied and formed a contract between himself and the Department. He said that the "extra duties roster" was a longstanding arrangement which required a doctor to be in attendance to cover early mornings and lunchtimes. Originally the roster also covered evening surgery, he said.

[23] The applicant said it was traditional to be remunerated for the "extra duty roster" hours by the participant having TOIL rather than by additional wages. The TOIL was added to the participant's recreational leave balance. The "extra rostered hours", he said, were 10 hours agreed by the South East District Manager in January 2005 that he should work to cover a shortfall in doctors.

[24] For clarity in distinguishing between the different categories of working hours portrayed by the applicant, I will refer to "extra rostered hours" as "additional rostered hours" throughout the decision.

[25] On 3 October 2005 Dr Cerchez wrote to the applicant seeking an explanation for his working extra time and claiming TOIL. (Exhibit R.2, T12855)) The applicant did not reply to Dr Cerchez.

[26] On 31 October 2005 the State Manager, Ms S Harpur, wrote a Memorandum to the applicant (Exhibit A6) regarding timesheets which he had not submitted. She urged him to forward them to Dr Cerchez for approval. She also reminded the applicant that overtime had to be approved in advance.

> *"Please remember that overtime (and therefore time off in lieu or other arrangement for working extra hours) needs to be approved in advance …*
>
> *Let me know if you have any further concerns on the matter."*

[27] The applicant responded to Ms Harpur via email the same day (Exhibit A6):

> *"However, I request that whilst my grievance claim is being assessed by an external investigator my pay sheets are to be signed by Michelle Le Mesurier".*

[28] The applicant did not, it appears, inform Dr Cerchez of his request. However, the Department did accede to his request.

[29] Subsequent to Ms Harpur's Memorandum dated 31 October 2005 the applicant continued to work "extra duty roster" hours and retrospectively seek approval.

[30] On receiving an "extra duty roster" timesheet for approval, Dr Cerchez wrote to the applicant on 10 November 2005 rejecting his claim for payment for the hours. (Exhibit M1)

> *"In regard to your overtime/leave in lieu claim form, I wish to advise you that I am unable to support these extra hours.*
>
> *As Siobhan has previously indicated to you, all overtime/time in lieu requires approval in advance. This is in line with Agency policy for all staff members.*
>
> *Please don't hesitate to contact me if further clarification is required"*

[31] Subsequent to the Memorandum of Dr Cerchez dated 10 November 2005, the applicant said he continued to work the "extra duty roster" hours and retrospectively submitted the timesheets for approval to Ms Le Mesurier. He said it was not until January 2006 he realised he had not been credited with his time off in lieu for the previous November and December 2005 or January 2006.

[32] The applicant wrote to Dr Crechez on 10 February 2006 (Exhibit A12) requesting that two hours per week of his "extra duty roster" hours be paid as wages rather than as

TOIL to bring his fortnightly hours up to the 76 hours required to be deemed a full-time employee.

[33] Dr Cerchez responded by Memorandum dated 28 February 2006 (Exhibit A13) wherein he rejected the applicant's request. He again reiterated the requirements expressed in Ms Harpur's Memorandum dated 31 October 2005 regarding pre-approval for overtime, including TOIL arrangements. He also directed the applicant to restrict his hours at the Centre to his contracted quota of 62 per fortnight. Again, Dr Cerchez requested the applicant meet with him and Ms S Powell, Primary Health Coordinator South, to discuss the issue of "leave in lieu arrangements".

[34] The applicant's response was that he would consult with his industrial advisor. He made no other comment to Dr Cerchez.

Contracted Hours

[35] The applicant argued that his contracted hours were not 62:

> *"So I contend that, therefore, my contract hours was 76 per fortnight when the dispute arose, if one accepts that the longstanding arrangement of rostered hours of 72 and the longstanding extra duties roster brought my hours to above 76 hours*." (transcript p67, L25)

[36] The applicant said:

> *"It was understood that I worked 72 hours per fortnight and that was what was entered in the appointments diary … patient … booked in; patient seen, all the way through."* (Transcript p40 L10)

[37] The applicant did not expand who it was that understood his hours of work were 72 per fortnight. He put the proposition that it was an administrative oversight that his contract hours had not been increased formally to 76 per fortnight. He offered no evidence in support of this opinion.

[38] Ms T Banman, for the Minister, said that a review of the applicant's pay records showed he worked 74 hours per fortnight for the period he was Acting SMO. The pay records also showed he claimed overtime of one hour almost every workday from mid-January until the end of April 2005, designated "extra administrative duties", for the time from 7.15am until 8.15am.(Exhibit M5). He also continued to claim "extra duties roster" hours during this time.

[39] The journal entry (Exhibit M6) for the period the applicant took leave in May 2005 shows he sought 38 hours' paid leave and 24 hours' unpaid leave per fortnight equating to his contract hours of 62 per fortnight. This document, Ms J Fitton, for the Minister, said confirmed the Department's obligation to provide the applicant with 62 hours per fortnight.

[40] Ms Banman confirmed from the pay records that when the applicant returned from leave on 22 August 2005 he continued to work in excess of the 62 hours, averaging approximately 71.5 hours per fortnight. She contended this was done of the applicant's own volition and without seeking prior approval from his managers.

[41] Further, she contended that:

> *"… it was an action by Dr Bennett because of his being aggrieved with the appointment of a part-time SMO, and that the hours that he was claiming to be working was in protest of that, that he felt it was a necessity that he had to work these hours."* (transcript p133, L5)

[42] This comment was not challenged.

[43] Dr Cerchez said he had not perused the applicant's personnel file or the establishment list prior to the applicant's request to have his hours converted to full time in February 2006. He said it would not be normal practice for the SMO to be required to take that action. He was not aware until then of the applicant's substantive contract hours.

[44] Mr Baker said that the Agreement provided for working overtime. At Clause 13(b) - Part-Time Employees:

> *"A part time employee must work the full time equivalent hours before excess time is applicable. … and is approved by the head of agency … Leave in lieu of excess hours will accrue for part-time employees … in accordance with subclause (a)(ii) of this clause."*

[45] Ms Fitton said the only exception to the applicant's part-time contract of 62 hours was when he was appointed as the Acting SMO and contracted to work 76 hours per fortnight.

Extra Duties Roster

[46] The applicant stated that the "extra duties roster" was a longstanding arrangement in which, in the past, all doctors were expected to participate:

> *"My contention is that the extra duties roster was a longstanding roster; it was approved by virtue of the fact that it was a roster that was in place …"* (transcript p48, L1)

[47] Further, the applicant said:

> *"… I contend that the extra duties roster was not an overtime roster; it was a fixed roster."* (transcript p55, L15)

[48] In her evidence Dr S Dunbar said that it was part of her original contract that she participated in the "extra duties roster". She confirmed that the applicant was the last doctor to adhere to the "extra duties roster" and that for some time new doctors, when they joined the practice, dictated the hours they were prepared to work.

[49] Dr Dunbar said she understood everyone participating in the "extra duties roster" was remunerated by TOIL. She also said that there is no longer an "extra duties roster".

> *"At the moment we all just put the hours worked on our normal timesheets."* (transcript p12, L40)

[50] Dr Dunbar said that initially participation in the "extra duties roster" was by negotiation; however, the Practice Manager or the like was responsible to ensure all the

consulting times were covered by the appropriate number of doctors. She also said that the arrangements were 'reasonably informal'.

[51] Mrs PD McCall, in evidence, agreed that originally all the doctors were expected to, and did, participate in the "extra duties roster" but through the efflux of time doctors were choosing the hours that suited them. She also confirmed that the doctors would pick up extra sessions to cover any gaps when there were absences.

[52] The applicant submitted a statement from Dr M Klok. (Exhibit A5) The statement confirmed that at some point in time Dr Klok worked the "extra duties roster" and was paid in salary rather than TOIL. It was not made clear under what circumstances Dr Klok was remunerated with wages rather than TOIL or if Dr Klok's participation was within her establishment hours. However, perusal of Exhibit A2 shows that the participants in the roster nominated whether to be paid in salary or claim TOIL.

[53] The applicant asserted that he was asked to do the "extra duties roster". He did not say by whom or when this request was made of him. He stated that overtime was at the doctor's own initiative and retrospectively approved.

[54] The applicant said that he worked early mornings on Monday, Tuesday and Wednesday and lunch time Tuesday in a regular pattern on the roster.

[55] Ms Banman, said that the applicant's participation in a roster was disputed.

[56] The applicant said that the hours worked by the other doctors on the "extra duties roster" were absorbed into their normal time. (transcript p53, L5) He provided no evidence of this, other than that educed from Dr Dunbar. He gave no indication if the "absorption" into the other doctor's normal time was within their establishment hours or were additional to them.

[57] The applicant submitted examples of the "extra duties roster" (Exhibit A2) over a period of approximately two years. The exhibit showed that from February until August 2005 only Dr Dunbar and the applicant were filling in times, although the names of the other doctors were still on the list. It appears that more doctors participated in the roster the further back in time the samples went. The applicant said that the rosters submitted were displayed on the surgery wall. However, he offered no evidence as to who actually posted the paper roster.

[58] From September 2005 only the applicant participated in the "extra duties roster". He claimed that it was not he who put himself on the "extra duties roster" from August 2005 when he returned from leave, but confirmed "it was already there". (transcript p44, L10)

[59] However Exhibits A2 and M9 show that from at least September until December of 2005, it appears it was the applicant himself who wrote in the month and the year at the head of the paper "roster" as well as the hours he was claiming; similarly, Exhibit M11 shows from February until April of 2006 the same notation headed the document. No evidence was educed of any other party, including those in authority, having dealt with these sheets of paper.

[60] Mr Baker acknowledged that at some past point in time the "extra duties roster" had been required, but had "withered on the vine' and had been overtaken by the Agreement. He argued that when Dr Dunbar's time was converted to paid time the Department was merely applying the award.

[61] Under cross-examination, the applicant asked Dr G Cerchez if he was aware that he worked regular lunchtime duties on Tuesdays. Dr Cerchez replied:

> *"The issue of working a regular lunchtime duty was something that was discussed early on, and if you remember we decided that it wasn't that necessary, as a lot of general practices don't have a doctor working at lunchtime. … but largely lunchtimes were not regular consulting times."* (transcript p121, L5)

[62] The applicant submitted Exhibit A19, an extract from the manual appointment book. He argued that the document showed that he had been rostered on and confirmed his participation in the "extra duty roster".

[63] Exhibit M12 is a depiction of the hours worked by the medical staff at the Centre for March 2006. Ms Banman took the stand and confirmed under oath, the veracity of the data she had compiled to form the exhibit and that it had been developed to show the Centre's operating hours were from 8.00am until 6.00pm therefore there was no reason for the "extra duties roster".

[64] Dr Cerchez said that initially he was not aware of the "extra duties roster", however he became aware of this and other issues which "… *contributed grossly to the inefficiency of the practice*". (transcript p108, L20) He said that there was no explanation or documentation for the practice. He noted that only two doctors were participating in the roster both of whom had low productivity, but for different reasons.

[65] Dr Cerchez said the applicant had submitted an "extra duties roster" timesheet for approval, prior to the Memorandum dated 31 October 2005 (Exhibit A6), and he had indeed approved it. He said:

> *"… I did not sign any more extra duties rosters,* h*oping to meet with Dr Bennett to discuss the situation with him. … I was never able to meet with Dr Bennett to have that discussion to clarify those issues relating to why he felt it necessary to put extra duties down*." (transcript p110, L25)

[66] In his Memorandum dated 10 November 2005 (Exhibit M1) when rejecting the claim for October TOIL, Dr Cerchez suggested the applicant contact him if he required clarification. The applicant did not seek to meet Dr Cerchez. No evidence was educed that he sought clarification.

[67] The applicant cited a Memorandum dated 17 December 2003 from the then South East District Manger, Mr G Armstrong, regarding working additional sessions. (Exhibit A10) The applicant said the document showed that the District Manager had no issue with the doctors working more hours than their contract stipulated and having this time remunerated by TOIL.

[68] Ms Banman addressed Exhibit A10, the email from Mr G Armstrong to the applicant in which he said:

> *"Thank you for bringing this to my attention, as I was not aware of the arrangements whereby the doctors were accruing time off in lieu (TOIL) for working additional sessions."*

[69] Ms Banman stated that it was clear Mr Armstrong was unaware of the existence of an "extra duties roster". She said:

> *"I would contend that it has always been and continues to be the expectation of the employer that doctors were actually seeing patients during the hours of operation of the centre, and the very fact that Mr Armstrong refers to the fact as an additional session, gives additional weight to the argument …"* (transcript p218, L10)

[70] The applicant asserted that the Memorandum recognised the degree of autonomy the doctors had for taking it upon themselves to work extra hours. He did concede that such an arrangement was dependent upon the situation at the time. He also stated that other doctors were encouraged to increase their hours, although he provided no verification of this.

Additional Rostered Hours

[71] The applicant claimed that from 10 January 2005 he worked an extra 10 hours per fortnight, which was approved by the South East District Manager. He said that it *"… was to address the needs of the practice with short staffing."* (transcript p66, L45) There was no formal contract and no evidence adduced that such agreement had taken place.

[72] The Commission put to the applicant: was the extra 10 hours or "additional rostered hours" a consequence of his assuming the Acting SMO position? The applicant argued that the additional 10 hours were to meet the clinical needs of the practice which was short staffed at the time. He said he would have cut back on his clinical load to perform the Acting SMO role had there not been so much pressure caused by understaffing. (transcript p37, L20)

[73] The applicant made reference to Exhibits M3 and M4, the fixed-term contracts for acting in the SMO position. He argued that there was no relation to his working the "additional rostered hours" of 10 hours per fortnight and the nominated 76 hours prescribed in the contracts.

[74] The Commission put the proposition:

> *"… so what happened was they said to you, "Look you do your Dr Bennett thing and be a doctor, but you've also got to do this* (SMO role) *on top of it."* (transcript p37, L35)
>
> *"And to cope with the whole thing, we need you to work 10 more hours."* (transcript p37, L40)

[75] The applicant responded:

> "Well, that's a reasonable way to put it, yes." (transcript p37, L42)

[76] The applicant acknowledged he conducted a private practice as well as working at the Centre. He also asserted he had to reduce his private practice work to take on more hours at the Centre to cope with the clinical workload and the Acting SMO role.

[77] It was put to the applicant that the 72 hours per fortnight became his new base load for the duration of his time as Acting SMO. He responded: "*And through to 31 October*." (transcript p38, L15) He offered no evidence of such an arrangement.

Communications

[78] The applicant addressed the Memorandum dated 31 October 2005 from Ms S Harpur (Exhibit A6), the subject of which was "salary payments". He referred to the last paragraph, which said:

> *"Please remember that overtime (and therefore time off in lieu or other arrangement for working extra hours) needs to be approved in advance of it being worked by a staff member."*

[79] The applicant contended that this was a reference to "overtime" and not to the "extra duties roster". He argued that the "extra duties roster" was not overtime, it was a roster. He further argued:

> *"I in no way felt that this Memorandum of 31 October removed the extra duties roster."* (transcript p42, L20)

[80] The applicant said from 31 October 2005 he stopped claiming for "overtime" although he continued to work some. It was his view that obtaining pre-approval, as required by the Memorandum, was impractical. He also continued to work his "extra duties roster" and his "additional rostered hours" without seeking pre-approval. He said that he did not see these activities as falling into the category of "overtime".

[81] The applicant asserted that had the Department wished to convey that pre-approval was required for participation in the "extra duties roster" or that the roster was coming to an end, the communication should have been specific to the issue, not attached to an unrelated matter. He argued he did not seek clarification of the directive because it was clear to him that the directive only referred to "overtime".

[82] The applicant argued that the Memorandum from Dr Cerchez dated 10 November 2005 (Exhibit M1), which reiterated the earlier Memorandum from Ms Harpur regarding the need for prior approval of "overtime/time in lieu" was unfair treatment of him by Dr Cerchez. He did not elaborate as to why it was unfair.

[83] Ms Fitton argued that the Memoranda dated 31 October 2005, 10 November 2005 and 28 February 2006 could have left the applicant in no doubt as to the requirements of the Department despite his continuing to ignore the directive.

Refusal to Meet

[84] Dr Cerchez gave evidence that he first encountered the applicant at a doctors meeting which he was conducting at the Centre as the new SMO in August 2005. He said the applicant took over the meeting and ran his own agenda, which was to complain about the mode of Dr Crechez's appointment.

[85] The applicant did not refute this.

[86] Dr Cerchez said he met with the applicant after the meeting to discuss any issues the applicant might have. He said the applicant agreed to "give him a go". However, he said this "truce" only lasted until the next morning.

[87] Again, the applicant did not refute this.

[88] Dr Cerchez claimed the applicant engaged in numerous activities which he considered to be obstructive and which impeded his and the Practice Manager's ability to manage the Centre.

[89] In the early stages of his conflict around the appointment of Dr Cerchez and with Dr Cerchez himself, the applicant allegedly sought advice from his industrial advisor and his legal council. We were told by the applicant that the advice provided to him was that he should not meet or speak directly with Dr Cerchez with respect any matters around his employment until all his grievances had been resolved. Further, the applicant said that the advice given was to inform Dr Cerchez that he should communicate any matters he wished to discuss with him in writing.

[90] Dr Cerchez in his Memoranda dated 10 November 2005 and 28 February 2006 sought to meet the applicant to discuss the issues around the extra hours.

[91] The applicant ignored the requests.

[92] The applicant acknowledged that he chose not to meet Dr Cerchez face-to-face to discuss the issues of having to seek approval for overtime and for "extra duties roster".

[93] The Commission sought to establish what procedure, if any, Dr Cerchez engaged in to affect a resolution of the matter:

> *"What I'm trying to look at is what process did management take, because it was their choice to change your work environment - what process did they follow? So we come to a point where an invitation had been put to you to meet. Your advice was, "No, I'm not going to meet with you face to face until all my grievances are resolved.""* (transcript p46/47, L45)

[94] The applicant's response was:

> *"I think it is more correctly characterised as a deferral of the time for meeting until the grievances are resolved".* (transcript p47, L10)

[95] The applicant further asserted that, in his opinion:

> *"… email correspondence could be characterised as a discussion."* (transcript p47, L35)

[96] The applicant referred to Dr Cerchez's efforts to seek a meeting with him in his Memorandum dated 28 February 2006 (Exhibit A13). He put the proposition that the decision had already been made to reduce his hours and the meeting was to pursue how to reduce the hours. Dr Cerchez replied:

> *"The purpose was to - as it says - look at those activities which you were finding difficult to fit into your normal hours, and reallocate them, so that you didn't have to do them."* (transcript p120, L20)

[97] Ms Fitton argued that the Department had been reasonable in all its attempts to resolve the matter with the applicant, but his refusal to discuss the issue with Dr Crechez prevented any mutual resolution. She said the applicant never accepted Dr Cerchez's appointment and did all in his power to disregard directions and persisted in working how he chose.

Practice Manager - Bookings

[98] On a number of occasions throughout his evidence the applicant argued that the "additional rostered hours" and the "extra duty roster" hours were put into the appointment diary, presumably by the Practice Manger or the Receptionist. Further, he argued that the "extra duties roster" was delineated in the appointments diary.

[99] The applicant argued that the patient bookings were already in the appointment diary when he returned from leave, entered, he said, by the Practice Manager. He produced no evidence to support this claim.

[100]The applicant said, with regard to the "extra duties roster" and his "additional rostered hours":

> *"I just continued the same working practice that I had when I came back.* (from leave) *It was entered in the appointments book by the Practice Manager. I worked the times; patients were booked in; it was just the accepted custom and practice …"* (transcript ps39/40, L45)

[101]The applicant did not indicate by whom in the practice it was accepted as custom and practice.

[102]The Commission posed the question with regard to who took it upon themselves to delineate the appointments diary to show the "extra duty roster" events:

> *"COMMISSIONER: And that would have been the Practice Manager or the SMO who would have done that?"*
>
> *DR BENNETT:"… - well it would have been Mrs McCall who had that - who wrote that in, but under instruction from the …"*(transcript p58, L40)

[103]The applicant asserted that Ms Green, the Practice Manager, continued to enter "extra duties roster" times up to the point he was suspended from duty in April 2006.

[104]Dr Cerchez responded to the applicant:

> *"My understanding was that the hours you were allocated were from 8 am onwards, and you chose to put those hours down as extra duties hours, when in fact they were rostered hours."* (transcript p120, L42)

[105]The applicant questioned Dr Cerchez as to why the Practice Manager continued to enter his availability to work over lunchtimes in the appointment diary. Dr Cerchez responded that he could not confirm that the Practice Manager had indeed entered the times in the diary and he only had the applicant's "say so". And further:

> *" … and I was unaware of it. I could only put it down to the level of disruption that was happening at the centre at the time, if it did in fact occur"* (transcript p121, L23)

[106]Dr Cerchez inferred the disruption was as a result of the applicant's behaviour.

[107]Dr Cerchez stated that neither the manual appointment diary nor the electronic version designated the applicant as the "lunchtime doctor". He said that although he was part time at the Centre he had constant electronic access to the appointment diary as well as clinical data for patients.

[108]Ms Banman provided excerpts from the electronic diary (Exhibit M13) which showed that there was no delineation of rosters or availability indicated in the diary. This is contrary to the applicant's assertion that the Practice Manager had rostered him in the diary for "extra duties roster" and "additional rostered hours" as well as his contracted hours.

[109]The applicant said that while he was the Acting SMO he had taken the responsibility of managing the appointment book from the Practice Manager, Ms Green, and given it to Mrs McCall because Ms Green was making so many mistakes.

[110]In her evidence Mrs McCall said:

> *"I mean, she didn't realise what time they started; she didn't realise what times they finished and she was putting them in for straight sessions when, you know, they weren't…"* (transcript p28, L32)
>
> *"That happened on a weekly basis."* (transcript p28, L35)

[111]In the decision emanating from T12919 of 2007[2], Ms Green gave evidence that the applicant openly opposed her appointment as the Practice Manager. (paragraph [12]) Further evidence was given by Ms Green that the applicant undermined her authority (paragraph [117]) to the point where he ignored her during his time as the Acting SMO. (paragraph [13])

[112]The applicant had made formal complaints against Ms Green. The applicant had also treated her in such a way that in October 2005 he had to make a formal written apology to her. (paragraph [57]) From the evidence in that matter the animus continued up to the applicant's suspension from duty.

[113]Evidence given in the above matter showed Ms Green to have already been an experienced Practice Manager prior to taking up the role at the Centre.

[114]Ms Banman sought to know the relationship between the applicant and the witness, Mrs McCall.

[115]The applicant said that Mrs McCall and he had a good working relationship and that she was a very efficient receptionist. When pressed further and after much circumlocution the applicant eventually admitted that he and Mrs McCall were in a personal relationship. Ms Banman asserted the applicant's aversion to answering a direct question impacted on his credibility and to the credibility of the witness's evidence.

Reversion of the Applicant's Hours

[116]As a result of the applicant's request to have his hours combined to make up a full-time load in February 2006, Dr Cerchez took two significant actions: Firstly, in his Memorandum dated 28 February 2006, (Exhibit A13) he formally refused the applicant's request to covert his hours to full time; and secondly, instructed the applicant to work no more than the 62 hours for which he was contracted. Again, Dr Cerchez also offered to meet the applicant to discuss the matter.

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[2] T12919 of 2007, McAlpine C, Dr Stephen Bennett v MASSA 2000, 6 June 2008

[117]In the same Memorandum Dr Cerchez addressed the issue of leave-in-lieu arrangements for additional hours worked for November and December 2005 and January 2006. Dr Cerchez said:

> *"… I am unable to approve these leave in lieu requests as they were not formally approved prior to the hours being worked as per stated departmental policy."*
>
> *The need for pre-approval to work additional hours was communicated to you in a memorandum you received from Ms. Siobhan Harpur, State Manager ARCH on 31 October 2005 which clearly states "that overtime (and therefore leave in lieu arrangements for working extra hours) need to be approved in advance of it being worked by a staff member".*

[118]Further in the Memorandum at Request for Meeting, Dr Cerchez then addressed the matter of the applicant working in excess of his 62 contracted hours per fortnight.

> *"I note that your contract states your substantive hours are 62 hours per fortnight since March 2004, and that it appears you have been working in excess of this since your return from leave in August 2005. I would ask that you immediately resume working within your substantive allocation of 62 hours per fortnight.*
>
> *Please contact me to arrange a meeting time, as soon as possible, to discuss the tasks that precipitated your perceived necessity for you to have been working these additional hours …"*

[119]The applicant responded to Dr Cerchez, via email on the same day *(Exhibit A2(11) of 2006)* as follows:

> *"I will consult with my industrial representative."*

[120]The applicant said Dr Cerchez reduced his overall hours to 56 per fortnight in March 2006, although still paying him for his contracted 62 hours.

[121]Ms Banman adduced Exhibit M12, which is purported to show the doctors' roster in March 2006, and indicated to the Commission that the applicant was rostered on for 31 hours per week equating to 62 hours per fortnight and not the 56 hours claimed by the applicant.

[122]On 21 March 2006 the applicant wrote, via email, to Ms Powell regarding his reduction in hours. (Exhibit M8) He said:

> *"I have now had the opportunity to consult with my industrial advisor and the State Service Commissioner about Dr. Cerchez's concerns that I am working above my contracted hours fortnightly.*
>
> *If the wish is to reduce my hours I am advised the appropriate reduction would be to …"*

[123]However, the applicant argued that this email should not be taken as his acceptance of the hours being brought back to his contracted commitment.

[124]The applicant argued that Dr Cerchez had given two different versions of his reasoning for reducing his hours. In the Memorandum of 28 February 2006 (Exhibit A13) Dr Cerchez expressed the following:

> *"… as recent recruitment for vacant positions has now been completed and therefore additional hours are not available. … additional hours that may or may not be left as a result of the recruitment process would need to be offered to all GPs in the practice …"*

[125]Referring to matter T12919 of 2007, the applicant cited Dr Cerchez alternate explanation for not granting him conversion of his "extra duties roster". (Exhibit A15) In that exhibit the transcript (p378-379) showed that Dr Cerchez was asked to explain the circumstances of his reducing the applicant's hours:

> *"… by that stage Dr Bennett's behaviour was very, very difficult and he – the Clarence Community Health Centre runs at a significant loss, I might point out, for the Department, when, in fact, it should be making quite a significant income stream. Because we bill Medicare, there is the potential to at least break even. We lose $600,000 a year. And on reviewing contracts, it was obvious – and at this stage we were having all sorts of problems with claiming of Medicare money and we were owed $55,000 because of Dr Bennett's activities in delaying Medicare claims. So he was not a productive member of our team and so I restricted his work to the 62 hours that he was, in fact, contracted for because he wasn't bringing in any income, he was contributing to our deficit. I had significant worries about how his behaviour was impacting on the team, on patient care, on the safety and quality of the centre and to go down any other path would've been quite problematic. So I limited him to what his contract was, in fact, for."*

[126]The applicant argued that the Centre was *"… a state run facility. Productivity is not measured in cash flow terms.*" (transcript p81, L43) He gave no supporting evidence for this opinion. He also argued that a delay in claiming accounts could not be "… *interpreted as unproductive …*" (transcript p82, L1) Again he gave no reason for this position.

[127]The applicant chose not meet Dr Cerchez to discuss the proposed reversion to his contracted hours.

[128]Dr Cerchez stated that it was necessary to make the decision to limit the applicant's hours because he had recruited a new doctor who wanted to work full time. He regarded the applicant as being unproductive. He said:

> *"Dr Bennett engaged in a number of practices which restricted patient access to the centre, and that involved booking his own appointments through the electronic computer system, booking a reduced number of patients, compared to other doctors, and, by example, I worked at the centre seeing patients on many afternoons, and an example I can recall is when he saw four patients that afternoon and I saw 14. And, likewise, another occasion where I saw 17 patients and he saw 10, when we were the only two doctors on. So there was a process under way which seemed to be limited access for patients. Bookings would be changed throughout the day, electronically. A large number of no shows would occur, patients whose name appeared on the booking list would not attend, and on a couple of occasions these patients were rung by the Practice Manager, and the patients were unaware that they had an appointment. Dr Bennett was in the habit of doing house calls in the*

> *middle of a session, whereas normal practice for general practitioners would be to do a house call at the beginning or the end of the session. Clearly that's more time efficient, because if you have to allow time for patients to finish, schedule a house call for an hour, and then come back, it's different to doing a house call at the beginning or end of a session. He engaged in a large number of email traffic, which is obvious from the amount of evidence that we've had to compile. And that email traffic often involved instances of administrative function and activities in which he should never have been involved. They were administrative duties, they were all sorts of things from salary rates of employees through to use of cars. And on one occasion I counted I received 18 emails during what was a normal consulting day. So these emails often were not short, and it takes quite a while to formulate an email. It means that you have to flick in and out of the computer program that you use for medical patients into the email program, and then back again, which is obviously time consuming."* (transcript ps111/112, L45)

[129]Dr Cerchez said that the Centre was quite different from a normal general practice in that the doctors were paid for a half-hour period after each session to complete paperwork. He said that in his experience doctors complete most of the required paperwork while the patient is with them. With reference to the applicant he said "… *an experienced doctor of 25 years should be able to manage their time …*". (transcript p112, L47)

[130]Again, with reference to the applicant, Dr Cerchez said that he often blocked off large amounts of time with the explanation of "adhering to clinical duties".

[131]Ms Banman also used Exhibit M13 to illustrate the extent to which the applicant had blocked out consultation times for other purposes. All of which she said were blocked by the applicant himself:

> *"I'd also just like to highlight throughout the document a number of different things, of times booked out for tea break, do not book insurance, day before bookings only, reserved, do not book report, do not book, do not book, do not book, etcetera, and also the tea breaks really in March started happening both morning and afternoon and do not book referrals, and again do not book referrals/reports. … That throughout the document is representation of just some of the data entered by Dr Bennett."* (transcript p149, L35)

[132]Ms Banman referred to Exhibit M10, which was a compilation of the manual and electronic diaries showing gaps in the appointment calendar blocked off by the applicant.

[133]The applicant challenged the accuracy of the document.

[134]Ms Banman, under oath, confirmed the veracity of the data compiled into the document.

[135]Dr Cerchez said he only became aware of the applicant regularly working beyond his contracted hours in January 2006 when he was conducting an exercise to match the establishment hours available to the number of doctors in the complement.

[136]Under cross-examination the applicant sought the reason for Dr Cerchez's contention that hours were required to employ Dr Jackson full time was not mentioned in his Memorandum dated 28 February 2006 (Exhibit A13). Dr Cerchez responded as follows:

> *"Clearly it's not in this document. It was one of the things that I needed to meet with you and talk to you about, going back to October the previous year, but you will recall you refused all opportunity to meet. It's not …*
>
> *I think the correct term is deferred? ---It's not something that one would put in a document, unless one had fully explored the situation, had got your opinion, had sought your views, and then quite clearly one could have put it in writing. But there was never that opportunity to explore it with you. A deferral of a meeting, as you put it, from September 2005 to when you were suspended is quite a long deferral, considering we're in the same building day to day, passing each other in the corridor. It seemed inappropriate that you weren't able to meet with me."* (transcript p118, L32)

[137]The applicant sought an explanation of the minor differences in the texts in the Memorandum for Ms Harpur (Exhibit A6) and the one for Dr Cerchez (Exhibit A13) regarding the need for pre-approval of overtime. Dr Cerchez said "… *I would interpret them to be the same*". (transcript p119, L25)

[138]Dr Cerchez said that he was constantly monitoring the applicant's activities and behaviour with respect to his alleged non-productivity. He said:

> *"… You will recall that on many occasions I tried to meet with you …*
>
> *… so that I could clarify in my own mind your need for extra duties. My impression was you were behaving quite differently to the vast majority of general practitioners I have come in contact with over my 30 years experience."* (transcript ps121/122, L42)

[139]It was explained that vocationally registered doctors command a higher Medicare rebate for consultations than doctors who are not vocationally registered.

[140]The applicant put the proposition that: because Dr Jackson was not vocationally registered at the time of his engagement and the applicant was, it would follow Dr Jackson would be bringing in less income per patient than he. This he said was inconsistent with assertion by Dr Cerchez that he needed to improve productivity.

[141]Dr Cerchez responded:

> *"Can you explain how that was going to improve your perception of the productivity of the practice? --- Very easily. At that time you were bringing no income into the practice because you were refusing to sign the Medicare rebate checks. You were also – Dr Jackson would see patients every 15 minutes, and he would see them quite appropriately, and without blocking out large periods of time. He was not involving himself in administrative activities for which he had no part to be involved in, and in fact he was a lot more productive, from a financial point of view, than you were, and it was that situation which I was replacing. I was replacing a doctor for which we were paying full-time pay, who had no income coming in to the Department, with a doctor who, although not vocationally registered, was bringing in money to the practice, whereas you were not. So economically it made sense."* (transcript p123, L10)

[142]The applicant defended his decision to refuse to engage in electronic billing because he wanted specific indemnity.

[143] Dr Cerchez said no other doctor in the practice had an issue with electronic billing. Indeed, he said that a number of assurances were provided to the applicant regarding indemnity, but he would not accept them. The issue of the applicant's refusal to participate in the electronic billing process was addressed in the decision of matter T12919 at paragraphs [369-378] inclusive.

[144]Dr Cerchez was asked if he had accurate figures as to the frequency of the applicant blocking out consulting times. He responded:

> *"No, I don't have accurate figures. I'm aware that it increased as the months went on, and as your behaviour became more difficult there were more times blocked off, and more times being changed. But I can't give you the frequencies. Certainly within every session there was unexplained times and changes made to the appointment book, which once again I would stress no other doctor in the centre did on such a frequent basis, and no other doctor I've ever experienced in my working life has ever done that."* (transcript p125, L20)

[145]The issue of the applicant allegedly inappropriately blocking out consulting times was addressed in matter T12919 at paragraphs [392-405] inclusive.

[146]Ms Banman argued that any application by a doctor to seek full-time employment had to be considered carefully given the increased financial commitment the new package imposed on the Centre. Also there was the probability that any number of current doctors may have been interested in the package and therefore there had to be a transparent process adopted to further the requests.

[147]Ms Banman said that even after receiving the Memorandum dated 28 February 2006 from Dr Cerchez rejecting his request (Exhibit A13), the applicant continued to raise the matter with other line managers all of whom referred him back to Dr Cerchez.

Recruitment Process

[148]From evidence it appears it was commonplace for doctors to come and go at the Centre. There also appears to have been a continual process of advertising for and the recruitment of doctors. The applicant acknowledged that: "*There's always been a recruitment drive.*" (transcript p73, L24)

[149]The Commission posed the questions:

> *"COMMISSIONER: So it wouldn't have been unusual for a new doctor to come on board?*
>
> *DR BENNETT: No …*
>
> *COMMISSIONER: … if there was a continuous search for doctors, whether they be locums or permanents, the expectation would have been that if – the point of recruiting people was supposed to take the workload off the other doctors'*
>
> *DR BENNETT: Yes."* (transcript p73, L25)

[150]Ms Banman said that in the Memorandum dated 28 February 2006, Dr Cerchez explained to the applicant that once the recruitment process had been finalised with the

new doctors, any residual hours would be offered to all the doctors at the Centre through an 'expression of interest' process. But, she said, the applicant refused to discuss the matter with Dr Cerchez.

[151]Both Dr Dunbar and Mrs McCall made the point that doctors negotiated their hours and consulting times as they were recruited.

[152]The applicant argued that "*… it was unfair to replace my rostered hours with a locum doctor.*" (transcript p82, L5)

[153]Dr Cerchez pointed out that the applicant's statement was misleading, Dr Jackson was not a locum.

Dr Dunbar's TOIL Conversion

[154]Dr Dunbar provided a statement (Exhibit A1) as well as giving evidence. In August 2005 she sought to convert the remuneration for working the "extra duties roster" from TOIL to being "*… paid in the normal way.*" Dr Dunbar also said she was told by the Practice Manager *"… that wasn't a problem …*" but she would check with the SMO. Soon afterwards she was told to "*… start writing those hours now …*" on her normal timesheet. She said that she was not required to complete any documentation; nor was she aware of any criteria which had to be met to affect a conversion of hours from TOIL to wages. (transcript p8, L40)

[155]Dr Crechez said that when Dr Dunbar approached the Practice Manager to have the TOIL component of her earnings converted to paid hours, he was receptive to the request. He said as a female doctor Dr Dunbar had a particular patient profile which warranted that she spent more time counselling individual patients than, conventionally, the male doctors did. He said it was a 'strange situation' where she had to continually request additional time when it was obviously required. He confirmed her requests for additional time were a regular occurrence and therefore he assessed that it was not an overtime situation, but a genuine need of the practice. He said he agreed that these extra hours would become part of Dr Dunbar's normal contact time. Further, he said the conversion from TOIL hours to salary was facilitated within her "establishment" and that her employment status remained as part time.

[156]Dr Dunbar stated that although she was currently working 30 hours per week, and had done so for the previous three months, she said her current contract still showed 24 hours per fortnight. (transcript p13, L20)

Custom and Practice

[157]The applicant contested the removal of the 10 "additional rostered hours" and the "extra rostered hours" from his work program while a dispute was on foot. He argued that Clause 14 of the Agreement stipulated that custom and practice should be maintained until a resolution.

[158]Ms Banman noted the applicant continually referred to the grievance procedure, Clause 14 of the Agreement, particularly the preservation of "custom and practice". She noted that he tended to omit the first paragraph of the section outlining the objective of the procedure. The introductory paragraph states:

"The objectives of this procedure are to promote the resolution of grievances and disputes by measures based on consultation, cooperation and discussion; to reduce the level of industrial disputation; and to avoid interruption to the performance of work and the consequential loss of service to the community and of wages."

[159]In response to the applicant's demand that custom and practice should prevail during the dispute, Ms Harpur responded in the Memorandum *(Exhibit A2(27) of 2006)* as follows:

"The Grievance and Disputes Settlement Procedure that you refer to in the Salaried Medical Practitioners Agreement of 2003 states under Section 14(a) that:

> *"in the first instance, the employee(s) and or local employee organisation representative(s) shall attempt to resolve the dispute with the immediate supervisor."*

I read that there is a clear offer of a meeting to discuss your hours in the Memorandum sent to you on 28 February 2006 by your line Manager Dr George Chercez (sic).

I do not understand you to have satisfied section 14(a) such that you escalating it to Section 14(d). You also refer to Section 14(f) which states:

> *"until the dispute is resolved … …work shall continue normally in accordance with custom and practice … etc"*

Your contract is clear that your substantive hours have been 62 per fortnight since March 2004 and on that basis I refer to this being "custom and practice" until such time as you have taken up the offer to meet with Dr Chercez (sic) to discuss with him any reasons for you to be required to work over and above these hours."

[160]Ms Fitton argued that the applicant's claim indicating that the 10 "additional rostered hours" were "custom and practice" was not accepted. She said the expectation was that the applicant would revert back to his contract hours on returning from leave in August 2005. Further, she said he had no authority to work more than his contracted hours.

[161]The applicant cited a number of authorities on the subject of grievance procedures and the custom and practice provision. He cited the decision emanating from T10165 of 2002[3] (Exhibit A7). He argued that the same principles should apply to the instant matter with regard to payment for "extra duty roster" hours. He directed the Commission's attention to paragraph [116] of the decision, where Shelley DP said:

"I find that there was a general, rather than a specific, authorisation given by Mr Titmus to Mr Matthewson to work the hours required to meet operating requirements and that overtime worked by Mr Matthewson was authorised overtime worked at the direction of the employer. That authorisation was on the basis that, as his Operations Manager, Mr Matthewson was to start at whatever hour necessary to get the job done."

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[3] T10165 of 2002, Shelly DP, Steven John Matthewson v The Egg Marketing Board Tasmania, 14 March 2003

[162]Ms Fitton responded that this authority differs from the instant matter because in the authority the Operations Manager knew the work was being undertaken, there was a blanket approval for the work to be done and the work was never sought to be brought to an end. She said this was clearly different from the applicant's case, where the Manager was not aware he was working the times, there was no approval and the Department saw no need for the practice to continue.

[163]The applicant's contention was that the "extra duties roster" was authorised by virtue of its longevity. He cited from Exhibit A8[4] where longstanding employment arrangements assumed approval. He argued that this authority supported his contention of the acceptance of longstanding usage or practice as precedent.

[164]In response Ms Fitton said the circumstances in this authority differed from the instant matter because in the authority the practice was a clear and understood pattern of work, again, unlike the instant matter.

> *"For a practice to constitute a binding usage it must be shown to be well known and certain in its terms …*
>
> *… not inconsistent with an award or agreement."*

[165]Ms Fitton argued that the usage was not well known to management and was inconsistent with the Agreement.

[166]Mr Baker cited Exhibit M15.[5] He argued that this authority goes to the notion of a practice becoming an implied term within an existing contract. He directed the Commission to the following paragraphs, which state in part:

> *"[130] The concept of "implied terms" has been considered by the High Court on a number of occasions …*
>
> > *… In each case the problem is caused by a deficiency in the expression of a consensual agreement. … with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it …*
> >
> > *… The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue."*
>
> *"[131] The conditions that must be applied before a court may imply a term into a contract were set out by the Privy Council in BP Refinery (Westernport) Pty Ltd v Shire of Hastings:*
>
> > *for a term to be implied, the following conditions (which may overlap) must be satisfied.*
> >
> > *(1) it must be reasonable and equitable; (2) it must be necessary to give business efficiency to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes*

[4] NSWIR Comm, Public Service Association v Zoological Park Board of New South Wales, 543 of 2007
[5] AIRC 15, 22 March 2007, Australian Rail, Tram and Bus Industry Union v The Rail Infrastructure Corporation (ODN AG2005/4337) [AG841273]

without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

"[132} A term may be implied into a contract through custom and practice. In Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ stated:

"The circumstances in which trade custom or usage may form the basis for the implication of terms into a contract have been considered in many cases. The cases have established the following propositions:

(1) The existence of a custom or usage that will justify the implication of a term into a contract is a question of fact.

(2) There must be acquiescence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract. …
However, it is not necessary that the custom be universally accepted, for such a requirement would always be defeated by the denial by one litigant of the very matter that the other party seeks to prove in the proceedings.

(3) A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement.
(4) A person may be bound by a custom notwithstanding the fact that he had no knowledge of it. … The result is that in modern times nothing turns on the presence or absence of actual knowledge of the custom; that matter will stand or fall with the resolution of the issue of the degree of notoriety which the custom has achieved. The respondent's contention that industry practices unknown to the assured are incapable of forming the basis of an implied term of contract cannot be sustained."

[167]And finally:

"[133] In the High Court decision of Byrne and Frew, McHugh and Gummow JJ referred to the approval to Con-Stan and added:

The question is always whether the general notoriety of the custom makes it reasonable to assume that the parties contracted with reference to the custom so that it is therefore reasonable to import such a term into the contract. Where there is such an established usage, "the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain."

[168]Mr Baker opined that the applicant had *"… imposed himself upon the Department in a deceptive manner …*". (transcript p161, L38) He further argued that the applicant's position did not meet the five criteria as expressed in the *BP Westernport*[6] decision.

[169]Mr Baker referred to Exhibit M16[7] which addressed the issue of ongoing custom and practice which may come to an end, At page 4 of that decision it states:

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[6] BP Refinery (Westernport) v Shire of Hastings (1977) 180 CLR 266
[7] ARIC, Bitupave Ltd v AWU-FIME Amalgamated Union (C No. 21418 of 1995)

> *"… This previous stance is now viewed differently and as a consequence rectified i.e. an incorrect viewed payment situation is removed following this interpretation change to the award requirement.*
>
> *… This is all however not assisted by the situation that there was probably some form of acceptable custom and practice in existence, even until most recent times, nor at law what any subsequent given award interpretation may attempt to prove or disprove.*
>
> *With these obviously contradictory and conflicting views prevailing, the question seems to come down to what emphasis one can glance or obtain guidance from through a construction of the relevant award provisions. …*
>
> *While mindful of the particular custom and practice said to have prevailed, I do not see it as realistic to ask that such a custom and practice needs to prevail for ever and a day, especially where it can be accepted and/or successfully argued that any placed interpretation may have been incorrect.."*

[170]Mr Baker asserted that there may have been a custom and practice 'some years ago' regarding an "extra duties roster", but that had in effect fallen into disrepair and the Department saw no reason to continue it beyond October 2005.

[171]Mr Baker noted there was nothing written down with reference to the "extra duties roster", but it was an arrangement unique to the Centre. Further, he said the applicant accepted a contract to act in a temporary position for four months at 76 hours per fortnight. He also said that the applicant was paid overtime and a managerial allowance during this time. He argued that on return from leave in August 2005 the applicant took it upon himself to work 72 hours as well as the "extra duties roster". He asserted the applicant continued to work the "extra duties roster" despite three memoranda advising the need for pre-approval of this extra work.

[172]Mr Baker indicated that the claim had been "… *manipulated by Dr Bennett in his refusal to revert his hours of work from 72 to 62 upon his return from recreational leave."* (transcript p161, L35)

Management Prerogative

[173]The applicant cited Exhibit A16[8] with regard to management prerogative:

> *"The management prerogative is not a sword which can be wielded in wanton disregard of the industrial consequences, nor is it a shield to hide behind. An employer has a responsibility to manage fairly. Almost every initiative that an employer may take can be clothed in the ubiquity of managerial prerogative. To espouse this principle does not relieve the employer of the obligation to justify the effect where a change is instituted to some long standing custom and practise. Managerial prerogative is not a short cut to arbitration without consultation ..."* (transcript p85, L10)

[174]The applicant argued this authority supported his assertion as to the lack of procedural fairness and natural justice.

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[8] WAIRC, No. CR 676 of 1986, The Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates

[175]With respect to managerial prerogative, Ms Fitton addressed Exhibit A16, and accepted that an employer must be able to justify change to a longstanding custom and practice and not make a unilateral decision to change it. She also accepted a change must be reasonable, management must act fairly and the onus is actually on the employer to justify its decision. She argued that the "extra duties roster" had been ineffectual since the Centre's normal operating times encompassed the times purported to be served by the roster, and further argued that it had been shown that a "lunch time doctor" was not necessary. Added to that, only the applicant claimed to still be operating the roster and his refusal to discuss anything with Dr Cerchez meant management had no option but to put a stop to the practice.

[176]Mr Baker raised the issue of the management of the Centre being afforded the prerogative to manage the business as they it saw fit. He cited T12922 of 2002[9]:

> *"[63] I have taken account of the arguments advanced by Mr Baker in relation to management prerogative, and agree with the principles advanced; in summary, that, prima facie, management has the right to manage their business and that industrial tribunals should not interfere unless that interference is necessary to protect the interests, including the health and safety, of employees. …"*

[177]Mr Baker argued that application of the Agreement in requiring pre-approval for overtime of any nature was management having the right to manage; as indeed was the cessation of the redundant "extra duties rooster".

Jurisdiction

[178]Mr Baker put the proposition that the issue before the Commission was whether or not the "extra duties roster" fell within the terms of the award and hence the ability of the Commission to make a decision on the matter.

[179]Ms Fitton argued that for the Commission to recognise the applicant's hours of work as his contract hours would be an appointment and therefore outside its jurisdiction.

[180]Mr Baker, in support of Ms Fitton's submission, said that if the Commission found in favour of the applicant and increased his contract hours, such an action would be tantamount to a new appointment which, he said, would be outside the power of the Commission under the Act. Further, to add the TOIL to the applicant's contract hours would be tantamount to a breach of the Agreement. He cited the Act at s.31(2):

> *"A Commissioner shall not make an order under this section –*
>
> *(a) that is inconsistent with the provisions of any Act dealing with the same subject-matter; or*
>
> *(b) that makes an award or that varies or creates a provision of an award."*

[181]Further at s.31(4):

> *"An order under this section does not have effect so as to require any person to contravene, or fail to comply with, an award or to commit an offence, or to*

[9] T12922 of 2007, Shelley DP, MASSA 2000 v CPSU & LHMU, 27 August 2007

do an act which, if the order had not been made, would render that person liable to any legal proceedings."

[182]Mr Baker cited Exhibit M17[10] as relevant to the Commission's powers with respect to making appointments. He said:

"… was a decision that dealt with a decision of this commission that was ultimately reviewed by the Supreme Court of Tasmania as to whether or not an appointment under the Act is excluded in the definition of industrial matter … and this is an extract of Hansard, the Tasmanian Hansard:

> *Remember that so far as the public sector is concerned, there is provided a separate mechanism of appeal and decision in respect of appointments and promotions for qualifications. In looking at the relationship between the private sector and the public sector provisions, the judgments may benefit these matters to be excluded this time. It may be that experience will show this ought to change. If it does, change will need to be made. At the time of the debate the only existing public servants or those with an employment relationship with the state had the right of appeal against appointment or promotion within this Public Service. All aspects of the appellant disputes with the respondent related to appointment to the position that she held until the end of 1994, pursuant to the terms of a contract.*

And he makes a comment:

> *The delay in advertising, the manner in which the commissioner found that the appellant had been harshly and unjustly treated, and unjustified abandonment of the five-year rule or all matters related to the appointment of the appellant to the position of lecturer at the respondent university. Accordingly the learned judge in the first instance was correct in holding that they were not industrial matters within the meaning of section 3(1) and the commissioner had no jurisdiction to make an order with respect to the dispute.*

And we would say that that is consistent with what Dr Bennett is seeking in this matter, in particular in relation to matters 4, 5 and 7 as outlined in your original decision." (Transcript p165, L.7)

[183]Mr Baker also argued that a decision supporting the applicant would be against the Wage Fixing Principles, in particular Principle 3 - Role Of The Commission In Workplace Bargaining. Further, he said that under s.36 of the Act it would not be in the public interest to issue a decision contrary to the already negotiated position of the two parties.

[184]Mr Baker argued that the "extra duties roster" did not conform to award entitlements; and further that it was an over-award payment and, as such, could not be the subject of a matter to be determined by this Commission. He cited Exhibit M14[11] to support his contention. This authority limits the Commission to deal with matters which are 'contained in the award' and specifically excludes matters 'that are more favourable than those provided by the award'.

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[10] Supreme Court of Tasmania, Jan Saarinen v University of Tasmania [1977] TASSC 125, 121/1997

[11] T8439 of 1999, Full Bench, LHMU v Rans Management Group Pty Ltd trading as Tattersall's Hobart Acquatic Centre, 2 May 2000

SUMMARY

[185]Ms Fitton argued that there was no entitlement by the applicant to substantive hours of 72 per fortnight; no entitlement to remuneration for "extra duties roster" for the applicant's period of suspension; and no entitlement to the "specialists' package".

[186]Ms Banman referred to Exhibit M10 which she said illustrated that the applicant seemed to be the only doctor blocking out appointment times for paperwork, reports and the like.

[187]The applicant alleged that because Dr Cerchez was part time at the Centre, this caused him more work. (Transcript p209, L15) He further alleged that as the senior medical person in attendance at the Centre it was his role to process tests results, x-rays and the like when other doctors were not around, such as late afternoon. He provided no evidence that this was indeed asked of him. When asked why he continued to do this after his return from leave he responded "… *no one told me I shouldn't do it.*" (Transcript p211, L13)

[188]Dr Cerchez said he instigated the 'red dot doctor', an activity where a doctor is formally nominated at each session to ensure that pathology results, test results, x-rays and the like which come into the Centre, are reviewed and, if necessary, acted upon. This was a safety net so that if the 'referring' doctor, who would normally have dealt with his/her own referral, was not available.

[189]In his summing up the applicant introduced a number of exhibits which were opposed by Mr Baker. The applicant said he wanted to refute a number of assertions by Dr Cerchez.

[190]Mr Baker objected. He argued that the applicant had ample opportunity to cross-examine Dr Cerchez and that introducing new evidence was unfair.

[191]The Commission allowed the evidence to be presented in a bid to ensure the applicant had every opportunity to present his case. However, the evidence adduced revisited the issues in matter T12919 and had been addressed in that decision by this Commission. Nothing in the additional exhibits made any material difference to the evidence given in matter T12919.

FINDINGS

[192]The matters in dispute had their genesis in the conflict which arose within the Centre, driven by the applicant's attitude to Dr Cerchez's appointment as SMO and the applicant's subsequent behaviour towards Dr Cerchez. The number and nature of grievances raised by the applicant and the counter grievances would attest to this.

[193]It was acknowledged the applicant had sought and was granted extra consulting hours to bring his contract hours up to 62 in March 2004. This appears to have been as a result of the Centre management seeking expressions of interest from the doctors to take up additional consulting sessions which, I believe, was the normal process.

Contracted Hours/Additional Rostered Hours

[194]I turn to the legitimacy of the applicant's assertion that his substantive contracted hours were 72 per fortnight from January 2005 and not 62 as stated by the Minister.

[195]Over and above his negotiated contract hours, the applicant alleged he had been granted an increase of 10-hours per fortnight by the then South Eastern District Manager in January 2005. The "additional rostered hours" he said, were required to address short staffing in the Centre. He educed no evidence to substantiate that the additional hours had been sanctioned.

[196]Coincidentally on 10 January 2005, the same day he alleged he was given approval for the "additional rostered hours", the applicant accepted the role of Acting SMO. Exhibits M3 and M4, the contracts for his time as Acting SMO, authorised an engagement of 76-hours per fortnight, a full-time workload. The applicant argued that the additional 10 hours were not as a result of the increased SMO responsibility. In fact he said he had to reduce his private practice hours to accommodate the Acting SMO commitment. He also stated that there was no relation between the additional 10 hours and the 76 hours prescribed in the contracts.

[197]It should be noted that the applicant argued the contracts were not fixed term. Whether fixed term or not both contracts had a final end date prescribed beyond which the contract was not valid.

[198]It was put to the applicant that the 72-hours per fortnight was for the duration of his time as Acting SMO. He disputed this and said "and through to 31 October". He provided no evidence to substantiate his claim. He made the comment that on his return from leave "the roster continued".

[199]The applicant took three months leave from May until August. The journal entry (Exhibit M6) shows that he requested paid and unpaid leave equivalent to 62-hours per fortnight. He did not seek leave equivalent to the 72 hours that he alleged were his contracted hours. There is no evidence that he raised the issue of receiving less holiday remuneration than his alleged contract hours would have warranted.

[200]The applicant was opposed to the part-time nature of Dr Cerchez's appointment. He claimed this caused him extra work. He also claimed that because he was the senior doctor on site he had to work extra hours to cover such things as test results, x-rays and the like if they became available when the treating doctor was not on site. When asked why he continued to perform this function when he returned from leave he said "*no one told me I shouldn't do it*". (transcript p211, L13)

[201]Ms Banman opined that the applicant, as part of his objection to Dr Cerchez's appointment and in his bid to undermine Dr Cerchez's position, continued to work the hours he had while Acting SMO.

[202]In matter T12919 there was evidence educed which showed that on numerous occasions the applicant had claimed he should be the SMO. There was also evidence educed where he sought the support of senior managers that Dr Cerchez be removed and for him to be installed in his place until a full-time permanent SMO was engaged.

[203]The term "extra rostered hours" (referred to by the Commission as "additional rostered hours") was a creation of the applicant. No one other than the applicant understood the terminology. In my view it was his attempt to legitimise the extra hours he worked by giving them a label. There is no evidence at all that these additional hours were approved. There was no evidence to show the applicant's substantive contracted hours were anything other than 62 per fortnight. There is clear evidence of the option to

work up to 76-hours per fortnight as required in the Acting SMO contracts. This option terminated on the cessation of each of the contracts.

[204]The applicant acknowledged that the 10 hours in question were to address a shortage of personnel at that particular time. He also acknowledged that working such additional hours would be situational. Even if it could be shown the applicant had approval to work the additional hours, it follows that as the staffing situation changed so would the need for additional hours, not only for the applicant but for all the doctors at the Centre.

[205]The applicant argued that it was an "administrative oversight" that his contract hours had not formally been increase to 76 hours per fortnight, incorporating 10 hours of "additional rostered hours" and four hours of "extra duty roster" hours. I disagree. The evidence is clear that Dr Cerchez, the applicant's line Manger, nor the State Manger, were aware that the hours he was working were not his contract hours until a review by Dr Cerchez in January 2006. It would have been they who would have approved an increase in the applicant's contract hours. To suggest that it was an "oversight" is fanciful in the extreme.

[206]It followed that on his return from leave the applicant, of his own volition and without authority, chose to work 10 additional hours per fortnight. There was no evidence to support the applicant's claim to an addition of 10-hours per fortnight beyond his substantive 62 hours. The applicant is not entitled to have 10 additional hours per fortnight added to his substantive contract hours. I so find.

Extra Duties Roster

[207]I turn to the applicant's participation in the "extra duties roster".

[208]Ms Harpur's Memorandum of 31 October 2005 (Exhibit A6) addressed the issue of submitting timesheets. However, in the final paragraph it reminded the applicant that *"… overtime (and therefore time off in lieu or other arrangement for working extra hours) needs to be approved in advance …"*

[209]The applicant argued that had the Department wished to convey the message that pre-approval was required for the "extra duties roster" or that if the roster was to cease there should have been a specific memorandum to that effect.

[210]In the first instance I have some sympathy with the applicant's view. However his response to Ms Harpur did not oppose the directive, nor argue a different position. His response only sought to by-pass Dr Cerchez in the approval process for time sheets. From his reply it would not be unreasonable for management to have interpreted that the applicant had accepted the directive and would comply with it.

[211]The applicant expressed a view of what he considered constituted "overtime". He argued that the reference to pre-approval was for overtime and not the "extra duties roster". Further he said that the "extra duties roster" was not overtime, it was a roster. He further argued that the "additional rostered hours" were not overtime, but also roster.

[212]It is incongruous that the applicant isolated the "extra duties roster" and the "additional rostered hours" from his understanding of overtime. In my view this interpretation is the applicant's attempt at justifying his refusal to comply with management directions.

[213]Similar to the matter of "additional rostered hours", Dr Cerchez and senior management do not appear to have been aware of the existence of the "extra duties roster", at least until Dr Dunbar sought to have some of her hours converted to salary. It certainly was not common knowledge as evidenced by Mr Armstrong's Memorandum of 17 December 2003:

> *"Thank you for bringing this to my attention, as I was not aware of the arrangements whereby the doctors were accruing time off in lieu (TOIL) for working additional sessions."* (Exhibit A10)

[214]The applicant argued that the Memorandum of 31 October 2005, and therefore the directive ensuing from that, only referred to his perception of "overtime". However the Memorandum also referred to the need for pre-approval for "time off in lieu or other arrangement", which in the context of the Memorandum was embraced by the term "overtime". From evidence the only occurrence of "time off in lieu" being requested was for hours worked on the "extra duties roster" and at that point in time no other doctor was engaged in the "roster".

[215]It is understandable that Ms Harpur did not refer to the "extra duties roster" by name as alluded to above as I suspect it was not a term with which she or Dr Cerchez was familiar. Had Ms Harpur's communication been the only one, the applicant may well have had grounds for complaint.

[216]Exhibit R2 is an email from Dr Cerchez which pre-dated Ms Harpur's directive to the applicant dated 31 October 2005. It was submitted to the Full Bench (T12855) at the original appeal in this matter in July 2007. It is an email outlining Dr Cerchez's concerns over the applicant's professional performance. However he also raises the issue of the applicant working extra hours, where he said:

> *"As well, I need to understand the system of time off in lieu that you operate with early starts and lunch hours, as it is not in keeping with the award or the needs of the Health Centre in relation to patient demand.*
>
> *…*
>
> *I again request that we formally meet …"*

[217]It is quite clear Dr Cerchez was referring to "extra duty roster" hours. It is reasonable to accept the applicant at this stage, prior to the Memorandum of 31 October 2005, was aware Dr Cerchez had queries about his claims for early morning and lunchtime hours.

[218]On 10 November 2005, in response to the applicant seeking retrospective approval for "extra duties roster" hours, Dr Cerchez wrote to him: firstly denying his request; and secondly, reiterating the need for pre-approval as directed by Ms Harpur earlier.

[219]In this instance there is no ambiguity in the directive of Dr Cerchez. He is clearly addressing the applicant's claim for "extra duty roster" hours. Although he did not use the nomenclature "extra duty roster", his reference to "leave in lieu arrangements" leave no doubt as to the matter to which he referred.

[220]The applicant confirmed he ceased claiming for his interpretation of "overtime" on receipt of Ms Harpur's Memorandum. He incorporated the "additional rostered hours" into his normal timesheets from the date when he returned from leave in August. Therefore the only claim he could have made was for "extra duty roster" hours.

[221]There was no evidence educed to indicate that the applicant objected to Dr Cerchez refusing to approve his retrospective claim. There was no correspondence adduced that the applicant even acknowledged Dr Cerchez decision. Although, in his Memorandum, Dr Cerchez offered to discuss the matter; the applicant, from evidence, ignored the gesture.

[222]Regardless of what arrangements, if any applied before 31 October 2005, management have an obligation to monitor the number of hours employees work and also to adhere to the Departmental protocol and the agreement.

[223]On a number of occasions Dr Cerchez offered to meet with the applicant to discuss his perceived need to work extra hours. As the Manager, Dr Cerchez had every right to expect the applicant's cooperation to do this. The applicant consistently refused to meet Dr Cerchez. I will address the impact of this later.

[224]The applicant seeks payment for the "extra duties roster" hours he worked for November 2005 through to April 2006 inclusive. He cited Clause 14 of the agreement, which refers to custom and practise continuing while a dispute is in progress. I will address custom and practice later in the decision. This dispute only arose in March 2006. Until that point at least, the applicant chose to ignore the directives of Dr Cerchez and Ms Harpur, including Dr Cerchez's directive of 28 February 2006. Up until that point the applicant did not directly challenge any of the directives issued. The directives were consistent with the agreement and Departmental protocol.

[225]The applicant wilfully refused to follow directives, even after being denied retrospective approval for October's "extra duty roster". He made no objection to having the approval denied for the October claim. He could have expected no other outcome for future retrospective claims than a continuation of Dr Cerchez's position not to accept them. Yet he persisted in claiming the time up to his suspension. The applicant's actions have no logic and, in my view, they reflect the hubris he exhibited throughout his dealings with Dr Cerchez.

[226]The applicant said he only realised he had not been credited with the TOIL he had claimed for November, December and January during January 2006. There was no indication if the applicant had been submitting these particular timesheets on a monthly basis or had lodged them all together in January. Regardless of when he submitted the timesheets, as alluded to above, it is my view that he could not expect a different outcome from that which he received for the October timesheet.

[227]In his Memorandum of 28 February 2006, Dr Cerchez reiterates the requirement for pre-approval of overtime. He specifically mentions that the applicant's "leave in lieu" requests for November, December and January had not been approved because the applicant did not seek and receive approval before working the additional hours. The applicant now having received no less than three directives continued, he said, to work "extra duty roster" hours in March and April without pre-approval.

[228]Up to 28 February 2006 the Department had not directed the applicant to cease participating in the "extra duty roster". To that point it is evident management was seeking justification for the extra hours; not an unreasonable request in any environment. There was nothing in the Memorandum which would have prevented the applicant seeking approval in advance to work any extra hours he felt were necessary. The applicant was given fair notice that he had to justify extra hours by seeking pre-approval. Even if he construed the first notification as ambiguous, the second and third

memoranda as well as Dr Cerchez's original query were perfectly clear. He was afforded the opportunity to discuss the matter with his line Manager, he did not.

[229]Given that the applicant did not, it appears, argue against the directives of Ms Harpur or Dr Cerchez until March 2006, it is my view that Dr Cerchez and the other managers managed the situation as best they could, given the extremely difficult work environment created by the applicant. The applicant was told on numerous occasions of the expectation of the Centre management and he simply ignored the numerous management directives.

[230]The applicant said he had not sought clarification because it was clear to him that the memoranda were not targeted at the "extra duty roster" hours or the "additional rostered hours". The intent of these memoranda could not be clearer, as alluded to above. The applicant's claim of his interpretation of the memoranda, in my view, is simply a fabrication to justify his refusal to follow directives.

[231]The Minister has no obligation to reimburse the applicant for "extra duty roster" hours claimed to have been worked by him for the period November 2005 through to April 2006 inclusive, for which he did not seek pre-approval. I so find.

Practice Manager - Bookings

[232]The applicant submitted that the 10 "additional rostered hours" had been approved by management and the "extra duty roaster" had been approved by dint of its longevity, therefore he was entitled to work those additional hours. He asserted that these hours were indeed his contracted hours. The view must then be, that the applicant was resolute in his conviction that he was "entitled" to claim these hours. Yet when confronted as to the reasons why he persisted in working these hours he attempted to implicate the Practice Manager, Ms Green, as being at fault. The applicant claimed that when he returned from leave the appointments were already in the practice diary. He made the claim that Ms Green continued to make bookings which amounted to 76 or more hours per fortnight. He argued that Ms Green continued to book patients during the "extra duty roster" times up until his suspension.

[233]Indeed the applicant expressed his view that:

> *"It was understood that I worked 72 hours per fortnight and that was what was entered in the appointments diary; …"* (transcript p40, L10)

[234]The applicant provided the Commission with no evidence of who at the Centre understood that he worked such a regime or who, other than himself, would have instructed the staff to that effect.

[235]Although the applicant implicated Ms Green in perpetuating his engagements in the "extra duties roster", it was noted that where the "extra duties roster" timesheets adduced for September 2005 through to April 2006 appear they only had the applicant's handwriting on them, even the date at the top of the pages. The authority section "Checked and correct _____ Senior Medical Officer" had been left blank. It is questionable if Ms Green was aware of the existence of these particular timesheets. There is no evidence that these timesheets were ever viewed by anyone at the Centre other than the applicant.

[236]The applicant, assisted by his partner Mrs McCall, attempted to show Ms Green as less than competent. The history of the applicant's behaviour towards Ms Green is well

documented in matter T12919. I disregard the inference made by the applicant and Mrs McCall.

[237]Exhibit A19, a sample of the manual appointment diary from 2004, shows the applicant did not work Wednesday afternoons. Exhibit M10, a compilation of the applicant's hours from August 2005 until April 2006, shows the applicant did not work on Wednesday afternoons or Saturdays. Exhibit M13 is an extract from the electronic appointment diary for February and March 2006; again it shows that the applicant did not normally work on Wednesday afternoons or Saturdays.

[238]One must pose the question as to why Ms Green kept those times free of appointments. It would be highly unlikely that she would have done so of her own volition. A more logical assumption would be that she was instructed to do so by the applicant.

[239]If Dr Cerchez and Ms Harpur were not aware of the applicant's contracted hours during the period in question, it is highly unlikely that Ms Green would have been either. In the same vein as keeping Wednesday afternoons and Saturdays free, it is most likely Ms Green was following the applicant's instructions in accepting appointments throughout the remaining consulting times during the week. These instructions may have been direct to Ms Green by the applicant or by his omission to draw her attention to the excess hours he was accepting.

[240]The applicant, like all the other doctors at the Centre, was trusted to manage his hours according to his contract. It should not be expected of the Practice Manager to act as a time keeper for individual doctors.

[241]There is no evidence to support the applicant's inference that Ms Green, as Practice Manager, was responsible for or had any input to the hours the applicant worked on his return from leave up to his suspension.

Recruitment Process

[242]On the issue of the directive to limit his hours to the contracted 62 per fortnight, the applicant argued "*… it was unfair to replace my rostered hours with a locum doctor …*". (transcript p.82, L.5) Although the applicant made this allegation and had communicated such to his colleagues at the Centre, it was pointed out by Dr Cerchez that the doctor to whom the applicant referred was not a locum.

[243]The applicant understood the process of appointments. In fact he demonstrated that in accessing some available consulting hours in 2004.

[244]The applicant, Mrs McCall and Dr Dunbar all concurred on the limited resources and the continual movement of doctors to and from the Centre. They also concurred that doctors negotiated the hours they wanted to work and the times within which those hours fitted. It is reasonable to assume that once a suite of hours had been agreed, then those hours would form the basis of the contracted hours between the doctor and the Department; as indeed had been experienced by the applicant himself in 2004.

[245]The applicant acknowledged that the 10 "additional rostered hours" he alleged were allocated to him were required because of a shortage of doctors to meet patient demand. He also acknowledged that this occurrence was situational. If the shortage of doctors was alleviated, meaning there was a full complement of doctors available, then it

follows that each doctor would work his negotiated hours and there would be no need for overtime, unless in an emergency.

[246]Dr Jackson, the new recruit, wanted to work full time. It follows that his time would be made up of the excess hours the other doctors were working over and above their contracted quota. In fact the applicant agreed with this proposition:

> *"THE COMMISSIONER: … the point of recruiting people was supposed to take the workload off the other doctors.*
>
> *DR BENNETT: Yes."* (transcript p73, L.35)

[247]Dr Cerchez, in his response to the applicant of 28 February 2006, said that should there be excess hours available to redistribute after Dr Jackson's allocation it would be appropriate to seek expressions of interest from all the doctors before re-allocating them. One would accept this as a sensible management response offering an equitable opportunity to all the staff.

[248]Although the applicant alleged unfairness, the evidence showed that Dr Cerchez followed the same process in allocating hours to Dr Jackson as had been used to allocate the extra hours to the applicant in 2004. The applicant's claim of replacing "my rostered hours" has no basis in fact.

[249]As has been shown above the applicant had no entitlement to the "additional rostered hours" and failed to obtain pre-approval for the defunct "extra duty roster" hours. His allegation of unfairness in Dr Cerchez's allocation of hours to Dr Jackson is unfounded. I so find.

Reversion Of Hours

[250]I turn now to the directive given to the applicant on 28 February 2006 to revert to his contracted 62 hours per fortnight from that date. One must pose the question: was this directive reasonable?

[251]Dr Cerchez said that in January 2006 he discovered that the applicant had been working in excess of his contracted hours without approval. The applicant's request of 10 February 2007 to have these hours recognised as a full-time load appears to have been the catalyst for the directive. I accept Dr Cerchez's assertion that he presumed the applicant was working his contracted hours from the time he returned from leave. He had no reason to suspect otherwise.

[252]*Exhibit A2(18) of 2006*, an email from Dr Cerchez to the applicant dated 3 March 2006 follows the numerous attempts by Dr Cerchez to meet with the applicant in a bid to resolve the issue of excess hours. To this point the applicant had ignored Dr Cerchez's directives, the email states:

> *"The need to provide effective and efficient operation of the Health Centre requires that I alter the roster. We require consulting room Number 1 on Monday and Thursday morning so you are not rostered on for work at these times, effect immediately. As indicated, I have attempted to negotiate this with you on a number of occasions, however, your failure to meet, or provide any reason for not meeting, has required me to make this decision without your input.*

> *Further discussions about the roster would only need to occur if there is an alteration to your substantive hours. As offered on a number of occasions I am happy to meet with (sic) about any issues you may have, including your approved hours, however until such discussions take place rostering of doctors, needs to meet the needs of the existing staff hours."*

[253]The applicant's response to *Exhibit A2(18) of 2006*, also dated 3 March 2006, was noted in the exhibit as follows:

> *"Unfortunately I will have to ask the State Service Commissioner to rule on your action."*

[254]*Exhibit A2(20) of 2006*, dated 21 March 2006, in which the applicant wrote to Ms S Powell, said:

> *"I have now had the opportunity to consult with my industrial advisor and the State Service Commissioner about Dr Cerchez's concerns that I am working above my contract hours fortnightly.*
>
> *If the wish is to reduce my hours I am advised the appropriate reduction would be … This will bring my hours back to 62."*

[255]Such a response is curious considering that the applicant's next action on 24 March 2006 was to notify Ms Powell that he was preparing a formal grievance against Dr Cerchez as he considered his directive to be "discriminatory, retaliatory and an exercise in victimisation". This appears to be the first time the applicant had actually disputed the directives by Dr Cerchez and earlier Ms Harpur.

[256]From the applicant's response of 21 March 2006 it would be reasonable to assume that his industrial advisor had suggested the applicant accede to Dr Cerchez's directives. However, the applicant obviously did not agree with the advice hence the threat of raising a formal grievance. Although the applicant cited consultation with the State Service Commissioner, I simply do not believe that the State Service Commissioner would have given the applicant industrial relations advice regarding a dispute which was on foot. I interpret the applicant's claim as exaggeration.

[257]Similarly when the applicant claimed that his hours had been reduced to 56, but was paid for 62 hours; it was shown that in fact he was rostered on for 62 hours. Again an exaggeration.

[258]Dr Cerchez's evidence portrays the applicant as an unproductive employee. Perusal of Exhibits M10 and M13 clearly show the applicant was in the habit of blocking out large blocks of time with the notation "do not book". Given that he had a half hour each session for paperwork one must question his motive.

[259]Dr Cerchez cited other aspects of the applicant's behaviour which contributed to his assessment that the applicant was unproductive. I found Dr Cerchez's evidence to be compelling. It seems reasonable that as Manger, Dr Cerchez would want to minimise the negative impact the applicant was having on the effectiveness of the Centre by not extending his contact hours. The establishment of the quantum of hours contracted by a doctor is a matter of negotiation. Management have no obligation to accede to a request for extra hours, of itself. Consideration must be given to the needs of the facility, matched with the particular doctor's skills as well as the availability of hours before making a decision. It is a recognised business process.

[260]Given the process Dr Cerchez adopted, of continually attempting to communicate with the applicant even when he had made the decision to limit the hours, Dr Cerchez still invited a meeting; the applicant's abject refusal to in any way participate in seeking resolution; limiting the applicant's hours to those agreed in his contract was not an unreasonable action. I so find.

Refusal To Meet

[261]I turn now to the impact on the dispute resolution process that the applicant's decision to refuse to speak directly with Dr Cerchez has caused.

[262]The keystone of the agreement, at Clause 14 - Grievance and Disputes Settlement Procedure, is communication. The clause is quite clear in it's intent:

> *"The objectives of this procedure are to promote the resolution of grievances and disputes by measures based on consultation, cooperation and discussion; …"*

[263]The applicant's position negated any opportunity for "consultation" or "discussion". His attitude throughout has been to frustrate any semblance of "cooperation". There was evidence educed which demonstrated Dr Cerchez's numerous attempts to consult with the applicant, all to no avail. Evidence was also educed of other senior managers advising of the need for the applicant to communicate with Dr Cerchez, again to no avail.

[264]For much of the time the applicant simply ignored overtures by Dr Cerchez, regardless of the issues raised. When he did respond, a review of the emails sent by the applicant to Dr Cerchez shows a consistent theme of curt replies and, in most cases, avoiding the topic raised in the original correspondence.

[265]A clear example of this is, the applicant did not reply to Dr Cerchez's Memorandum of 3 October 2005 which addressed TOIL the first time. The applicant avoided addressing the content of Ms Harpur's Memorandum of 31 October 2006 in his reply. He also avoided addressing, or even acknowledging, the content Dr Cerchez's Memorandum of 28 February 2006 in his reply. The applicant's recalcitrance frustrated any opportunity to resolve the instant dispute and others disputes referred to during the hearing of this matter.

[266]Although the applicant refused to abide by the process outlined in Clause 14(a) of the Agreement, he asserted that the Minister had breached the Agreement by failing to adhere to (f) of the same clause, which refers to the continuation of custom and practice while a dispute is in the process of being resolved.

Custom And Practice

[267]I now address the alleged breach of the "custom and practice" provision, Clause 14 of the Agreement.

[268]In the first instance in order to be affected by this provision an activity must be proven to be "custom and practice".

[269]I turn to the applicant's assertion that the "additional rostered hours" was such a longstanding arrangement that it brought his contracted hours up to 72 per fortnight.

[270]As referred to above there is no evidence that the "additional rostered hours" were approved at any point in time. The applicant therefore could provide no framework within which the hours he alleged were approved would fit.

[271]As also referred to previously, the applicant sought annual leave equivalent to 62-hours per fortnight for the three-month period May to August 2005. He made no claim for additional hours to reflect his alleged new contract hours. Logic would dictate that one would claim leave entitlements commensurate with one's basic employment arrangements. In not doing so the applicant, in my view, confirmed that he understood and accepted his employment arrangement of 62-hours per fortnight.

[272]On his return from leave in August 2005 the applicant began working 10-hours per fortnight more than his contracted hours. He neither sought nor was given permission to work these hours.

[273]For an activity to be considered "custom and practice" it must be legitimate. The applicant took advantage of the trust put in the doctors at the Centre to manage their own time. He took advantage of the disruption in the practice, caused by his own behaviour as described by Dr Cerchez, to access 10 extra hours per fortnight by stealth.

[274]The applicant cited T10165 as a longstanding arrangement similar to that which he alleged. At paragraph [5] of that decision it stated:

> *"Put simply, Mr Matthewson's claim is based upon the assertion that it was necessary for him to work overtime every day in order to complete the tasks that he was required to perform … with the knowledge and approval of Mr Barry Titmus …"*

[275]On the balance of probability, Shelley DP found that the applicant had worked overtime. The gist of this case, however, was the attempt to offset over-award payments and allowances against underpayment of overtime. The evidence showed that the work Mr Matthewson performed in the mornings and at lunch time was essential to the running of the operation. That Mr Matthewson's activities were known to his manager was accepted.

[276]In the instant matter, the applicant argued that the need for him to work late in the afternoon was to check on any x-rays or pathology which may have had come in because the SMO was only part time and he was the senior doctor, it was his responsibility.

[277]Unlike T10165, the circumstances are somewhat different in the instant matter. In T10165 the applicant's involvement in regular overtime was acknowledged as integral to the function of the operation and his participation was known to management. In the instant matter, however, the applicant's assertion that it was necessary for him to be in attendance late in the day was is simply false. Perusal of the appointment diary, provided by the applicant and those provided by the respondent, show that he did not work late every day. In fact it was shown that he had Wednesday afternoons off and he did not stay late on all the other days. Yet he claimed as the senior doctor it was his responsibility to be in attendance. It is evident the applicant did not discuss the need for his attendance with Dr Cerchez, nor indeed was Dr Cerchez aware of his practice. The applicant made no mention of who took this responsibility when he was not at the Centre.

[278]The applicant's reference to the "additional rostered hours" as being a 'longstanding' practice is deliberately misleading. He legitimately worked extended

contract hours for four months in 2005 as the Acting SMO. Beyond that time he had no claim to these hours.

[279]There is no validity in the applicant's claim that the history of his working 10 "additional rostered hours" constituted a custom and practice. I so find.

[280]I now turn to the claim by the applicant that the "extra duty roster" was custom and practice and, as such, he should be entitled to claim these hours as part of his contracted hours from October 2005 onwards.

[281]From the evidence of the applicant, Dr Dunbar and Mrs McCall, the doctors at the Centre chose to participate in the "extra duty roster" or not. Some participated for a time then ceased of their own volition. Participation does not appear to have been a condition of employment. From evidence provided, when a number of doctors participated in the roster, some chose to be paid for the hours they worked, others to have the hours credited to their annual leave. There was no evidence to suggest whether the hours the participants worked in this roster were part of their 'establishment' as with Dr Dunbar, or overtime as with the applicant.

[282]Mr Baker asserted that the "roster" had been defunct for some time.

[283] Dr Cerchez said the roster was not necessary. He cited a conversation he had with the applicant wherein it was agreed that there was no need to have doctor coverage at lunch times.

[284]This was not refuted.

[285]Yet the applicant continued to claim TOIL for lunchtime hours.

[286]Ms Banman asserted that the Centre's operating hours were 8.00am until 6.00pm therefore there was no need of such a roster since doctors were on site throughout the day. The Commission was not made aware when this particular arrangement started.

[287]There was evidence educe which confirmed that the existence of the "extra duties roster" was not common knowledge at the senior levels of management. Dr Cerchez gave evidence that he could not find any reference to the roster in any of the Centre's procedures. There appears to be no understanding of how it came about or how it had been sustained. The "extra duty roster" was obviously not a part of the Centre's management strategy. It was not known to management and there was no compulsion for doctors to participate. From the evidence of Dr Cerchez and Ms Banman the "extra duty roster" was not necessary and, out of all the doctors, only one was availing himself of it and even his participation varied from week to week.

[288]The applicant argued that there was a designated "early morning" doctor and a "lunchtime" doctor. He argued that these activities were denoted in the appointment diary by the Practice Manager.

[289]Perusal of the examples of the paper diary shows that although "early" is written on four occasions above the applicant's name: on one occasion there were four other doctors there at the same time; on two occasions he only had appointments after other doctors had started; and on one occasion he was earlier than others. The appointment diary also showed that he used the early sessions to do paperwork. There was no evidence educed as to who wrote in the diary "early" and there was no delineation of "lunchtime" doctor. Perusal of the electronic diary shows no delineation of "early" or

"lunchtime". The applicant's claim is not substantiated which casts further doubt on the veracity of his evidence.

[290]The applicant again cited matter T10165 in support of his claim that the "extra duty roster" constituted a custom and practice. As with the claim for "additional rostered hours" there is a marked contrast between the instant matter and T10165. In T10165 it was shown that management were aware of Mr Matthewson working extra hours and indeed the need for him to do so. There was no question that his extra hours were acknowledged as part of his day's work; his work was seen as integral to the operation of the business.

[291]In the instant matter, the "extra duty roster" was clearly unknown by senior management. Management were not aware the applicant was engaging in these extra hours. It was shown that the "extra duty roster" was not necessary for the operation of the Centre. The haphazard nature of participation in the roster clearly showed it was ineffectual.

[292]I find no precedent in the decision in matter T10165 to persuade me that the applicant's participation in the "extra duty roster" hours was either approved by dint of longevity or constituted a custom and practice.

[293]The applicant also cited Exhibit A8[12] in support of his claim that custom and practice should prevail. The matter concerned the long-term practice of staff at Sydney Zoo accessing a flexi day in lieu of extra hours worked over a month cycle. It was understood by management that the nature of the operation necessitated personnel working regular extra hours. However, a particular department in the Zoo stopped the flexi-day practice. The outcome of the matter was that the practice was seen to be longstanding, that there was no evidence of consent in the removal and that it should continue. It was also found that the award under which the applicants in this matter worked had been written with the expectation of employees accessing flexi days. The decision cites Clauses 9 and 10 which outline how, precisely, the flexi days were to be accumulated and how they were to be taken. The decision also noted that the two applicants *"… would liaise with their supervisor Mr Latham to have their flexiday allocated".*

[294]Further in that decision Ritchie C also found that the flexi days could be implied into the applicant's employment contract. The decision also stipulated:

> *"For a practice to constitute a binding usage it must be shown to be well known and certain in its terms."*

[295]In the instant matter there was no evidence that any formal agreement had been made as to who would participate in the "extra duties roster", how it was to operate or how it was to be administered. There was evidence that in contrast to Exhibit A8 the "extra duty roster" was not a widely known practice. Unlike Exhibit A8, the "extra duty roster" was not underpinned by an award, nor did it have general acceptance within the Centre. Unlike the instant matter where participants opted in and out of participation, in the matter cited in Exhibit A8 the employment condition applied to everyone.

[296]Again in Exhibit A8, the matter cited the applicants as being in dialogue with their supervisor to access flexi days by agreement. In the instant matter we have the applicant who, over period of six months, refused to communicate with Dr Cerchez on

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[12] IRC NSW PSA & the Zoo [2007] NSWIR Comm 1080, Ritchie C, dated 23 October 2007

the matter of the "extra duties roster" despite numerous attempts by Dr Cerchez to do so.

[297]Also in Exhibit A8 it cited the respondent, without consultation or agreement, withdrew a recognised widespread condition of employment. In contrast, in the instant matter, after six months of attempting to discuss the issue with the applicant and three clear directives being ignored, Dr Cerchez directed the applicant to only work his contract hours. Until that point in time he was not directed to cease working the "extra duty roster". This was not a unilateral action, nor a matter that had not been communicated to the applicant. It is my finding that the responsibility for the lack of dialogue rested solely with the applicant.

[298]In addressing "binding usage", Ritchie C outlined the requirements to be "well known" and "certain in terms". In the instant matter the "extra duties roster" was neither well known nor certain in its terms.

[299]I find no precedent in Exhibit A8 which would convince me of the applicant's claim that the "extra duty roster' was custom and practice.

[300]The applicant has failed to prove that the hours he termed "extra duty roster" were a custom and practice. I so find.

[301]The applicant argued that the "additional rostered hours" and the "extra duties roster" hours were an implied extension of his original contract.

[302]Mr Baker, in his summing up, cited Exhibit M15[13] as being a precedent set in a matter contained within the argument. At paragraph 131 of that decision it outlines the principles behind incorporating implied terms in a contract:

> *"The conditions that must be applied before a court may imply a term into a contract were set out by the Privy Council in BP Refinery (Westernport) Pty Limited v Shire of Hastings:*
>
> > *for a term to be implied, the following conditions (which may overlap) must be satisfied:*
> >
> > *(1) it must be reasonable and equitable; (2) it must be necessary to give business efficiency to the contract, so that no term will be implied if the contract is effective without It; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any expressed term of the contract."*

[303]Applying these criteria to the "extra duties roster" I find the following:

(1) It must be reasonable and equitable:

As shown above, that the roster had no basis in the needs of the Centre as is clear by the fact that over a short period of time only one doctor, the applicant, chose to engage in it. It was not necessary therefore and its continuation was not reasonable. Participation in the roster appears to have been voluntary therefore equitability would not be a measure.

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[13] Australian Rail, Tram and Bus Industry Union v Rail Infrastructure Corporation (C2006/3723, Hamberger SDP, Sydney 22 March 2007

(2) It must be necessary to give business efficiency to the contract so that no term will be implied if the contract is effective without it:

It was made clear that the roster was not necessary or desirable. Its effectiveness is obviously questionable if all but one person is participating in it. The Centre currently runs without the roster and there was no evidence educed of any adverse effect. The contract is effective without it.

(3) It must be so obvious that it goes without saying:

It is clear that senior management did not know the practice was happening. Once senior management were aware of the practice they sought an explanation from the applicant who consistently refused to cooperate. The practice was alien to the Centre's patient care strategy.

(4) It must be capable of clear expression:

The applicant made much of the importance of the "extra duties roster", whereas Dr Cerchez gave evidence that the lunchtime coverage was not necessary nor were early mornings. It should also be noted that from the appointment diary the applicant often did not see patients during his early morning session, but chose to block off the time to do paperwork.

(5) It must not contradict any expressed term of the contract:

That the Head of Agency must agree to "excess hours" is stipulated in both the Agreement and the award. The applicant refused to seek approval to participate in the "extra duties roster" even after being directed to.

[304]In all of the five measures the applicant has failed to show that the "extra duty roster" was indeed "custom and practice". I agree with Ms Harpur in her Memorandum to the applicant *(Exhibit A2(27) of 2006)* that the custom and practice to be adhered to was the applicant's contracted 62-hours per fortnight.

[305]The applicant's claim that the "extra duty roster" should prevail as a "custom and practice" is not substantiated. I so find.

Management Prerogative

[306]Both parties adduced authorities with respect to management prerogative. The theme throughout the authorities was that management could not unilaterally change conditions of employment. Another important theme was that management does have the right to manage their business as effectively and efficiently as is practicable. In the instant matter management identified a practice, the "extra duty roster", as not necessary and not in keeping with the service the Centre was offering to patients. Further it came to management's attention that only one doctor at the Centre was participating in the roster. Management took a decision to discontinue the practice.

[307]However management did not immediately put a stop to the roster; they sought of the only doctor participating in it that he should follow Departmental protocol and apply for pre-approval before he undertook the work. The applicant, as has been shown on numerous occasions, refused to follow the directive. Over a period of five months management sought, also on numerous occasions, to discuss the matter with the

applicant, he refused. Not only did he refuse to communicate with his Manager over the matter he ignored the three directives seeking pre-approval.

[308]The applicant argued that the directives were ambiguous and were not specific to the "extra duty roster". Even the most cursory perusal of the four written communications leaves one in no doubt that they were addressing the "extra duty roster". As has been shown previously, this position was simply a ploy the applicant used in justifying his behaviour of ignoring the directives.

[309]The applicant stated that it was unfair that he was the only doctor who had been sent the Memorandum of 31 October 2005. As it happened, at that time he was the only doctor claiming TOIL for an activity. There was no evidence educed to suggest any other doctor contravened the protocol to seek pre-approval before working extra hours. It was certainly an obligation on management to make the applicant aware that he was not following protocol.

[310]In my view management at the Centre, in its endeavour to communicate with the applicant over some five months, acted in a very reasonable and somewhat restrained manner. Dr Cerchez had no alternative but to direct the applicant to revert to his contracted hours as a last resort to gain control of an unacceptable situation. If there is one criticism of the Department it is that it acceded to the applicant's request to have his timesheets bypass Dr Cerchez for approval. It would appear this gave the applicant room to practice his deception without detection for a longer period.

[311]In this matter the management at the Centre exercised management prerogative in a fair and reasonable manner. I so find.

Dr Dunbar's TOIL Conversion

[312]On the matter of Dr Dunbar's success in converting TOIL to wages, I now address the applicant's allegation that he was discriminated against by not obtaining the same outcome.

[313]It is apparent from Dr Cerchez's evidence that he treated both requests quite independently, yet it appears he applied the same logic. In the case of Dr Dunbar the evidence was that she provided specific skills in dealing with female patients. The application of these skills, we were told, was time consuming and limited the number of patients Dr Dunbar could see. Dr Cerchez recognised a demand for Dr Dunbar's particular skills and, as Manager, saw it appropriate that she not have to continually apply for additional consulting time, but have that time incorporated in her routine day. He also made the point that Dr Dunbar's request fell within her establishment hours. It is evident Dr Cerchez assessed the needs of the Centre at the time and evaluated Dr Dunbar's contribution to the functioning of the Centre. He discussed the matter with Dr Dunbar and negotiated an outcome. Both Dr Dunbar and the Centre appear to have been satisfied with the arrangements.

[314]The applicant sought the TOIL he accrued be converted into hours so he could access a particular remuneration package. There is certainly nothing wrong in that. The applicant's request came some six months after that of Dr Dunbar. In contrast to Dr Dunbar however, the applicant offered no justification for the need to work the TOIL hours in the first place. Evidence is that on at least three occasions he was directed to justify his "extra duty roster" hours and simply ignored the directives. He refused to speak to Dr Cerchez about the matter let alone provide any justification.

[315]From evidence Dr Cerchez saw the applicant as unproductive and cited a number of examples where his contribution lagged behind other doctors and expected convention. The applicant's obstructive behaviour towards redeeming Medicare fees and his manipulation of the appointment diary are but two examples of his impact on the performance of the Centre in delivering patient service.

[316]There was also the availability of hours to consider. At the time Dr Dunbar sought the conversion of her hours it appears her request was within her establishment. Some months later a new doctor had been recruited who sought and was given a full workload from the uncontracted hours available, as had been the practice throughout. The environment at the Centre was obviously different at the two junctures.

[317]Exhibit R1 (T12855) is an email dated 27 April 2006, from Dr Cerchez to Ms Harpur, written after the applicant's suspension. In it Dr Cerchez outlines the logic behind converting Dr Dunbar's TOIL to paid hours and his reasoning for not agreeing to the applicant's request. He said:

> *"The issue of "time in lieu" as was practiced at CCHC is a complex one, as there is no provision for the way it operated for Specialist Medical Officers in the Salaried Medical Practitioners Award … I was also unable to find any documentation at the centre as to how the system evolved and there was no documentation of how TOIL was allocated apart from a running time sheet which was written on by the doctors involved. … There were, therefore obvious differences and inequities in the way in which doctors doing the same work at the centre were being remunerated for the hours they did.*
>
> *…*
>
> *The need for doctors to require extra time to complete the requirements for patient care arises from time to time on an irregular basis. … A discussion occurred late last year with Dr Dunbar that she was keen to increase her hours and assist with the Saturday roster by working every third Saturday. … I also discussed with her a recognition that she had a number of complex patients who required extra time …It was also acknowledged to her that she was generating the appropriate billing … and this was good for the long term viability of the Centre.*
>
> *Dr Bennett indicated a large number of hours each month that were "additional work". He would attend the Centre early most mornings, despite no demand or requirement to do so. He would also claim daily additional hours. There was no evidence that these hours were required from a "complexity" audit of his cases and no evidence that in fact he was attending to clinical duties by his early attendance or late departures. There were also a large number of inefficient processes in the way he made his own appointments, and an exceptionally long time allocated for house calls in hours. I attempted to have a discussion with Dr Bennett on a number of occasions about his additional hours and did indicate this to him via a number of emails from about October last year. He refused all meetings and refused to have such a discussion. The directive was given in November last year, by Siobhan that all such additional hours should be approved before hand. He never sought such approval but kept submitting TOIL time sheets.*
>
> *There was no "formal" process in place for conversion of TOIL hours as this was not a formal arrangement under the award. A change of rostering did not require that the previous process continued. The matter was resolved*

with Sally by discussion and mutual agreement. No such opportunity was possible with Dr Bennett."

[318]The process adopted by Dr Cerchez in evaluating Dr Dunbar's request and the applicant's request for conversion of TOIL was the same. However Dr Dunbar presented a case which was accepted, while the applicant simply refused to even discuss his request. Dr Cerchez was left with little choice but to refuse the applicant's request on those grounds alone. Dr Dunbar's request was within her establishment. The applicant's request was in excess of his contract hours. The staffing arrangements were different in the two cases with the engagement of Dr Jackson and before him Dr Cherry. Further, in both cases, Dr Cerchez also evaluated the worth of the individuals' contribution to the viability of the Centre and educed two very different values. In my view it is not a valid argument that the two decisions necessarily need to be the same.

[319]The applicant was not discriminated against by Dr Cerchez in denying his request to have TOIL converted to salary. I so find.

[320]I turn now to the questions posed by the Full Bench in their findings of the appeal[14]:

1) Is Dr Bennet entitled to payment for the hours he worked in accordance with Extra Hours Roster?

   By Extra Hours Roster I understand the Full Bench to be referring to the "Extra Duties Roster". The applicant is not entitled to receive payment the "extra duties roster" as outlined in my decision above.

2) When and by what means was the "Extra Hours Roster" discontinued as claimed by the Respondent?

   The "extra duties roster" became defunct over time. It was shown the roster was not necessary and the applicant's persistence in working it had no impact on the effectiveness of the Centre's provision of service. After five months of the applicant refusing to discuss the issue, management directed him to revert to his contract hours of 62 hours per fortnight. The option was still open to him to justify the need for his hours and seek pre-approval.

3) Why was Dr Dunbar's position in respect to the "Extra Hours Roster" different to that of Dr Bennett?

   As has been shown above, both applications were treated individually. They were both assessed on merit, on the individual's contribution to the business and the availability of unallocated hours. The applications were also lodged six months apart in two different staffing environments.

4) What were Dr Bennett's contract hours?

   The only evidence presented and substantiated was that the applicant's contract hours were 62 per fortnight.

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[14] T12855 of 2006, Full Bench, Dr Stephen Bennett v The Minister Administering the State Service Act 2000 re: Appeal of T12723

5) Were there any changes to his contract hours that needed to be addressed?

The only evidence of any change to the applicant's contract hours was his participation as the Acting SMO for two fixed-term contracts amounting to four months in 2005. However the applicant refused to acknowledge that he was entitled during those two periods to work 76 hours per fortnight.

6) When Dr Bennett was required to work contract hours of 72 hours per fortnight, what was the status of the additional 10 hours?

There is no evidence that the applicant was required to work contract hours of 72 hours per fortnight.

7) What process was undertaken to remove the additional 10 hours from Dr Bennett's contract hours?

There is no evidence that the applicant had an additional 10 hours added to his contract. The applicant was directed initially to seek pre-approval for extra hours, which he ignored and eventually he was directed to revert to his contract hours of 62 per fortnight.

[321] In summary, I now address the applicant's claims:

1. Payment for hours worked related to the "extra duties roster" for November and December 2005 and January, February, March and April 2006.

   The applicant is not entitled to payment for time worked which was not pre-approved as directed. I so find

2. Restoration of rostered hours to 72 per fortnight which consists of 62 contracted hours and 10 "extra rostered hours" from 6 March 2006, with back pay until 19 March 2007.

   The applicant has no claim to the addition of 10 hours extra hours to his contract of 62 hours per fortnight. I so find.

3. Restoration of at least 7.6 "extra duties roster" hours from 6 March 2006, with back pay until 19 March 2007.

   As per 1. above, the applicant is not entitled to payment for time worked which was not pre-approved as directed. I so find

4. Payment in lieu of denied benefits associated with the salaried specialist package commensurate with a full-time employee from 10 February 2006 to 19 March 2007.

   The applicant did not meet the criteria for participation in the Salaried Specialist Remuneration Package. I so find.

5. Interest appropriate for the amount of back-pay.

   It is outside the jurisdiction of this Commission to address interest payments.

6. A ruling from the Commission that a successful appeal against the Commissioner's decision in matter T12919 of 2007 will require recognition that the applicant was a full-time employee at the time of termination.

   It is not appropriate this Commission deal with a hypothetical situation.

[322]The Commission has not addressed the Minister's concerns over jurisdiction. Given the nature of the findings the Minister's concerns were not an issue. However, it should be noted that I have considerable sympathy with their argument.

[323]The application is dismissed. I so order.

James P McAlpine
COMMISSIONER

Appearances:

Dr S Bennett for himself

Mr P Baker with Ms T Banman and Ms S Powell for the Minister administering the State Service Act 2000, (Department of Health and Human Services)

Date and Place of Hearing:

2006
August 15
September 26
Hobart