

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Dr Diane Van De Mark (Applicant)
AND Tairawhiti District Health Board (Respondent)
REPRESENTATIVES Bruce Corkill, Counsel for Applicant
Emma Huston, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 14 February 2003
FINAL SUBMISSIONS 17 February, 18 February, 24 February 2003
DATE OF DETERMINATION 29 May 2003

INTERIM DETERMINATION OF THE AUTHORITY

The applicant, Dr Diane Van de Mark, is currently employed by the respondent as an obstetrician and gynaecologist. She commenced work with the respondent's predecessor in 1997 and understood at the time that she would be one of two specialist obstetricians and gynaecologists employed. She was told that there was an established pattern of 1:2 call for each doctor, which would continue, and that if either she or her colleague were to be on leave a locum would be engaged to supply cover. However she was also told that on occasions when absences arose at short notice, 1:1 call might be necessary.

It was envisaged by both parties that 1:1 call would be infrequent and not for prolonged periods. Dr Van de Mark told me that this was an important issue for her, because she was a single parent of a young daughter. Unfortunately, the level of 1:1 call turned out to be higher than expected.

This employment relationship problem concerns a dispute about the correct rate of on-call payments to be made to Dr Van de Mark. With the agreement of the parties I have begun by inquiring into the nature and effect of the terms of employment, and have deferred investigation of quantum of remedies (if any) until determination of those issues. However, I have recorded here, in some detail, my findings on a number of factual matters which may impact on any determination of quantum.

Chronology of events

1. On or about 29 August 1997 Dr Van de Mark entered into an individual contract of employment with Tairawhiti Healthcare Limited, a predecessor of the respondent. The terms of the contract were contained in a letter of 19 August 1997 to the Applicant and in the **Senior Medical Officer's Collective Employment Contract** (*the first CEC*) with Tairawhiti Healthcare Limited. The term of this document was from **1 October 1996 to 1 January 1998** and

although the applicant never became a party to it, it is common ground that its terms were incorporated into her individual contract of employment.

2. The contract was amended by letter (the *replacement letter*) dated 23 January 1998 and countersigned by the Applicant on 28 January 1998.
3. The individual contract (as amended) provided for a 1:2 roster and in consideration of that, for a 20% availability allowance. Additional payments would be made whenever the Applicant undertook cover of 1:1 nature. (*“In addition you will be paid an additional \$500.00 for every second day if at any time you are required to do a 1:1 call roster. If you are required to do additional weekends, you will also receive \$500.00 for each additional night at the weekend.”*)
4. This arrangement was not inconsistent with the collective agreement. It is not in itself the subject of any dispute between the parties, but issues do exist about whether the applicant received the correct allowances pursuant to this contract.
5. Evidence was given for the respondent by Mr Dan Madden who is currently line manager in charge of medical, Children’s and Women’s Health Services at Gisborne Hospital. He told me:

“It is common practise in most District Health Boards for doctors to be employed to be on call for a certain frequency (in the case of Dr Van de Mark, one out of every two weekdays/evenings and weekends) and payment for this to be salarised (Dr Van de Mark received a 20% availability allowance as part of her total annual salary).

Under this kind of arrangement, the doctor agrees to be on call for these periods and penalty payments are paid should a doctor be required to be on call more frequently than the contracted periods. Both parties take a chance as to whether they will have to work more or less than their rostered hours. This will depend on several factors including whether there are enough doctors to staff the roster.

In Dr Van de Mark’s case, a 1:2 roster (and salarised remuneration) was arranged. This assumed that Tairāwhiti would employ two obstetricians and gynaecologists...

During 1999 Tairāwhiti gained approval to employ a third obstetrician and gynaecologist...”

6. After **1 January 1998** negotiations began with regard to a new CEC. Dr Van de Mark participated in meetings to discuss those negotiations and the proposed terms of the new contract, along with other members of her union, the Association of Salaried Medical Specialists (ASMS).
7. Dr Van de Mark told me that the subject of on-call allowances particularly for additional on call periods was a contentious and important topic for negotiation. This was confirmed to me by one of the negotiators of the document, Henry Stubbs. He told me that this issue

“was perhaps the single most important issue in successive negotiations with Tairāwhiti DHB. It generated a great deal of heat and was regularly discussed at meetings of ASMS members in the course of successive negotiations before agreement was eventually reached. ...

Central to the negotiation of after hours’ on-call payments was the intention that any new collective contract provision would replace existing individual arrangements that delivered lesser benefit.”

8. Dr Van de Mark told me:

“Ultimately a new clause was negotiated and ratified...

When voting for ratification, I thought the new clause 3.4 (ii) would apply to me; I was shown as party to the CEC in Schedule 1.”

9. Upon ratification (after several months of negotiation) the **Tairawhiti Healthcare Senior Medical and Dental Officers CEC** (the *second CEC*) was expressed to take retrospective effect from **2 January 1998 to 1 July 1999**.

10. The new clause 3.4 (ii) in the second CEC read as follows:

“Roster Availability

The employer shall, effective from 1 November 1998, pay an employee on a roster an availability allowance in two parts which shall be calculated as follows:

- 1. Availability requirement shall be determined on a roster by roster basis and the requirement for locums shall be part of this process.*
- 2. That availability shall be translated to a number of availability periods expected over a year for each individual on that roster (each weeknight = one period; each weekend = five periods).*
- 3. The availability allowance shall be 1% of the employee’s full-time equivalent salary per 13 periods up to a maximum of 130 periods per annum. Thereafter the payment shall be \$400.00 per period from 1 November 1998 increasing to \$500.00 on 30 June 1999. Payment shall be by notification of actual periods worked on a fortnightly basis once 130 periods have been reached (ie, from 1 November 1998.) These rates shall apply to those rosters without registrar cover. They will be halved in the event that registrar cover is available.*
- 4. All other agreements that may exist prior to this agreement with individual employees may only be replaced with Clause 3.4 if agreed by the individual employee.”*

(Emphasis by the Authority.)

Increase in call

11. In **November 1998** the other specialist gynaecologist left Tairawhiti Healthcare Ltd and was replaced by a Dr A. who had only recently arrived in the country and to whom the Medical Council of New Zealand had given a “*probationary class 4 registration.*” This meant that the doctor concerned could practice only as a registrar, under constant supervision by Dr Van de Mark.

12. In practice, this meant that Dr Van de Mark had to assist the doctor concerned with all surgery, and be on call with her to provide supervision if required. Dr Van de Mark describes the period that followed as a “nightmare.”

13. Dr Van de Mark told me that for the first half of 1999 she received periodic payments for this

additional call. Thereafter they ceased, and she was advised that Ms Rachel Haggerty, Health Services General Manager, would meet with her to discuss them. However, Ms Haggerty left the respondent's employ and the discussion never took place.

14. In April 1999 the Health Funding Authority began a massive re-read of cervical smears in the Gisborne area after significant concerns were raised as to the accuracy of smears read by Dr M Bottrill, pathologist of Gisborne. This necessitated considerable follow up work for Dr Van de Mark as she became involved in the care of women whose smears had been misread, and further increased her workload.
15. As already noted, in 1999 approval was obtained for a third obstetrician and gynaecologist in the Gisborne district. It took until January 2000 for another specialist (Dr B.) to be employed. Unfortunately, immediately upon his appointment, Dr A. left. The respondent did not gain a third obstetrician and gynaecologist until the end of 2002, two years later.
16. Because he was employed after approval had been obtained for a third obstetrician, Dr B. was employed to work a 1:3 call roster. In practice this meant that he received penalty payments (pursuant to the third CEC) for being on call more than the 1:3 in his contract, which meant a greater additional payment for being on call the same number of periods as Dr Van de Mark.
17. While these changes were taking place, Mr Madden told me that:

"In the absence of an election to transfer, Dr Van de Mark remained on the roster availability allowance contained in the replacement letter. This meant that she did not receive the smaller availability allowances payable for working a 1:3 roster under the CECs or the CEA. Conversely, it also meant that Dr Van de Mark did not have the increased chance of receiving penalty payments for working in excess of rostered call outs while Tairawhiti was unable to recruit a third obstetrician and gynaecologist..."

...at no time during the term of the Second CEC did Dr Van de Mark advise Tairawhiti, either orally or in writing, that she wished to be paid her roster availability allowance according to the formula contained in the second CEC instead of the formula contained in the Replacement Letter."

Third CEC 2 July 1999 to 31 December 2000

18. Meanwhile, a new CEC the **Tairawhiti Healthcare Senior Medical and Dental Officers CEC** (the *third CEC*) had been negotiated for a term from 2 July 1999 to 31 December 2000. Once again Dr Van de Mark attended the relevant meetings which discussed claims and ratification. Again Dr Van de Mark was listed as party to the document. The roster availability allowance was again the subject of clause 3.4 (ii) of the document. It provided a different method for calculating the allowance; however, like the second CEC it contained the following provision:

"All other agreements that may exist prior to this contract with individual employees may only be replaced by the clause 3.4 (ii) if agreed with the individual employee."

19. Mr Madden told me that:

"during the term of the Third CEC, Tairawhiti and Dr Van de Mark did not agree that the roster availability allowance contained in the Third CEC would apply instead of the provisions contained in the Replacement Letter. I know this because, amongst other things, had Dr Van de Mark elected to be paid her roster availability allowance according to the formula contained

in either the Second or Third CECs there would have been a record in her personnel file and her pay changed accordingly.”

20. Mr Madden told me that the whole issue of the IEC/CEC was a very contentious one for all doctors and all were cautious about moving and unsure whether it would be to their advantage.
21. Dr Van de Mark’s evidence was that, at the time the second and third CECs were entered into, she assumed that she would automatically begin to receive the new roster allowances provided for under those contracts.
22. In answer to questions from me, Dr Van de Mark explained that at the time of ratification of the second and third CECs she believed that the ratification vote signified that the members had agreed to the new terms. She thought that once she had ratified a new contract she would begin receiving all the benefits of its terms including the new roster allowance.
23. She said the new formula had been explained to her at the time of the first ratification and she had formed a firm belief that it would be more advantageous to her. She said that if she had wanted to remain on her existing roster allowances, she would not have ratified the contract.
24. She told me that she thought she had read 3.4 (ii) of the second and third CECs at the time but cannot specifically recall this. I then asked for her comments on the paragraph *“All other agreements that may exist prior to this agreement with individual employees may only be replaced with Clause 3.4 if agreed by the individual employee.”*
25. Dr Van de Mark did not appear to have considered this paragraph before. She told me that reading it now did not change what she had just told me, as she considered that her ratification vote amounted to the agreement required by this paragraph.
26. For a considerable time after the new contract came into force, Dr Van de Mark laboured under the misapprehension that she *was* receiving on call payments as set out in clause 3.4(ii) of the second and third CECs. When I asked her why she had not picked up the fact that her allowances had remained the same she told me:
 - That her salary payments fluctuated from week to week for a number of reasons any way;
 - At around the time the second CEC was ratified she got some extra payments for supervising Dr A;
 - She also got an increase because her base salary had changed;
 - The period after the second CEC was ratified was the very busy time when she was doing back up for Dr A. as well as her own call.
27. She said that all these factors meant that without carefully checking she would not have picked up the fact that she was still on the old allowances.
28. On 8 September 1999 she followed up her earlier discussions with Rachel Haggerty by writing to Lyn Davis, Service Manager, Maternity/Child and Adolescent Health as follows:

“When [Dr A] came on board many months ago, I remember you told me you would be giving me some additional money for the extra call that I would have to do supervising her.

I do not remember how much this was and looking at my pay slip, I have got absolutely no way of figuring it out.

Since this seems to be turning into quite a marathon, I would like to know what it is that I am

actually receiving.”

29. Dr Van de Mark told me that at this time she was generally unhappy. She felt that her pay did not seem right but was not sure of her specific entitlements.
30. On 12 December 2000, Dr Van de Mark wrote to Ms Davis again, saying:

“Dr B. and I wish to be paid the amounts we believe are owing to us for the extra work which we have performed throughout the past year.

As you know, SMOs are entitled to extra payments when working more than a one in three roster. Attached are rosters for the period from January 8...through November 30 of this year...”

Dr Van de Mark set out details of days worked, and concluded:

“As you know, other surgical specialists who have been asked to work extra rostered time throughout the past year, have been paid by HL at the rates stipulated in the SO contract. Using these rates, the amounts due to us are:

Van de Mark \$32,750.00...”

31. Dr Van de Mark told me that at this stage she still thought that it was mutually understood that she was covered by clause 3.4(ii) and thought any dispute over her allowances was about how that clause applied. Because of this, she conceded that this letter did not amount to an express agreement to move onto the provisions of the CEC.
32. After getting the letter, Ms Davis replied that she would pass on these concerns to Mr Madden. However, Dr Van de Mark heard nothing.
33. On 12 June 2001 she wrote to Mr Madden advising him that she also believed there was an issue regarding the hours she worked when Dr A. had been the only other obstetrician and gynaecologist. She told him:
- “At the time I was assured that working these extra hours would be appropriately compensated and in fact I believe I received some additional recompense during the first weeks or perhaps even months that she was here. These extra payments were halted by Rachel Haggerty who told me that she needed to evaluate my contract before continuing with them. That evaluation never occurred.”*

34. Dr Van de Mark did not quantify any request in respect of these issues, but did ask Mr Madden to sit down with her and discuss them. The letter made no reference to the roster availability allowance.
35. Mr Madden told me that Tairawhiti never agreed that Dr Van de Mark should or needed to provide back up for Dr. A during Dr A's callouts. However, Dr Van de Mark provided me with a copy of Dr A's registration document, issued by the Medical Council, which does indeed state that Dr A was to work only under supervision and specifically names Dr Van de Mark as the person responsible for supervising her. **For the record I unreservedly accept Dr Van de Mark's contention that she was obliged to provide back-up for Dr A whenever Dr A was on call.** When supporting Dr A in this way, she was on 1:1 call.

36. Mr Madden told me that he did not recall exactly how he responded to Dr Van de Mark's letter. She says she received no response, and on 25 July 2001 Dr Van de Mark wrote again. This time she named a figure (\$32,750.00) which she believed the respondent owed to her, but she did not say how she had arrived at it and again, made no reference to the roster availability allowance.
37. One point mentioned by Dr Van de Mark in her letter was that the other obstetrician and gynaecologist, Dr B, was paid differently from her. (This was, of course, because he was employed under the third CEC.) Mr Madden told me that he thought that it was the realisation, in around mid 2001, that Dr B was paid more than her that triggered "alarm bells" for Dr Van de Mark. He told me that

"I explained to her that she could switch to a roster availability allowance under the CEA if she wanted. I described how the effect of this would be to decrease her salaried income but make penalty payments available should she have to work more than 1:3 call roster."

38. Dr Van de Mark told me that she could not specifically recall Mr Madden speaking to her as described here and was not entirely sure when "the penny dropped" that the respondent was still paying her allowances as per the terms of her original individual contract. However, she agreed that the realisation that Dr B was being paid more than her probably did "trigger alarm bells" for her. She said it was also likely that around this time Mr Madden told her that she was still being paid on-call allowances pursuant to her original individual contract.

CEA 1 January 2001 to 31 August 2002.

39. The fourth and final document of relevance here is the Tairawhiti District Health Board Senior Medical and Dental Officers Collective Employment Agreement the term of which was expressed to be from **1 January 2001 to 31 August 2002**. This document had not been renegotiated at the time of the investigation into Dr van de Mark's employment relationship problem and contained her current terms and conditions of employment. Clause 3.4(ii) of the preceding documents is replaced by the following:

"Notes:

1./ All other agreements that may exist prior to this Agreement with individual employees may only be replaced with the above entitlement if agreed with the individual employee."

40. Mr Madden told me that none of the employees in the medical, children's and women's health area who were covered by the Second or Third CECs had elected to change to the roster availability allowances contained in those documents.
41. However, some of those covered by the CEA elected to change from individually agreed entitlements or from one of the previous CECs to the roster availability allowance contained in the CEA.
42. They did so upon receipt of a package he sent out to doctors in the medical, children's and women's health area during a 'tidy up' of general administration in mid 2002. The package included for each doctor a form he had created for the purpose of recording any agreement to transfer to the availability scheme contained in the CEC.

43. Mr Madden also told me:

“I did not send this package to Tairawhiti’s two obstetricians and gynaecologists, Dr Van de Mark and Dr [B], as at that time Tairawhiti was in discussions with each of them regarding aspects of their salaries and I did not want to complicate the discussions...however, at the same time I sent these packages out I did have a conversation with Dr Van de Mark during which I told her that I would like to send similar packages to her and Dr [B]. Dr Van de Mark responded by saying that she would not sign any transfer agreement as she believed it might weaken her position in this dispute.”

44. Dr Van de Mark was dissatisfied with the lack of progress over her concerns and sought the help of ASMS. On her behalf Mr Stubbs of ASMS wrote to Mr Madden on 22 January 2002. His letter outlined the undisputed arrangements which were entered into between the hospital and Dr Van de Mark when she was employed and then went on:

“A new collective contract was signed in February 1999. It contained a new enhanced “roster availability” payments regime in clause 3.4 (ii) that was backdated to 2 January 1998.

The benefits under that regime, taken overall, were a considerable improvement on Dr Van de Mark’s previous contractual entitlements for a 1:2 call, with provision for additional payments when she did 1:1.

Dr Van de Mark is entitled to claim the benefits under clause 3.4(ii) with effect from 1 November 1998 and for the avoidance of doubt, hereby does so.”

45. Mr Madden told me that for him, January 2002 was when the “penny dropped.” He said that up until this point, he thought any dispute was about the application of the original IEC. Only when he got Mr Stubbs letter did he realise that what Dr Van de Mark wanted was to be paid under the terms of the second CEC and successive documents.
46. Discussions took place over the next two months. On 15 March 2002 Mr Madden wrote to Mr Stubbs outlining Tairawhiti’s position as follows:

“Your letter requests that Diane should be granted the benefits of the enhanced availability scheme which came into effect February 1999.

I do not agree that Diane, or any doctor, should automatically be able to claim the benefits of clause 3.4(ii) retrospectively. This is unprecedented and it was commonly believed/understood at THL/TDH that transfer to the new scheme was a matter of purposeful deliberation. That no doctor transferred to the scheme testifies to the uncertainty that Diane and her colleagues must have felt about it. For any doctor to then retrospectively calculate whether it would have been disadvantageous for them to have transferred onto the scheme way back in 1998 seems rather opportunistic.

47. Mr Stubbs’ reply, on 12 April 2002 recorded that Dr Van de Mark’s position was that from the date in 1998 when new clause 3.4(ii) took effect, she was entitled to payment for all her on-call work in accordance with that clause and its successive amendments.
48. The parties were effectively at an impasse at this point. In September 2002 Dr Van de Mark lodged the matter with the Authority as an employment relationship problem.
49. On 6 November 2002 Mr Madden wrote to Dr Van de Mark offering for her to switch to the roster availability allowance contained in the CEA. He told me that:

“as [Dr I.], the long awaited third obstetrician and gynaecologist was about to start with Tairawhiti, I thought it would be a good time to try and get all three of the obstetricians on the same scheme to avoid the disparity that had arisen in the past.”

50. He provided calculations indicating the impact on her pay should she transfer. However I note that these calculations do not factor in the effect of unfilled vacancies, which as we have seen dramatically increased the call Dr Van de Mark had been required to undertake over the years.

51. It is in fact common ground that in the months after Dr I. started work, and there were at last three obstetricians and gynaecologists sharing the call, Dr Van de Mark would probably be better off on the terms of her original IEC.

52. Dr Van de Mark did not return a signed copy of this letter. She told me

“I did not accept the terms contained in that letter because there were important and longstanding issues central to my employment, which were before this Authority, and which had to be resolved first.”

53. At the investigation meeting she elaborated on this by saying that it was “not worth bashing her head on a brick wall.”

54. Dr Van de Mark reserves her position on whether she has in fact received everything to which she was entitled under the original contract until it has been determined what terms apply to her.

Issues for Determination

55. Ms Huston correctly identified three key issues arising in this case. They are:

- *What is the relevance of s.19(2) of the Employment Contracts Act 1991 to the interpretation of clause 3.4?*
- *Did the parties need to agree to replace the applicant’s individual entitlement to a roster availability allowance (as contained in the letters of offer dated 29 August 1997 and 28 January 1998) with the entitlements to a roster availability allowance contained in each of the second and third CECs and the current CEA?*
- *If such agreement was required, was any such agreement reached?*

56. In addition, a fourth matter was in dispute and required determination. It was:

- *whether the provisions of the CEC were in fact more advantageous to Dr Van de Mark than those contained in her original individual employment agreement.*

57. Because an accurate assessment of this issue went to quantum, and by agreement any determination of quantum had been deferred Mr Corkill suggested that this issue be rephrased as follows:

“If the availability allowance under the collective contract was financially more advantageous at the inception of the date of each/any of the collective contracts, then as a matter of law, did that superior provision prevail (over original individual contract)”

Applicant's position

58. Mr Corkill submitted that sub-paragraph (4) of the CEC and the note in the CEA should not, in the circumstances as they turned out, apply to Dr Van de Mark. Instead, he said, the superior availability allowance provisions of the second, third and a fourth collectives should be held to apply to her.
59. His primary argument was that, pursuant to s.19 of the Employment Contracts Act 1991 and s.61 of the Employment Relations Act 2000:

“In a situation where the collective provisions were superior, as they were in Dr Van de Mark's case, then by operation of law they applied”

hence, he said, the words of successive sub paragraphs (4) or the ‘note’ in the CEA were:

“subject to statute, and in reality would apply only where the IEC availability allowance provisions were superior.”

60. In support of this position he also argued that sub-paragraph (4) *“in its various forms in the successive collective documents was a “process” clause and hence subservient to sub paragraphs 1-3 of clause 3.4.”* Sub-paragraph 4, he argued, can be separated from sub-paragraphs 1-3 because it is inconsistent with them and inconsistent with the IEC, and s. 19 of the Employment Contracts Act 1991 therefore takes effect.

61. However, he also advanced two alternative arguments. The first was that sub-paragraph (4) was void for uncertainty since:

“it contains no indication as to who had the obligation to raise the issue, within what timeframe the issue had to be dealt with (if any) or what should happen if one party or the other unreasonably withheld agreement.”

62. In particular he noted that the respondent seemed unclear about whether it amounted to an election to transfer or whether the agreement of both parties was required, in which case, he said, the clause amounted to an *“agreement to agree”* and should be held to be unenforceable for that reason alone.

63. Finally he argued that if the Authority rejected the applicant's first two submissions that sub paragraph (4) was either subject to statute or void for uncertainty, then, by operation of the Authority's equity and good conscience provisions, *“this is a situation where Dr Van de Mark has been significantly prejudiced by a technicality which the employer should not be permitted to rely on.”*

Respondent's position

64. The respondent's position was summarised as follows:

- *There is no inconsistency between the individual agreement and the various collective agreements in terms of section 19(2) of the ECA and that clause 3.4(ii) should therefore be interpreted in accordance with its terms.*
- *For the applicant to be entitled to the roster availability allowance provided for in the CECs/CEA instead of the allowance provided for in the applicant's individual agreement, a*

specific agreement would have had to have been reached between the applicant and the respondent to this effect.

- *No such agreement has been reached between the applicant and the respondent.*

Conclusions

65. Before attempting to answer the questions for determination as expressed by Counsel, I must set out some further conclusions.
66. **First, the words of sub-paragraph (4) amount to an election to transfer** rather than an agreement to agree. This is clear from the express words themselves, which refer to the agreement of the employee party only. The employer party has already agreed, without qualification, to be bound by clause 3.4(ii) of the collective employment agreement.
67. Although it has not been argued otherwise, I note for completeness that I consider there could be no suggestion that a doctor might have the option of moving backwards and forwards between the schemes.
68. The first part of Mr Corkill's submission (that where collective provisions are superior to the provisions of an individual contract covering parties to that collective, then by operation of law the provisions of the collective apply) is well-established law. The issue for determination here is what effect if any, sub-paragraph (4) has in a situation where the collective provisions are, or may be superior to the original individual terms.
69. Mr Corkill's submissions are predicated on a view that the collective provisions were clearly superior to those in the original individual terms of employment. He has asked me to set out what my findings would be if this had already been established as a matter of fact, phrasing the question for my determination as set out in paragraph 57 above.
70. The difficulty with the applicant's position (as expressed here by Mr Corkill) is that depending on staffing levels and the availability of locums, the relative advantage (from the employees perspective) could shift from one scheme to the other and back again over time.
71. Witnesses for both sides observed to me that only with the benefit of hindsight would it be possible to ascertain which of the two schemes would be more beneficial to an individual over a given period of time. Indeed, in correspondence to the respondent Mr Stubbs expressed the view that Dr Van de Mark should be entitled to claim retrospectively because to have been required to do otherwise would be to ask her to "*gamble*." This view was not pursued by Mr Corkill during the Authority's investigation however for completeness I have recorded below my conclusions on it.
72. Thus, even if the scheme contained in each clause 3.4(ii) was more beneficial to a doctor as of the date the CEC came into force, the advantage could disappear over the life of the document. Employee parties to the collective might be disadvantaged by being locked in to clause 3.4(ii) at any particular point, such as the date the CEC came into force. This might or might not be apparent at that point.
73. I consider it reasonable for me to infer that this uncertainty (about what would be most advantageous for any individual employee) lies behind the insertion in clause 3.4(ii) of sub paragraph (4). The sub-paragraph amounts to an option to "grandparent" existing provisions should a doctor believe those provisions to be more advantageous to him or her. It addresses

the potential problem arising out of the fact that the situation would not be uniform for all doctors or even for the same doctor at different times, and the resulting difficulty of making an accurate assessment of what would be in the best interests of any particular individual. The sub-paragraph leaves it to each doctor to make the call as to what is in his or her best interests. They can have the better of the two, and moreover, they can decide which that is. **In this way, sub-paragraph (4) clearly confers a benefit upon employee parties to the CEC/CEA.**

74. Therefore, the words of sub-paragraph (4) of clause 3.4(ii) do not stand outside the collective contract. They form part of its terms. They do not amount to a “process” provision since they confer a substantive benefit, namely a right of election of preferred terms and conditions. Unless the employee consents to a transfer to clause 3.4(ii) his or her prior entitlements remain “grandparented.” This occurs *pursuant to the CEC itself*.
75. As such, the words of subparagraph (4) are themselves protected by s.19 of the Employment Contracts Act and s.61 of the Employment Relations Act 2000.
76. **The right to transfer is not retrospective.** The employee party will remain on the “grandparented” terms and conditions of employment until the point of election, from which time onwards clause 3.4(ii) will apply.
77. During the investigation meeting I addressed a number of questions to Dr Van de Mark in order to ascertain what she thought subparagraph (4) meant. Mr Stubbs objected to this line of questioning because as he saw it, her view of the clause was not relevant (its effect being a matter for legal argument only.) I disagreed, on the basis that if the clause in question required her agreement, what she thought would constitute such agreement was relevant, as was whether she believed she had at any time given it.
78. As the foregoing summary of the history has recorded, she was clearly confused about what she was actually getting paid, and unfamiliar with the terms of the collective agreement. It was not until December 2000 that she indicated that she wanted to be paid under the CEC and not until some time later again (at least mid 2001) that she realised she had never been paid call allowances under the successive collective documents. At no time did she expressly elect to transfer.
79. Bearing all this in mind, my answers to the issues as identified by Counsel are:
- S.19 (2) and s.61 do not have the effect argued by Counsel for the applicant since the words in question (and the right of election to transfer they create) are themselves part of the collective contract.
 - Whether or not the provisions of the CEC are (at any given point in time) more beneficial, only the employee party’s agreement is needed for payment to commence pursuant to clause 3.4 (ii). The further agreement of the employer party is not required.
 - The provision is not void for uncertainty. As a unilateral right to transfer it is not an agreement to agree.
 - The applicant is not “prejudiced by a technicality.” The correct application of the provisions of the successive CECs/CEA does not amount to a technicality.
 - As to the final question Mr Corkill framed for the Authority’s determination, I reiterate that even if the provisions were more beneficial for the employee at the date upon which each

CEC came into effect, this might not continue to be the case during the term of the document. In these circumstances, it is to each employees on-going advantage to retain control over whether, and when, he or she transfers. Again, sub-paragraph (4) is not void by operation of s.19 of the Employment Contracts Act 1991 or s61 of the Employment Relations Act 2000.

Whether there was an agreement to transfer

80. This leads me to the final question: whether Dr Van de Mark agreed to be transferred to the availability allowance set out in successive clauses 3.4(ii).

81. As we have seen, it is common ground that she did not expressly agree to this.

Was there implied agreement to transfer?

82. At the investigation meeting, after hearing all the evidence I advised Counsel that I was of the view that there was an additional question to be considered. This was whether Dr Van de Mark had given her implied agreement to the transfer. Because this was not an issue which Counsel had addressed in their prepared submissions, I accepted further written submissions on the issue after the meeting.

83. The applicant's position on this issue is recorded in submissions as follows:

"Dr Van de Mark raised the matter in writing twice in the course of the third CEC...On 8 September 1999, she was unable to know on what basis on call payments had been made to her. There was an onus on the employer to clarify the issues. There is no evidence that it did.

...

By 12 December 2000 she was frustrated about the call allowances and expressly requested payment under the third CEC rates which she cited in her letter of that date.

...

It is submitted that in this letter she undoubtedly expressed agreement to payment, of availability allowances under the collective, if so, she was entitled to payment under clause 3.4.(ii) for the term of that contract. That is from its inception on 1 July 1999."

84. In response to this, Ms Huston argued firstly that bi-lateral agreement between the two parties was required. I have already disposed of that point. She also submitted:

"In order to protect the rights of...individuals to remain on...individual terms, it is important that any agreement to move must be clear and unequivocal. Any precedent set allowing a letter, such as that written by Dr Van de Mark, to be read up to being an agreement would be dangerous for those individuals."

85. It is clear from Dr Van de Mark's letter of September 1999 that she was not sure how her allowances were calculated and was seeking clarification of this. (It is of course most unfortunate that this very reasonable request was not actioned.)

86. Having received no answer, Dr Van de Mark wrote again, this time asking that she be paid allowances under the "SO contract" that is, the collective employment agreement.

87. I accept that this was not an express election to transfer. The respondent's failure to action her request of the previous September meant the Dr Van de Mark continued to labour under the misapprehension that she had already transferred, and that no express election to transfer was needed.
88. It was however a "clear and unequivocal" express request to be paid the on-call allowances provided for in the Collective Employment Contract subparagraphs 1-3.
- 89. I am satisfied that as such, it amounts to implied agreement to transfer onto those provisions.**
90. I am also satisfied, in light of what is set out unequivocally in the letter of December 2000, that it is not reasonable for Mr Madden to say that he did not understand, until Mr Stubbs wrote to him, that Dr Van de Mark wanted to be paid the allowances in the collective contract.

Quantum

91. As indicated previously, at this stage this issue is left for the parties to attempt to resolve between themselves. They may of course return to the Authority for a determination of the issue, if it cannot be resolved. Although I make no direction to mediation I remind them that they are of course free to avail themselves of that service.

Costs

92. Any application for costs will be considered at the conclusion of the investigation into the applicant's employment relationship problem.

Y S Oldfield
Member of Employment Relations Authority

