

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN New Zealand Public Service Association (Applicant)

AND Bay of Plenty District Health Board (Respondent)

REPRESENTATIVES Andrew Dallas, for Applicant
Mark Beech, for Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 10 September 2004

DATE OF DETERMINATION 1 October 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In its statement of problem the New Zealand Public Service Association (“PSA”) claims the Bay of Plenty District Health Board (“the Health Board”) has breached the terms of the Mental Health Nurses and Mental Healthcare Assistants Collective Employment Agreement dated 1 July 2002 to 30 June 2004 (“the CEA”).
- [2] In its statement in reply the Health Board denies there has been any breach of the Collective Employment Agreement.

Preliminary Issue

- [3] On 31 August 2004 the respondent filed an application in the Authority to have the matter raised by the PSA struck out. The respondent submitted in the alternative that the parole evidence rule be applied to the proceedings brought by the applicant.
- [4] At the investigation meeting on 10 September 2004 I heard submissions from both parties on the matters raised in the application.
- [5] I advised the parties at the investigation meeting that the matter would not be struck out. My reasoning, as explained, is that an employment relationship problem has been raised by the PSA, which if determined in their favour may result in further claims by the PSA. I proceeded with the investigation meeting.

Background

- [6] The employment relationship problem concerns the wording on the CEA negotiated during 2003 and finalised in September 2003.
- [7] On 11 August 2003 Mr Ray Ferguson who led the negotiations on behalf of the Health Board, wrote to Mr Ron Berry, the PSA Organiser who led the negotiations on behalf of the PSA, and set out the terms of settlement.
- [8] Mr Berry took this letter to the ratification meeting and it was the terms set out in this letter which was ratified by the members.
- [9] Following ratification Mr Ferguson redrafted the expired CEA and incorporated the newly ratified terms and conditions into the old agreement. This then became the document about which this matter is concerned.
- [10] Mr Berry signed the CEA on 23 September 2003 on behalf of the PSA. At the investigation meeting Mr Berry told me he had checked the document before he signed it. Mr Berry acknowledged that he did not check the calculations set out in the Additional Hours clauses.
- [11] There are five clauses within the CEA which refer to the payment of time at the Additional Hours rates specified in Schedule A of the CEA.
- [12] There are two schedules which provide for Additional Hours rates in the CE; Schedule A and Schedule B. It was common ground at the investigation meeting that Schedule A, clause 2A and 2B were the rates applicable only to the period 8 April 2002 to 30 June 2002 and these rates are identical to the rates specified in the preceding CEA.
- [13] Schedule B clauses 5A and 5B specify the rates to be applied as a result of the negotiations between the union and the respondent as from 1 July 2002 and until 30 June 2004 which is the date the CEA was to expire. Schedule B is not referred to in the body of the CEA.
- [14] Under the preceding CEA staff were paid in accordance with a salary scale which identified incremental “*levels*” together with the applicable rate of pay,
- [15] Schedule B at clauses 1 and 4 provide for a new salary scale. The new salary scale specifies incremental “*steps*” instead of “*levels*”. Clause 1 specifies how the “*levels*” will correspond with the new “*steps*”, the corresponding applicable rate of pay which has been calculated to include the negotiated salary increase for each step.
- [16] Both Schedule A and Schedule B provide for an additional payment for work carried out on week nights, Friday nights and Saturday/Sunday. The rates are identical in both Schedule A and Schedule B.
- [17] Both Schedule A and Schedule B also provide for Additional Hours rates. Again the rates are identical with the exception that in Schedule B there are more specified rates included into the document to take into account that there are more “*steps*” in the new salary scale than there were “*levels*” in the previous scale.
- [18] Schedule B clause 5A states as a preamble:

Additional Hours worked beyond the rostered 8 or 10 hour shift, or 80 hours per fortnight, instead of ordinary rate (calculated as ordinary rate x 1.5).

[19] Then follows the statement:

If more than three additional consecutive hours are worked in any 24 hour period the rate for Additional hours in excess of three hours will increase to ordinary rate x 2 (rates as per 2B below). [my emphasis]

[20] The preamble to clause 5B states:

Additional Hours on Public Holidays and Call-back, instead of ordinary rate. (calculated as ordinary rate x 2)

Discussion and determination

[21] The PSA have submitted that the rates set out in Schedule B clauses 5A and 5B are wrong. The PSA say the rates should have been calculated by applying the 1.5 and 2 multiplier to the ordinary rate as set out in the preamble to both clauses.

[22] The respondent submitted that if the Authority is to make a declaration that the calculation is wrong and that the rates specified are not correct then the CEA will need to be varied.

[23] Section 163 of the Employment Relations Act 2000 prohibits the Authority in respect of from making an order cancelling or varying a collective agreement or any term of a collective agreement.

[24] It was common ground at the investigation meeting that the state of the Health Board's finances was a matter raised and discussed at the negotiations.

[25] The Authority was provided with copies of correspondence between the parties. Letters from the Health Board dated 24 June 2003 and 11 August 2003 set out the Health Board's offer of settlement to the negotiations. Both letters state:

The overall package which equates to 1.3% in the first year and 6.4% in the second year includes –

An increase in base salary rates exclusive of overtime and penal rates... [my emphasis]

[26] An earlier letter from the Health Board to the PSA dated 18 June 2003 has an identical statement except the percentage rates quoted were 1.8% and 3.6% respectively.

[27] In answer to my questions at the Authority, Mr Berry confirmed that he signed the CEA after reading it to ensure it reflected the negotiated settlement. He added that he never checked all the individual rates specified in Schedule B.

[28] Mr Ferguson told me that when he updated the old CEA he mistakenly left the reference to the 1.5 and 2 multipliers in the document.

[29] I have accepted Mr Ferguson's evidence that when he updated the expired CEA to incorporate the negotiated settlement terms he failed to remove and update some parts of the document. This is supported by the fact that when Mr Ferguson updated the preceding CEA he failed to include any reference in the body of the new CEA to the rates specified in Schedule B even though these rates applied to at least five clauses of the document. As set out earlier in this determination the reference continues to be to **Schedule A**.

- [30] Not only that, but the statement between clauses 5A and 5B in the new Schedule B refers to “...rates as per 2B below”. If the reference was correct it would read “5B”
- [31] It was common ground that staff who qualified for the payment of Additional Rates under the CEA have been paid by the Health Board in accordance with the specified rates in Schedule B clauses 5A and 5B.
- [32] I have concluded that the Health Board have not breached the Collective Employment Agreement.
- [33] I am unable to be of any further assistance to the applicant in this matter.

Costs

- [34] The parties are invited to attempt to resolve the question of costs between them. If they are unable to do so the Health Board should file a memorandum on costs within 28 days of the date of this determination. The PSA has a further 14 days from the date of receiving the Health Board’s memorandum in which to file a memorandum in response. The Health Board should file anything in reply within 3 days of receipt.

Vicki Campbell
Member of Employment Relations Authority