

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN New Zealand Public Service Association (Applicant)
AND The Waitemata District Health Board (Respondent)
REPRESENTATIVES Andrew Dallas, Counsel for Applicant
Anthony Russell, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 21 May 2004
SUBMISSIONS RECEIVED 31 May, 4 and 14 June 2004
DATE OF DETERMINATION 18 June 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Public Service Association (“PSA”) and the Waitemata District Health Board (“WDHB”) are parties to a series of collective employment agreements. The PSA has members who are employed as inpatient registered nurses, enrolled nurses and psychiatric assistants at the Mason Clinic (“the Clinic”), a facility operated by the WDHB, and who accordingly are or have been covered by the collective employment agreements.

[2] The PSA says the WDHB has breached the current collective employment agreement and its predecessors by failing to provide its members at the Clinic with either a uniform or a clothing allowance. It has therefore brought a class action seeking the payment of allowances for the period September 1996 – September 2002. I accept at the outset that s 142 of the Employment Relations Act 2000 means no payment can be sought in respect of any alleged failure occurring more than 6 years before the date of filing in the Authority of the statement of problem. Since the date of filing was 27 May 2003, no payment can be sought in respect of the period prior to 27 May 1997.

[3] The WDHB says uniforms have been available at the Clinic and as a result there are no entitlements to clothing allowances.

Background

[4] The agreement in force when this matter was filed was the Waitemata District Health Board & PSA Professional, Administrative, Clerical, Technical & Related Employees Collective Agreement (1 February 2001 – 31 January 2003).

[5] The relevant provision reads as follows:

“8.4.2 Civilian Clothing Allowance

An allowance of \$3.04 per day (or proportionate part thereof for an employee employed part time) shall be paid for each working day on which, because of therapeutic requirements or in the interests of patient care/rehabilitation an employee is directed by the employer to wear civilian clothing instead of the normal uniform. Provided that this allowance shall not be payable to staff wholly or mainly employed in an administrative role or staff who, with the employer’s permission elect to wear civilian clothing on duty.”

[6] A similar provision appeared in the preceding agreement of 1 August 1999 - 31 January 2001, as well as in the further preceding agreements of 1 March 1998 - 31 July 1999, the agreement expiring on 30 September 1997 and the agreement dated 1994 – 1996. Earlier preceding agreements and awards also contained materially similar provisions.

[7] I was told the Clinic was opened in 1989 or 1990. It deals with patients with mental illness, a history of criminal offending, and who are considered to be high risk. As at the date of the investigation meeting it operated six units, and I was told that a clothing allowance is paid to staff at one of the units, Rimu Hostel. In general the reasons for directing that civilian clothing be worn include the importance for certain classes of patients of being able to go out, accompanied, into the community without it being obvious that they are accompanied. In some circumstances it is also considered important for a patient to be encouraged to relate to a nurse or therapist without the barrier that can be created if the nurse or therapist is wearing a uniform. These are also reasons why, even in the absence of a direction from the employer, staff members can and do choose to wear civilian clothing.

[8] I did not understand the present employment relationship problem to cover any staff member working at Rimu Hostel. In addition there was no allegation that the management at the Clinic expressly directed the nursing staff covered by the present problem to wear civilian clothing instead of the normal uniform. Nor was there an allegation that no uniforms were available at all, to anyone. Instead the present dispute concerns whether an alleged failure to provide uniforms at the Clinic (or more accurately the effect of shortcomings in its procedure for providing uniforms) amounted to a direction to wear civilian clothing, or whether the proviso to clause 8.4.2 applied in that the nursing staff elected to wear civilian clothing despite uniforms being available.

[9] According to a document headed ‘Policy 1992 – 1999 Standards of Dress for Nursing Staff’, the uniform for women at the Mason Clinic included a white dress with suitable shoes, while the uniform for men included grey trousers or shorts, white shirt, blue cardigan, and suitable shoes and socks. The policy went so far as to set out guidelines to be taken into consideration when ‘electing’ to wear mufti (or ‘civilian clothing’) and stressed that no-one was required to wear mufti. Elsewhere it said ‘the wearing of mufti is a privilege and if an acceptable standard is not maintained this privilege may be withdrawn ...’. By the late 1990s the policy was significantly out of step with practical developments at the Clinic. Moreover a further policy document dated March 1999 did not even mention uniforms, rather it set out generalised standards for civilian dress. The same appeared to be true of a subsequent policy document of January 2001.

[10] The procedure for managing the provision of uniforms throughout the period was as follows. Myra Brown-Toko held a degree of responsibility in the matter. However Ms Brown-Toko was not a manager or an administration officer, and had no other responsibilities in respect of the nursing staff. In her brief of evidence she said she was employed at the Clinic as the cleaning staff supervisor, although others described her as the multi-skill supervisor. She also said in evidence that, from 1992 until 2002 she was responsible only for uniforms for male nursing staff. Uniforms for female nursing staff were obtained through the Clinic’s laundry services, until in 2002 Ms Brown-Toko took over the responsibility for those staff members’ uniforms too.

[11] Ms Brown-Toko maintained such supply as she could hold of white shirts, grey trousers (or shorts) and the cardigan. She said at the investigation meeting she had a limited supply of the latter and did not know where replacements could be sourced. She kept the items in her office, but the nature of her supervisory duties meant she was often not there. Male nursing staff requiring a uniform were expected to ask at her office for relevant items, which because of her movements around the Clinic was sometimes easier said than done. She maintained a record book and a separate card recording the items issued, to whom they were issued and the date of issue. If the necessary size was not in stock she would order it, and in general she would reorder items when stock was low. She said she did not place any orders in the period 2000 - 2002 because she understood a working party was seeking to devise a new uniform.

[12] Unlike the procedure I was told was in place in some other facilities, Ms Brown-Toko's procedure was to rely entirely on staff members to initiate requests for the uniform items they said they required. She acknowledged she did not chase people up if they approached her when she was away from her office, or after she sent them away to obtain their measurements so she could give them the correct-sized uniform. There was no periodic issuing of uniform items to individuals, for example annually, and uniforms were not issued in sets of items, for example one trouser and two shirts. New staff members were not provided with a set of uniform items, told what the uniform policy was, or told of Ms Brown-Toko's role. They were left to find out for themselves how to acquire a uniform, and follow up if they wished.

[13] The combination of Ms Brown-Toko's absences from her office, the lack of any advice to new staff about uniforms, and the reliance on staff members to initiate requests and identify the items they required, underlay the following accounts from staff members of their experiences:

- (a) Robin Byrt, psychiatric nurse. Mr Byrt had a uniform obtained at his previous hospital, and which he wore when he commenced his employment at the Clinic in 1992. He said he made several inquiries about a replacement when the uniform became worn, only to be told there was none available. When his old uniform became unusable he began to wear civilian clothing to work. He worked elsewhere in the mid 1990s, and on his return in 1997 he continued to wear civilian clothing. It is from May 1997, or the date of his return if it was later, that any claim he may have commences. His evidence was that during that period he made enquiries about a uniform, but he acknowledged these were generally in passing.
- (b) Barry Field, psychiatric assistant. Mr Field had a uniform in the early 1990s, but when he sought a replacement in 1995 he said he was told there was nothing available. He said he subsequently made several approaches to Ms Brown-Toko and eventually his approaches became 'a bit of a joke'. He wore civilian clothing from 1995. However he acknowledged that many of his approaches were made away from Ms Brown-Toko's office, and Ms Brown-Toko said he asked about uniforms only in passing.
- (c) John Croot, psychiatric nurse. Mr Croot began his employment at the Mason Clinic in 1999. He wore civilian clothing. He said that when he asked other staff members about uniforms they recounted their own or others' failed efforts to obtain one, so he decided it was hopeless to even try to obtain one for himself. He also said that, when uniforms became available in 2002, he chose not to uplift one because he felt patients were more comfortable if he did not wear uniform. He worked with patients in rehabilitation on a social basis, and believed a uniform could impair the necessary rapport.
- (d) Ruth Harvey, comprehensive nurse. When she commenced her employment at the Clinic in 1993 Ms Harvey was told there were no white dresses available. Accordingly she began claiming a uniform allowance, but was soon told to stop. Any issues arising out of that state of affairs arose outside the period within which a claim for a clothing allowance can be made. Ms Harvey continued to wear civilian clothing even after a new uniform was chosen for women in or about 1996. There was a break in her employment at the Clinic between

May 2000 and May 2001. She has chosen not to wear the uniform that became available in 2002.

- (e) Christopher Hunt, psychiatric nurse. Mr Hunt had worn a uniform in his previous employment and wanted to continue to do so when he commenced work at the Mason Clinic in 1993. He said that over time he found it more and more difficult to obtain replacements, being told when he asked that there were none available. It became an embarrassing hassle to ask for uniforms, so he stopped. He said at the investigation meeting that he wore civilian clothing between February 1996 and September 2002, although he retained uniform items which he wore occasionally, and particularly if he went to a court hearing.
- (f) Clare McCarten, comprehensive nurse. Ms McCarten began her employment at the Clinic in April 2001. She said she enquired once about a uniform but did not follow up, being happy to wear civilian clothing. She obtained a uniform after 2002.
- (g) Ronald McKain, psychiatric assistant. Mr McKain had a uniform obtained at his previous hospital, and continued to wear it after he began his employment at the Clinic in 1993. He received replacement items during the 1990s, attributing that success to his own persistence, but did not recall receiving any further items between November 1999 and November 2002.
- (h) Alois ('Lou') Marty, psychiatric nurse. Mr Marty began his employment at the Clinic in 1993. He said at the investigation meeting that at first he wore the uniform he obtained at his previous hospital, but after it wore out he wore civilian clothing. He said he made several requests to Ms Brown-Toko for a uniform but was told there was none available. He also said he did not go to her office when he made these requests, although after 2002 Ms Brown-Toko was more purposeful in arranging a time to meet at her office so he could obtain a uniform.

[14] The WDHB produced records to show that a small supply of various items and sizes of uniform for male nursing staff remained in stock at the Clinic between December 1995 and November 1999. There were no corresponding records in respect of the female staff. However for the latter part of the period the basic uniform included a navy blue skirt or trousers. I was provided with invoices showing supplies of those items were ordered.

[15] From time to time there were attempts to decide and agree on a new uniform for nursing staff. In or about 1995 Audrey Walsh, then one of two managers with overall responsibility for the Clinic, and Amy Donnelly, an enrolled nurse and the PSA delegate, worked together on finding and trialling a new more suitable uniform for female staff members. In particular they recognised the outdated nature of the white dress. One attempt led to the identification of a sweatpant that proved to be of such poor quality the memory provoked laughter at the investigation meeting, although it seemed the associated sweatshirts were acceptable. An attempt to find a replacement for the sweatpant led to the identification of the navy blue skirt or trousers in or about 1996. The choice was not universally supported and there was no dispute that many staff members did not wear the skirt or trousers because they did not like them.

[16] In or about 2000 Ms Donnelly approached Ms Walsh, who by then was the sole manager of the clinic, with a request that all uniforms be reviewed. In early 2000 there was an abortive attempt by a management group to identify the level of support for a new uniform, but the attempt went nowhere in part because of cynicism about whether there would ever be agreement on a suitable uniform.

[17] On 20 December 2000 the Employment Court issued its decision on appeal from a decision of the Employment Tribunal in **Auckland Healthcare Services Limited (Connolly Unit) v Sutherland** (20 December 2000, Judge Travis, AC 102/00). The court addressed the payment of a clothing allowance under a clause substantially the same as clause 8.4.2. It declined to disturb the

Tribunal's findings that Auckland Healthcare Services had a 'normal uniform' which could have been made available to staff at the Connolly Unit but was not, as well as the finding that, in the absence of any choice in the matter, the staff had not 'elected' to wear their own clothes. The practical effect of those findings was that a clothing allowance was payable.

[18] When that outcome became known, interest at the Clinic and in other facilities focussed again on the provision of uniforms or the payment of an allowance. The issue was also raised in association with discussions about the renegotiation of the collective agreement.

[19] By letter dated 12 August 2001, on behalf of the staff Ms Donnelly inquired of Ms Walsh whether staff were directed to wear a uniform and, if so, how they could obtain it. The letter recorded that a number of staff had been informed there were no uniforms available at the time. Although no details were provided I regard something of the kind as quite possible, given Ms Brown-Toko's evidence that she stopped replenishing supplies between 2000 and 2002 because of her understanding that a new uniform was to be found. Also, she said there was a difficulty with the supply of uniforms.

[20] Ms Walsh replied by letter dated 20 August 2001. She said in part:

"The management's position on this matter has remained constant, i.e. we have not legislated for uniforms or mufti, as it is such a personal issue. Only the individual can determine whether or not their practice is enhanced by the wearing of a uniform.

For the majority of time, uniforms have been available, although not without significant difficulties. The original nurses' uniform for females was unsuitable and we then established a working group and chose another uniform for females. The majority of females issued with this uniform did not wear it (sic). More recently our supplier stopped manufacturing uniforms and we have not identified another source because we believed a redesign of the uniform was appropriate. Many attempts to establishing (sic) working groups to resolve these issues have faltered through lack of interest in the past. The male uniform option was only taken up by a few staff and of those issued with a uniform many did not wear it. It is difficult for management to know whether Nurses do want us to become an 'Uniformed Service' or if the current situation of individual choice is preferred.

Clearly from your letter Nurses are once again considering this issue and there maybe sufficient interest at this time to resolve it.

The matters which need to be considered appear to be: -

1. Do we want to be a 'Uniformed Service'? (A recent survey of patient's (sic) families indicated this would be their preference)
Or
Do we want the current policy of choice to continue?
2. What would be an appropriate uniform?"

[21] The letter ended by suggesting that a joint working party be established to advance the issue. I understand a joint working party was established, but it lapsed.

[22] I do not agree that the position was quite as Ms Walsh put it. One problem her letter fails to acknowledge is that that the 'significant difficulties' included the difficulties of access created by the problems in making contact with Ms Brown-Toko, lack of follow up when she was approached, and ad hoc approach to issuing and maintaining supplies.

[23] At the same time there were exchanges about the clothing allowance between Warwick Jones, the PSA organiser, and Maryan Street, Employee Relations Manager for the WDHB, although those exchanges centred on one hand on the circumstances at two other WDHB mental health facilities and on the other on the possibility of a single approach for all WDHB mental health

facilities. Mr Jones expressed the view that the issue at the Clinic was a separate one and was being dealt with at a local level. Meetings and written exchanges between Mr Jones and Ms Street continued into early 2002, although the circumstances at the Clinic were not pursued at that level.

[24] Later in 2002 Mr Jones and Ms Street turned their attention more specifically to the Clinic. By letter to Ms Street dated 21 August 2002 Mr Jones referred to a meeting with Ms Walsh and others in July 2002 and said:

“At this meeting we were informed that a notice was to go out advising that male uniforms were available for nursing and related Mason Clinic employees not currently in receipt of the Clothing Allowance, and that suitable female uniforms would be provided once the type of uniform had been agreed with Delegates.

While we believe our members would prefer to receive the Clothing Allowance, the PSA understands that the current Collective Agreement gives the Employer the ability to determine whether to provide a uniform option or pay the allowance. Therefore once suitable uniforms are available to all staff who require them, we would accept that Waitemata DHB is complying with its obligations under the Collective Agreement.

However for significant periods up to now we believe that Waitemata DHB has failed to comply with the provisions of clause 8 at the Mason Clinic.

We contend that the intent of these provisions is to either provide staff with a uniform or uniform option, or to pay the allowance.

Past practice at the Mason Clinic for the majority of staff has been not to provide a genuine uniform option. At various times staff have requested uniforms and been told they are not available, not available in their size or that the service could not afford the cost of providing uniforms. New employees are routinely not informed that a uniform option is available.”

[25] While I recognise that Mr Jones was reporting what had been said to him, I do not accept that staff were told the service could not afford the cost of providing uniforms. The background to the comments about the availability of uniforms is as I have set it out from the evidence of Ms Brown-Toko and the staff members who gave evidence. The information provided to Mr Jones suffered from not acknowledging the casual nature of many of the approaches that had been made to Ms Brown-Toko.

[26] In September 2002 Bruce Talbot, the associate manager at the Clinic, issued a memorandum to the female nursing staff inviting them to see Ms Brown-Toko, provide their size or be measured for it, and view the new uniform which had been decided by then. As Mr Jones recorded in his letter, the matter of uniforms for males was addressed a month or so earlier. In general I understand that is why the employment relationship problem covered the period only to September 2002. More specifically I was provided with records indicating a large scale issue of items of uniform thereafter.

[27] By letter dated 26 September 2002, Ms Street advised Mr Jones:

“We believe that the wearing of uniform has been optional at the Mason Clinic from the outset. Over time some sizes have not been in demand and therefore eventually have not been available for some staff, but that has now been corrected, at least for the male staff. A full selection of sizes is currently available for male staff. The uniform for female staff has yet to be finally confirmed, after consultation for female staff.

We reserve the right to require staff to wear uniforms, as provided for in the Collective Agreement.

We understand that you have individual cases where people claim never to have been informed that the wearing of uniform was optional at the Mason Clinic, or again, cases where people maintain that they have been instructed not to wear uniform. We are prepared to examine each of those cases individually to determine whether or not some injustice has occurred, and to correct that injustice where necessary. ...”

[28] Discussions including some of the individuals who gave evidence at the investigation meeting followed, but the matter remained unresolved. Ms Street said in her brief of evidence that

none of the people spoken to were alleging they had been instructed not to wear a uniform, which accords with the evidence I heard. She believed the main concern was about problems in obtaining a uniform, and said she considered that did not give rise to a claim for a clothing allowance.

Determination

[29] Regarding the applicant's general complaint about the availability of uniforms I consider the management at the Clinic was not proactive in establishing and maintaining a procedure for their supply to staff members. On the contrary, it appointed Ms Brown-Toko to take responsibility for uniforms for the male nursing staff in circumstances where the role was clearly an add-on to her existing responsibilities and Ms Brown-Toko did not give it any priority. Thereafter no-one ensured there was any coherent system for the ordering, provision or supply of uniforms and nothing systematic was done about drawing the availability of a uniform to the attention of new staff members. It is not surprising that people like Messrs Byrt, Hunt and McKain began experiencing difficulties once the uniforms they brought with them to the Clinic began to wear out and nor is it surprising that a degree of cynicism about uniforms began to pervade the ranks of the nursing staff.

[30] Ms Walsh said in her letter to Ms Donnelly of 20 August 2001 that the management's position had remained constant in that it had not legislated for the wearing of a uniform on the ground that the issue was a personal one. While I would accept that was the attitude of the management by 2001, there was no evidence of any express and mutual understanding between the parties that the wearing of a uniform was optional, or why it was optional. Instead some people chose not to wear uniforms, some people had difficulty obtaining them and stopped trying, some people disliked the uniforms available, and the management stood back from the entire issue. Even the dress standards policy in force at the time was silent on uniforms. In short the appearance that the wearing of a uniform was optional was significantly affected by the management's own *laissez-faire* approach to the matter.

[31] To the extent staff members' complaints arose out of the inefficiencies caused by the lack of a coherent system regarding uniforms, then the complaints were valid. However matters do not end there. There was an attempt to maintain a supply of uniforms but some of the staff members took a very casual approach to obtaining their uniform. Although it is not satisfactory from a management point of view that people like Mr McKain should have had to rely on their own persistence to obtain a uniform, his experience showed that persistence could pay off. Those who relied on stopping Ms Brown-Toko as she was carrying out other duties away from her office could have been more proactive in pinning her down at the office, and could have followed up with her when she sent them away to obtain their measurements, for example.

[32] Further, despite my description of the approach of management as *laissez-faire*, the appearance of a 'culture' of not wearing a uniform at the Clinic was not entirely explained by that approach. Some witnesses, and in particular Mr Croot, preferred not to wear a uniform in any event. Others, such as Ms McCarten, were happy not to wear a uniform. I observe further that notes from a meeting of 19 December 2002 contain various statements from staff members to the effect that they either preferred not to wear a uniform, or wore it only in limited circumstances.

[33] In some instances the decision not to wear a uniform was affected by the staff member's dislike of the uniform. In her letter of August 2001 Ms Walsh referred on a broader basis to the matter of the likes and dislikes of uniforms when she referred to the majority of female staff members deciding not to wear the navy blue skirt or trousers. This was amplified in evidence by references to a perception that the older female staff members took one view of whether they liked

the uniform or not, while the younger ones took another. I would not visit on the employer the result of differences of that kind.

[34] I would accept it is the management's responsibility to ensure a certain level of suitability is achieved when selecting a uniform, but beyond that level a staff member exercises an election not to wear the uniform if he or she decides not wear it out of dislike. The discussion of the sweatpant identified in 1996 suggests the level was not achieved in that respect, but the level probably was met with the replacement choice of navy blue skirt or trousers. However any issues arising out of the suitability of the sweatpant fell prior to the period with which this employment relationship problem is concerned and in any event were not the subject of any claim for payment.

[35] It was readily apparent individuals' own views played a role in whether they wore a uniform or not. In addition notes taken in 2001 and 2002 during meetings of the PSA subgroup operating at the Clinic indicate an awareness that uniforms were supplied albeit sometimes on a patchy basis, and that problems had arisen in particular circumstances only.

[36] Overall there was such considerable variation in individual circumstances, and an apparent awareness of it on the part of some of the applicant's representatives, that it should have been obvious this matter did not lend itself to being filed as a class action. While many claims for payments under collective agreements are negotiated and settled on a class basis, and for pragmatic reasons, once litigation is commenced far more detailed attention is needed to the evidence required to prove a case. It took several months and several telephone conference calls before I was able to obtain enough evidence from the parties to provide any basis on which to proceed.

[37] In addition I urged the applicant repeatedly and from the outset to attempt to group the claimants' circumstances so this matter could be dealt with more efficiently. It should have made that attempt with reference to the kind of evidence needed to prove the claims for a clothing allowance - not with reference to the claimants' prior employment or to their occupational class as these facts were irrelevant to whether this particular claim could be made out under clause 8.4.2. It should have excluded all those who genuinely elected to wear civilian clothing, and looked more carefully at the legal basis on which it was arguing a 'direction' had been made as well as the scope of the evidence in support of that argument. For example on the evidence I heard it would appear there was a group of people who said they gave up asking for uniforms because of the problems they encountered, and a group whose employment commenced much later and did not bother asking for uniforms because of what colleagues told them about the likelihood of obtaining one.

[38] I acknowledge this kind of preparation is a time-consuming process, and often appears out of proportion to the amount of money to which any individual might be entitled. That does not change the fact that it is necessary in litigation even in an investigative procedure.

[39] Thus with reference to the wording of clause 8.4.2, I would dismiss the claims of people whose circumstances fall within any of the following categories:

- (a) Those who prefer not to wear a uniform for therapeutic reasons, and hence do not wear a uniform unless required to do so. These people have clearly made an election regarding the wearing of a uniform and do not have a claim to a clothing allowance.
- (b) Those who did not or do not wear a uniform because they did not or do not like the uniform available. That decision also amounts to an election and those who make such an election do not have a claim to a clothing allowance.
- (c) Those who have never asked for a uniform yet knew there was one in use. Despite the inadequacies in the procedure for providing uniforms, the tenor of the evidence was that new staff members were made aware either by other staff members or from

their own observation that there was a uniform worn at the Clinic. Even if other staff members discouraged them from pursuing the matter, I do not believe the failure to attempt to obtain a uniform is capable of amounting to a 'direction' from the employer that civilian clothing be worn.

[40] The other side of the coin requires an assessment of whether, despite the lack of an express direction, the circumstances prevailing at the Clinic amounted to a direction to a staff member not to wear a uniform. While the dictionary definition of 'direction' encompasses notions of giving an instruction or an order, I take a deliberately wider approach to the definition in the present circumstances. Such an approach is supported by the **Sutherland** decision, and in any event I believe any other approach would allow deliberate inaction to defeat the purpose se 8.4.2. That would be inequitable. I therefore interpret 'direction' as being capable of including action or inaction on the part of the employer which has the effect of giving an employee no choice but to wear civilian clothing when the employee would not otherwise have elected to do so. In turn this becomes an exercise in assessing individual circumstances as a matter of fact and degree.

[41] Unsatisfactory though their circumstances were, I am not persuaded that people like Messrs Byrt, Hunt and Field can be said to have had no choice in the matter of whether they wore a uniform or not. They had a choice, but exercising it required them to be as persistent as Mr McKain said he was. A lack of success in obtaining a uniform following a series of casual approaches to Ms Brown-Toko, but not followed up by either party, does not amount to a direction that civilian clothing be worn. Similarly, even if I accept these people were told on occasion that no uniform was available, there was nothing specific enough to contradict evidence that at least through the mid – late 1990s Ms Brown-Toko was prepared to and did order replacements if she was met in her office rather than being flagged down as she went about her other duties, and if she was in possession of the necessary information about size.

[42] Overall, on the evidence I have, there is only one aspect of this claim that may be of substance. The remainder of it is dismissed.

[43] The aspect to which I refer is WDHB's acknowledgement that the supply of uniforms was effectively put on hold in or about 2000-2002 because of supply difficulties, and pending the outcome of the latest attempt to identify a suitable uniform. If anyone wished to wear a uniform and approached Ms Brown-Toko (or presumably the laundry service) during that period, but was told no uniform was available, there may be a basis for saying the person concerned had no choice but to wear civilian clothing. However no allegation of that kind was made by anyone who gave evidence at the investigation meeting, and I cannot make any findings in favour of any other person in respect of the period without evidence.

[44] I suggest that matter be dealt with, in the first instance, by anyone whose circumstances fit within those just set out approaching the Clinic or its representative and putting the case for the payment of an allowance. If the matter cannot be resolved then leave is reserved to refer it to mediation and if necessary to the Authority for resolution.

[45] I would expect anyone making such an approach to be in a position to give specific evidence of any approach made to Ms Brown-Toko - rather than vague and generalised allegations - as well as evidence of the alleged response. I would not expect to see another class action if the matter proceeds because individual claims will turn on their own facts, except to the extent the relevant facts are similar. Thus I would not expect to hear from anyone who, for example, prefers not to wear a uniforms in any event, dislikes the uniform, or who has a uniform and chooses to wear it occasionally. Any failure on the part of the applicant to make a reasonable attempt to weed out

claims that obviously cannot succeed is likely to be reflected in costs if the matter returns to the Authority.

[46] Finally, I was told that improvements have been made to the procedure for managing the provision of uniforms. I trust that is so, and that the improvements amount to more than a minor and temporary tightening of the procedure discussed in the evidence. If they do not, then I recommend that the Clinic take advice, and act on it, about implementing an effective and efficient procedure. If it has not already done so then I also recommend that it overhaul the policy on dress standards and issue a document which includes express reference to whether the wearing of a uniform is optional or not and lists the circumstances in which a uniform is or is not required, as the case may be. Information about how a uniform can be obtained could also usefully be included. A copy of the document should be provided to all members of the nursing staff, as well as to new members on commencement of their employment.

Costs

[47] Costs are reserved.

[48] The parties are invited to agree on the matter themselves. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

R A Monaghan
Member, Employment Relations Authority