

Determination Number: WA 79/06

File Number: WEA 5025733

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Guardian Healthcare Group Limited (applicant)
<b>AND</b>	New Zealand Nurses Organisation (first respondent)
<b>AND</b>	Service and Food Workers Union Inc (second respondent)
<b>REPRESENTATIVES</b>	Richard Searle for the applicant Nicola Brush for the first, and Tim Oldfield for the second, respondents
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 4 April 2006
<b>SUBMISSIONS RECEIVED BY</b>	10 May 2006
<b>DATE OF DETERMINATION</b>	12 May 2006

**DETERMINATION OF AUTHORITY**

## Employment Relationship Problem

1. The Company says the problem it wants resolved is as follows:

1.1 *Whether a rest home is an “essential service” within Schedule 1 of the Employment Relations Act 2000, on the grounds that:*

1.1.1 *It may offer hospital-level care to residents and as such operate as a “hospital care institution” within the meaning of s. 58(4) Health and Disability Services (Safety) Act 2001 and clause 11(a) of Schedule 1 to the Employment Relations Act 2000;*

1.1.2 *It would be inconsistent for a stand-alone rest home not to be an essential service, where the rest home part of a joint hospital/rest home is an essential service;*

1.1.3 *A rest home which is a Stage 3 secure dementia unit is a “residential welfare institution” within the meaning of clause 14 of Schedule 1 to the Employment Relations Act 2000.*

1.2 *Whether a joint rest home and hospital facility is an “essential service” within Schedule 1 of the Act on the basis that:*

1.2.1 *a joint rest home and hospital facility is a “hospital care institution” within the meaning of s. 58(4) of the Health and Disability Services (Safety) Act 2001 and clause 11(a) of Schedule 1 of the Employment Relations Act 2000 on the following grounds:*

- *A joint hospital/rest home was a licensed hospital under the Hospitals Act 1957. Under s. 58(4) “hospital care institution” (b) of the Health and Disability Services (Safety) Act 2001, a previously licensed hospital is a “hospital care institution”;*
- *Alternatively, all parts of a joint hospital/rest home may be parts of a premise used for the purpose of a “hospital care institution” under s. 58(4) of the Health and Disability Services (Safety) Act 2001;*

- *Alternatively, the rest home is ancillary to the hospital under s. 58(4) of the Health and Disability Services (Safety) Act 2001;*

*1.2.2 Alternatively, a rest home is “a service necessary for the operation” of a hospital care institution within the meaning of clause 11(b) of Schedule 1 to the Employment Relations Act 2000, where there is a joint facility on the same site.*

*1.3 Whether on-site catering, cleaning and laundry services are “a service necessary for the operation” of a hospital care institution within the meaning of clause 11(b) of Schedule 1 of the Act, where there is also a rest home on the same site.*

(Refer to the re-amended statement of problem received on 5 April 2006 and as confirmed by counsel for the applicant, Mr Richard Searle, during the Authority’s investigation on the preceding day)

2. The respondents do not accept the applicant’s position and say instead that:
  - a. A rest home is not an essential service within Schedule 1 of the Employment Relations Act 2000 (the Act); and
  - b. A joint rest home and hospital facility is also not an essential service within Schedule 1 of the Act. In particular, the whole of a rest home and hospital facility is not a hospital care institution and is thus not within the Act; and
  - c. Only those parts of a joint facility that actually provide hospital care, and any other parts used for ancillary hospital care purposes can be defined as a hospital care institution; and
  - d. A rest home is not a service necessary for the operation of a hospital care institution within the meaning of the Act, where there is a joint facility on the same site; and
  - e. Whether onsite catering, cleaning and laundry services are a service necessary for the operation of a hospital care institution within the meaning of the Act is largely a question of fact depending on the particular circumstances.

3. Mediation did not settle this employment relationship problem.

## **Investigation**

4. During a telephone conference call on 13 January 2006 the parties agreed to a two-day investigation commencing in Wellington on 4 April. A timetable for witness statements, a statement of facts and bundle of documents was agreed.

## **Background**

5. Prior to the enactment of the Health and Disability Services (Safety) Act 2001 (the H&DS Act) providers in the residential aged care sector had to comply with the Hospitals Act 1957 and/or the Old People's Homes Regulations 1987.
6. Under the earlier legislative regime a premise was licensed as opposed to certified and could only be licensed for one purpose, that of either a hospital or an old people's home.
7. Prior to 1996 the Ministry of Health's (MoH) practice was to issue two separate licences – a hospital license and an old people's home licence – to premises that provided both old people's home and hospital levels of care.
8. In 1996 the Hospitals Act Amendment No 6 was enacted which was then followed by The Hospitals (Eligibility for Exemption) Notice (No 2) 1996: these allowed the MoH to issue one single licence to a hospital premise providing both hospital and old people's home levels of care.
9. The current statutory regime, via the H&DS Act, replaces the previous definition of "hospital" with "hospital care institution", and "old people's home" became "rest home care". The H&DS Act does not use premises to define what a rest home is.
10. Health and disability standards are generic and are applied to all health care service providers across the spectrum. Providers are required to meet standards that are appropriate to the level of care they have contracted to provide.

11. Under the H&DS Act certification occurs for the facility as a whole and provides for different services that may be offered. If a facility is a stand alone rest home it will be certified to provide rest home level of care. The equivalent applies in respect of a stand alone hospital.
12. A hybrid facility is certified as providing both rest home and hospital services across the facility without a physical distinction being made.
13. Under the H&DS Act the Director-General of Health (D-GH) has certified the applicant to provide hospital care or hospital and rest home care at all its current sites except for the sites at which the applicant is certified to provide only stand-alone rest home care.
14. Unlike the licensing system prevailing under the Hospitals Act 1957, the current certificates allowing both hospital and rest home care on the same premises do not dictate in which parts of the premises the two kinds of service are to be provided.
15. Additionally, a provider certificated to provide rest home care can provide hospital care for no more than one resident, so long as the provider does not attempt to provide hospital care for two or more persons who require hospital care.
16. The need for temporary case-by-case dispensations based on humanitarian grounds remains unchanged. It is not uncommon for rest home residents to remain in their rest home bedrooms for upwards of 7-days while they await formal assessment and approval for hospital level care: in the intervening period the rest home is obliged to provide adequate hospital level care.
17. The bulk of the Company's funding is from District Health Boards and is based on a fee-for-service model at a negotiated price per bed day and service mix, i.e. rest home, dementia or hospital care level.
18. At issue between the parties is whether or not the unions have to provide 14-days notice of the intention of their members, who are employed in the applicant's rest homes, to take strike action.

19. The applicant says (and the respondents agree) that, under Schedule 1 of the Act, a stand-alone hospital is an essential service along with its supporting services such as food, laundry and cleaning. Fourteen days notice of intended industrial action is therefore required of the relevant workforce.
20. The majority of the applicant's facilities are hospitals that offer rest home care.
21. The applicant considers its hospital facilities that also provide rest home care on the same site as a hospital care institution because:
  - a. The Company provides a continuum of service from low-medium rest home care to high hospital care on the same site without physical distinction between the rest home and the hospital on the certificate.
  - b. No distinction is made in respect of its bedrooms as to those accommodating residents requiring hospital or rest home level care.
  - c. Unlike the regime under the previous legislation, the D-GH has not prescribed the mix of hospital and rest home facilities. There is no requirement that care at a joint institution must be provided in separate units: it is up to the provider to ensure the adequacy of bed areas and that residents receive timely and appropriate care.
  - d. The Company's services are required to be certified under the H&DS Act. The applicant has been certified to provide both hospital and rest home care on most of its sites.
  - e. In facilities providing dual levels of care, the food, cleaning and laundry services provide services to both and cannot be separated.
22. In combined hospital and rest home service sites the care giving and nursing staff are frequently employed to, are expected to and do work across the facility in both areas of care provision. Relevant collective, and individual, employment agreements reflect these realities. While rosters are often set well in advance, they must remain fluid so as not to compromise the needs of residents/patients.

23. Under the licensing regime it was impossible to categorically state that at any one time an old people's home was providing exclusively low-medium rest home care. The state of residents' health and their care needs did (and do not) remain static but were (and remain) every changing. Various factors might tip the resident over from low level care to high level, hospital care needs. For the period of time taken to determine if the change is temporary or permanent (indicating the need for relocation to a high care service) that resident needs high level care and it is provided, albeit in a rest home.
24. It is therefore simplistic to state that hospitals provide hospital (high) level care and rest homes provide low (rest home) level care exclusively. This is even more accentuated in a hospital providing both levels of care.
25. Unlike the situation prevailing under the previous statutory regime, and because of the greater contemporary health needs (or increased acuity levels) of rest home residents, a rest home today must provide registered nurse care of residents in acknowledgement of the increased complexity of the health needs of current residents. The needs levels of residents entering rest home care today have increased to the point that, in the past, constituted admission to hospital level care. A resident's needs can and do, of course, fluctuate within minutes to hours. People now entering residential care have significantly higher care needs than they did at the time the Employment Contracts Act 1991 or the current Act came into place.
26. Another reason for rest home residents presenting with more serious medical problems today is the implementation by successive governments of 'aging in place' policies, i.e. as a result of old people being kept at home longer and of criteria for eligibility for residential care having been increased.
27. Because of increased frailty, an effect of employees being able to withdraw labour through strike action without notice would almost certainly be an increase in the incidence of unwanted events and outcomes such as skin tears and medication errors, and also because a significant proportion of rest home residents suffer from Alzheimers and other forms of dementia – the vast majority of whom are managed in main steam rest homes.

28. The link between hospital and rest home care has become so grey that, when interpreting definitions of such levels of care, the vulnerability of the resident should be accounted for. So as to ensure the wellbeing of residents, it is essential for a provider of rest home and hospital care to be able to plan, source and implement replacement staff should employees choose to withdraw their labour by strike action.

## **The Parties' Positions**

### **Applicant's Position**

29. In submissions received on 11 April, the applicant usefully summarised its position that a stand-alone rest home is an essential service for the following reasons:

- *It may offer hospital-level care to residents and as such operate as a "hospital care institution" within the meaning of s. 58(4) (of the H&DS Act) and clause 11(a) of Schedule 1 (of the Act);*
- *There has been a rise in acuity levels and the increase in admission standards that mean a rest home is, in fact, providing the level of care considered to be hospital level less than a decade ago;*
- *A rest home is an "essential service" for a significant section of society who would be in a very vulnerable position if industrial action without notice was to occur;*
- *There would be a significant inconsistency in the legislation if a stand-alone rest home was not to be an essential service, and the rest home part of a joint hospital/rest home was an essential service.*

30. As a stage 3 dementia unit is a rest home, the Company repeats the submissions set out above and adds additional argument, in favour of them being defined as a "residential welfare institution" within the meaning of clause 14 of Schedule 1 of the Act, including the fact that residents are assessed for admission, they provide welfare care in a residential setting, they are secured units, the residents may display episodes of verbal abuse, physical aggression violence and wandering and unannounced withdrawal of labour would put the residents in a high risk situation.

31. The Company argues that if its submission in favour of stage 3 dementia units is accepted, the Authority should also find that stage 2 rest homes are a “*residential welfare institution*” within the meaning of clause 14 of Schedule 1 of the Act, and thus an essential service, because they also require assessments for admission, provide welfare care in a residential setting, unannounced withdrawal of labour would put residents in a high risk situation and any other finding would create an unwanted disparity in the essential service status of stage 2 and 3 rest homes.

### **Respondents’ Position**

32. Because the respondents understand the potentially serious effect of strike action, it is their practice to give notice for its members working in the applicant’s hospitals and rest homes although they do not accept it is a legal requirement for notice to be so given.
33. Aged care facilities operated by the applicant are configured in two-ways: there are some which have both a hospital and a rest home and then there are others which have only rest home facilities on site. The Company’s website ([www.ghg.co.nz](http://www.ghg.co.nz)) lists its rests homes on a separate page from its hospitals. The Company has some aged care hospitals which do not have a rest home attached or associated with them, e.g. Hillsborough Hospital, Auckland and St Nicolas in Christchurch.
34. Even though there may be no legal restrictions on rest homes and hospitals being in the same physical area it is the Unions’ experience that they are typically housed in separate buildings or wings or floors. This reflects the requirement of hospitals for more equipment, wider corridors and beds that can be elevated.
35. Rest homes typically operate a home environment with more common areas made use of by residents who are more autonomous and self-sufficient.
36. The H&DS Act continues the separate certification for hospitals as distinct from rest homes, reflecting the different requirements for one from the other. Examples of the latter include lesser staffing levels in rest homes than hospitals, reflecting the lower level of care provided in the former.

37. In the meantime the sector operates on standards set out in the MoH New Zealand Handbook *“Indicators for Safe Aged-care and Dementia-Care for Consumers”* (Standards New Zealand, SNZ HB 8163; 2005). These standards recommend, amongst other things, that a registered nurse is on duty at all times in a hospital, but not in a rest home. For stage 2 rest homes, 2 hours of registered nurse input is recommended for each patient per consumer; in stage 3 rest homes or dementia units, the level is 3.5 hours per week. For hospitals, 8 to 14 hours input is recommended, depending on the level of hospital care.
38. For caregivers, the same figures are 12, 14.5 and 16.5 hours per week.
39. The Unions are not aware of a rest home specifically increasing the number of staff or the hours worked in order to cover patients regarded as hospital patients but who are in a rest home. It is expected that once residents are assessed as requiring hospital care then they are moved to a designated, i.e. hospital, facility.
40. Providers enjoy increased funding as one outcome of the transfer.
41. Staff working in rest homes are typically reluctant to work in stage 3 or dementia units (where I note staff are now required to achieve specific NZQA training requirements as defined within District Health Board service specifications). In some instances caregivers are employed, and rostered, specifically to work in the hospital or rest home and do not cross over to the other area.
42. Some caregivers employed in rest homes are physically unable to undertake the heavy lifting and other similar work required in hospitals.
43. Registered nurses are often based in the hospital (because of staffing requirements), but – in a sole-charge situation – often cover rest home needs at the same time. The reverse is much more uncommon.
44. The Unions accept that on average clients in rest homes have got more sick over time: this trend preceded the H&DS Act.

## Discussion and Findings

45. Despite the close, and operationally often interwoven, proximity of hospital and rest home activities, I do not accept any aspect of the position advanced by the applicant for the following reasons.

46. Clause 11 & 14 of Schedule 1 of the Act defines as an essential service,

*The operation of*

(a) **a hospital care institution** within the meaning of section 58(4) of the (H&DS Act); or

(b) **a service necessary for the operation** of such an institution.

(And)

*The operation of a **residential welfare institution** or prison.*

(emphasis added)

47. Sub-section 58(4) of the H&DS Act defines hospital care institutions as,

(a) *... premises used to provide hospital care, in accordance with section 9; but where only parts of any premises are used for that purpose, means only those parts and any other parts used for ancillary purposes; and*

(b) *at a time before 1 October 2004, includes a licensed hospital (within the meaning of section 118 of the Hospitals Act 1957).*

48. Sub-section 58(4) also goes on to similarly define residential disability institutions and rest homes, as premises used to provide that care in accordance with s. 9, etc. Significantly, I find, the H&DS Act does not define them as “*hospital care institution(s)*” or as “*premises used to provide hospital care*” (above).

49. Section 9 of the H&DS Act requires a person providing health care services of any kind to do so while certified by the D-GH to provide health care services of that kind, to meet all relevant service standards, to meet any conditions certified by the D-GH, to comply with the Act and to comply with applicable regulations if the services are rest home care or geriatric services that are hospital care.
50. I am satisfied that both Acts clearly and, for separate but parallel reasoning, deliberately differentiate between hospitals and rest homes, whether or not the latter is a stand alone facility or integrated in some way into the operation of a defined hospital. Parliament having separated these facilities, it is not for the Authority to attempt to conjoin them. The applicant's decision to obtain cost and other synergistic benefits from integrating the operation of its hospitals and rest homes is not a reason to effectively rewrite the legislation and, in particular, to withhold from the Unions' members (and other employees) the benefits and rights bestowed on them by the Act, particularly the right to strike with minimal or no notice.
51. I note here that the respondents clearly and responsibly recognise the practical importance of providing adequate (typically 14-days) notice, regardless or whether the workplace is a hospital care institution or another. This is because, amongst other reasons no doubt, they sensibly accept the importance of patient and resident care in the context of the applicant's close operation of its hospital and rest home assets.
52. Notwithstanding that voluntary practice, I accept the respondents' fundamental position and their reasoning, that rest homes and joint rest homes are not essential services within Schedule 1 of the Employment Relations Act 2000 (the Act) and that only those parts of a joint facility that actually provide hospital care, and any other parts used for ancillary hospital care purposes, can be defined as a hospital care institution. This is because a rest home is not a service necessary for the operation of a hospital care institution within the meaning of the Act, where there is a joint facility on the same site.
53. I add here the finding that, whether onsite catering, cleaning and laundry services **and** rest homes are a service necessary for the operation of a hospital care institution

within the meaning of the Act is – as the respondents argue – largely a question of fact depending on the particular circumstances.

54. I also reject the argument that the term “*residential welfare institution*” as set out in Clause 14 of Schedule 1 of the Act is intended to apply to any of the facilities or services provided by the Company. I am satisfied that a proper reading of that clause makes it clear that a penal institution of some type is contemplated, and not a rest home or dementia unit regardless of the level of security they might provide: the purpose of the security provided by the Company is to protect its client residents, whereas residential welfare institutions, amongst other things, exist to protect the community from their residents.
55. Finally, I prefer the respondents’ interpretation of ss 58(4) (b), that it should be read as a transition provision and has no application after 1 October 2004. It can not assist the applicant in arguing for an extension to all of its facilities the status of essential service.

### **Determination**

56. For the reasons set out above I find against the position or interpretations advanced by the applicant, Guardian Healthcare Group Limited, and opposed by the respondents, the New Zealand Nurses Organisation and the Service and Food Workers Union Inc.

### **Costs**

57. At the request of the parties costs are reserved.

**Denis Asher**

**Member of Employment Relations Authority**