

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 305/07
5075069

BETWEEN	PUBLIC SERVICE ASSOCIATION Applicant
AND	BAY OF PLENTY DISTRICT HEALTH BOARD, First Respondent
AND	NORTHLAND DISTRICT HEALTH BOARD, Second Respondent
AND	TAIRAWHITI DISTRICT HEALTH BOARD, Third Respondent
AND	WAIKATO DISTRICT HEALTH BOARD Fourth Respondent

Member of Authority: Vicki Campbell

Representatives: Tanya Kennedy and Steve Ross for Applicant
Doug Alderslade and Paul White for Respondents

Investigation Meeting 2 July 2007 at Hamilton

Submissions Received: 10 and 17 August 2007 from Applicant
10 and 17 August 2007 from Respondent

Determination: 3 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Public Service Association (PSA) has asked the Authority to assist the parties in relation to a dispute concerning the interpretation, application and operation of a multi employer collective agreement (MECA).

[2] The parties were unable to resolve the problem between by the use of mediation.

[3] The disputed application of the MECA relates to the following issues:

- The appropriate salary scale for Alcohol and Drug Clinicians employed by Waikato and Bay of Plenty (BOP) DHBs; and
- The appropriate salary scale for Health Promotion Officers employed by Waikato, Tairāwhiti and BOP DHBs; and
- The additional progression from step 5 to step 6 for employees on the Allied and Public Health Salary Scale employed by Waikato, Tairāwhiti, BOP and Northland DHBs; and
- Progression based on merit for certain occupational groups on the Allied & Public Health Salary Scale where a merit based progression process currently operates.

[4] During the course of the investigation into these questions, it became evident that the issues have arisen between the parties as a result of the fact that nationally agreed terms of settlement ("NTS"), signed off by all 21 DHB's (including the respondent parties to this employment relationship problem) and subsequently ratified by PSA members, were then altered during the course of negotiations between the parties when they were putting the Midland MECA document together. The changes have significantly affected the meaning and application of the NTS. As I have found below, those changes were neither ratified nor rejected by PSA members.

Approach to interpretation

[5] The following is a convenient summary by a full court of the Employment Court of the principals applicable to determining the dispute:

The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction maybe taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction...
New Zealand Tramways etc Union Inc v Transportation Auckland Limited and Cityline (New Zealand Limited, unreported, 27 November 2006, AC 61A/06).

The National Terms of Settlement

[6] Prior to July 2005 each of the DHB parties to this dispute had their own separate collective employment agreements with the PSA. In 2005 the PSA and all 21 DHBs nationally, negotiated and agreed to a national set of terms and conditions relating to wages and salaries, penal and overtime conditions, and

public holidays for categories of employees represented by the PSA. The resulting document is called the National Terms of Settlement (NTS) and was signed off by the 21 DHBs and the PSA on 22 September 2005.

[7] The NTS at Clause A provided for common salary scales to be applied to all DHBs and which applied from 1 July 2005. Relevant provisions from clause A of the NTS include:

5. The salary scales shall be written into regional MECAs currently under negotiation and shall apply from 1/7/05-30/06/07...

...

7. The DHBs agree to establish a working party to discuss guidelines for the progression criteria through two national joint working parties.

Where an agreed progression criteria process is in place within a DHB for an occupational group(s) for those steps above the automatic increment, this process will be utilised for the duration of the agreement or until replaced by nationally agreed criteria.

For those staff members who translate into a step from which they can subsequently progress automatically, such automatic progression will occur. This includes staff members who have commenced a prospective merit progression process. These staff will progress to the next salary step automatically without being required to complete the prospective merit progression process.

For those staff members who translate into a step from which progression is based on merit, they shall be able to commence a merit progression criteria process where this exists within the DHB. How the current merit criteria existing with a DHB apply to the new salary scale will be agreed at a regional level.

[8] Clause 7 of the NTS also provided for the structure of the regional MECAs which provided for a Midland MECA comprising Northland, Bay of Plenty, Lakes, Waikato and Tairāwhiti DHBs. Further, it states in relation to the MECAs:

- c) The Allied, Technical and Public Health document shall cover those employed on the salary scales in Appendix Two.
- d) These Terms of Settlement shall be integrated into the regional MECAs together with such other matters as the parties agree providing such matters are not inconsistent with these Terms of Settlement.

[9] The NTS sets out the applicable salary scales for each category of employee. The relevant categories are:

Allied & Public Health

Allied Health – including Dental therapists, Health Protection Officers and Health Promotion Officers

Alcohol & Drug

A & D Clinicians

Community Health Workers

This scale is available for those health workers and support workers employed in both Mental Health and Physical Health services. Staff will work predominantly in community settings but may also work in inpatient settings. Many of these roles will have a strong cultural element (although not exclusively) and may also be working under the direction and supervision of qualified staff (eg nurses or allied health professionals).

Level 3*

* Access to this scale is for those staff with relevant advanced tertiary/cultural qualifications (minimum Level 7 qualification and additional advanced qualifications). Roles may include community Health Workers, Community Support Workers, Maori and Pacific Island Community Support Workers and Nutritionists.

Level 2*

* Access to this scale is for those staff with relevant advanced qualifications, including cultural qualifications. Roles may include community Health Workers, Community Support Workers, Maori and Pacific Island Community Support Workers and Nutritionists.

Level 1*

* Access to this scale is for those staff with no formal qualifications or (Level 4) certificate/diplome (sic) qualifications such as the national Certificate in Mental Health (Mental Health Support Work) and some cultural qualifications. Roles may include Rehabilitations Support Workers, Maori Health Workers, Maori Mental Health Workers, Community Health Workers and Community Support Workers.

[10] I am satisfied that the purpose of the NTS document was to provide a common salary scale and common provisions dealing with hours of work, overtime, penal rates, public holidays and some allowances, on a national basis to be applied across all 21 DHBs irrespective of what other terms and conditions the regional MECAs may provide.

The Midland MECA

[11] Following the resolution of the NTS in September 2005, bargaining, which had already been commenced in the Midland area but which was adjourned until settlement of the NTS negotiations, resumed.

[12] According to the provisions of the NTS the terms set out in that document were to be integrated into regional MECA's together with other matters agreed between the parties so long as they were not inconsistent with the NTS terms. Any such negotiations and subsequent agreements were to have a cost neutral effect.

[13] During negotiations over the wording and the insertion of various clauses into the written document, the PSA held ratification meetings with its members in mid December 2005 (Lakes ratification meetings were held in February 2006). These ratification meetings were done with the full knowledge of the DHBs which supported the process.

[14] During the course of the investigation meeting the prospect emerged that the MECA may not have effect as a collective agreement because of a failing on the part of the PSA to properly ratify the MECA in accordance with the requirements of section 51. I called for additional documentation and requested the representatives to provide written submissions on this issue. I have had the opportunity to read those submissions and have taken them into consideration in coming to my conclusions in this matter.

Ratification of the MECA

[15] Section 51 stipulates that a union must not sign a collective agreement unless the agreement or variation has been ratified in accordance with the ratification procedures identified pursuant to the requirement of the union to notify the parties of the procedure for ratification by the employees to be bound by the resulting collective agreement.

[16] In relation to the meaning of ratification, the Court in *NZ Medical Laboratory Workers v Hamilton Medical Laboratory* [1998] 1 ERNZ 162, paragraph 30 stated:

Precisely what is ratification is not defined in the legislation. Having regard both to the general law of agency and to employment law and the reality of employment relations in New Zealand, I am satisfied that ratification is the principal's consent to a proposed settlement negotiated by an agent, confirmation of a provisional agreement or the giving of formal consent or sanction. When ratified a contract is held to have been made on and as from the date of settlement, not from the subsequent date of ratification.

[17] The agreed bargaining process entered into by the parties pursuant to section 32 of the Employment Relations Act, requires:

PSA settlement must go back to members to vote on, voting is by way of secret ballot – DHB by DHB - Waikato 50%+1, Tairāwhiti DHB 70%, BOP 50%+1, Lakes 70%, of those who cast a vote. The ratification is based on all DHBs ratifying the agreement.

[18] The bargaining process allowed for agreements to be reached as bargaining proceeded, on individual items, but did not prevent any party revisiting those agreed items until a full settlement was reached. The bargaining process agreement required the terms of settlement to be recorded in writing and signed off by both parties, following the ratification procedure.

[19] On 5 December 2005 the understanding between the PSA and the DHBs nationally was that the PSA would take a package to ratification made up of the NTS salary scales (including the provisions relating to hours of work, overtime, penal rates and some allowance) and any other matters that had already been agreed between the parties at regional bargaining. This was confirmed in an email from Ms Cath Jackson, an Employment Relations specialist for DHB NZ, to Mr Warwick Jones of the PSA national office, on 5 December 2005.

[20] At the investigation meeting I requested copies of the documents which were actually produced by the PSA for the purposes of their ratification meetings held with their members employed by each of the five DHBs. I have received

only two documents. A copy of the PSA monthly Newsletter "Pulse" and a copy of the ballot paper used for the Lakes ratification process.

[21] In the December publication of "Pulse", the PSA set out for its members the terms of the NTS agreement which had been signed off by each of the 21 DHB's. The newsletter set out the specific details for each of the salary scales, together with an explanation as to the impact of the agreements reached through the NTS.

[22] On 12 December 2005 the parties met in negotiation over the Midland MECA. The notes taken by the DHB at that meeting show that the PSA was keen to take the salary scales to ratification. It is evident that all parties at the negotiation meeting were aware that further meetings would be required in February 2006 to complete negotiations over the Midland MECA.

[23] Ms Margaret Takoko, Regional Delegate for the PSA, notified the DHBs that she wanted to get the salary scales offered to her members that day and that once the NTS was ratified the new salary scales could be paid out.

[24] Mr Pepperill responded that as far as he was concerned the negotiations had not completed and that the parties needed to have a finalised MECA document. He is recorded as advising Ms Takoko that the CEO's would not pay out any money without that document.

[25] At the negotiation meeting on 12 December changes to the wording of some of the salary categories were proposed. In particular the category of Community Health Worker was changed to include Health Promotion Officers. In a note recorded from that meeting Mr Pepperill advised that it was "...an option to be considered."

[26] On or about that same date, the PSA began holding ratification meetings with its members employed by the five DHBs about the Midland MECA. On 9 February 2006 Ms Takoko wrote to Mr Pepperell and advised him, in relation to the Midlands Region MECA ratification process that "...all five DHBs have ratified the National Terms of settlement and Salary scales".

[27] I am satisfied that it is more likely than not that at the ratification meetings held in December 2005, PSA members voted on the concept of a regional MECA to be made up of the NTS plus anything agreed as part of the MECA negotiation process. I am satisfied that members voted to accept the NTS document in its entirety on the understanding this document would form part of the MECA. This

conclusion is supported by a note set out on the bottom of the PSA's December "Pulse" which states:

Members will vote on the settlement of a regional allied, public health and technical Meca which is made up of the national terms of settlement plus anything agreed as part of the relevant regional negotiation process or by way of total variation.

Where a matter is not addressed as part of the national negotiation process and has not been agreed in the regional negotiations the status quo will prevail. That is, the existing provision shall continue.

[28] On 17 March 2006 Ms Jackson emailed Mr Jones at the PSA national office:

Re the Midlands Allied MECA, the DHBs have made an offer to the PSA that the DHBs understood the PSA regionally had declined to take out to ratification. Can you clarify whether that offer has now been taken out to members and whether they have ratified it?

[29] In response Mr Jones advises:

In terms of the midlands Allied meca, Bill and myself have discussed a short line up of Margaret, Bill and one other from each party to address all outstanding issues. If these matters can not be agreed then the national terms of settlement would prevail.

[30] Subsequent to the meetings held in December and early February by the PSA and which I find were "ratification" meetings, negotiations continued about the content and final wording of the Midland MECA document and included changes to the wording affecting the categories of employee covered by the salary scales.

[31] The negotiations for the MECA continued until late March 2006. As already mentioned, at the investigation meeting it became apparent that at no stage were the changes agreed to at the negotiation meetings (in particular the changes to the wording of the categories of employee covered by the NTS salary scales) ever taken back to the PSA membership to be covered by the MECA, to ratify or reject.

[32] I find that at most, the only terms and conditions that were ratified at the December meetings (and February for the Lakes DHB) of the PSA members were the terms and conditions contained within the NTS. This conclusion is supported by Ms Takoko's email to Mr Pepperill on 8 February 2006 where she confirms that the NTS had been ratified.

[33] The next question then is whether or not there is an effective collective agreement pursuant to the Act. Section 54 requires a collective to be in writing and signed by all union and employer parties to the agreement. The MECA is in writing and has been signed off by all parties, albeit the PSA should not have done so, as it had not ratified the settlement document. However, the Act prohibits the Authority from cancelling or varying a collective agreement or any term of a collective agreement (s.163).

[34] I have set out the clauses from the MECA which are relevant to this matter and have underlined the additions/alterations made to the wording which now appears in the MECA but was not included in the NTS:

Allied & Public Health

Audiologists, Child Play Specialists, Dietitians Dental Therapists, Health Protection Officers/Advisors, Health Promotion Officers/Advisors, Pharmacists, Physiotherapists, Podiatrist, Occupational Therapists, Orthoptists, Social Workers, Speech Language therapists, Needs Assessor and Service Co-ordinators (positions that require a minimum three year University degree or equivalent but not otherwise provided for in other scales in this document)

Alcohol & Drug

A & D Clinicians

Health Promotion and Community Health Workers

This scale is available for those health workers and support workers employed in both Mental Health and Physical Health services. Staff will work predominantly in community settings but may also work in inpatient settings. Many of these roles will have a strong cultural element (although not exclusively) and may also be working under the direction and supervision of qualified staff (eg nurses or allied health professionals).

Level 3*

* Access to this scale is for those staff with relevant advanced tertiary/cultural qualifications (minimum Level 7 NZQA Framework qualification and additional advanced qualifications). Roles may include community Health Workers, Community Support Workers, Maori and Pacific Island Community Support Workers and Nutritionists.

Level 2*

* Access to this scale is for those staff with relevant advanced qualifications, including cultural qualifications. Roles may include community Health Workers, Community Support Workers, Maori and Pacific Island Community Support Workers and Nutritionists.

Level 1*

* Access to this scale is for those staff with no formal qualifications or (Level 4 – NZQA Framework) certificate/diploma qualifications such as the national Certificate in Mental Health (Mental Health Support Work) and some cultural qualifications. Roles may include Rehabilitations Support Workers, Maori Health Workers, Maori Mental Health Workers, Community Health Workers and Community Support Workers.

[35] According to the agreed terms of the NTS the salary scales were to be integrated in the regional MECA's together with such other matters as agreed provided they were not inconsistent with the NTS.

[36] Also, of relevance to this matter is the reason for a delay from when final agreement was reached for the NTS settlement in September and the ratification process embarked on by the PSA. This was due to the fact that approval for additional funding required to meet the new salary rates had been delayed by the 2005 election. On 5 December, however, after using the new salary scales as the basis for its calculations, the government advised the parties to the NTS that funding had been approved.

[37] The issue arising in this matter is analogous to the situation which arose in *Armstrong v Attorney-General* [1995] 1 ERNZ 43. In that case following the ratification of a collective employment agreement, the Secretary for Justice

insisted on inserting a further clause dealing with housing. The PSA agreed to the clause but the new clause was not ratified. The Court stated:

It is a highly questionable practice to introduce new material into contracts after ratification (*Laboratory Workers v Capital coast Health* [1994] 2 ERNZ 93) or even before ratification but after the terms of settlement have been agreed (*NZ Engineering Union Inc v Shell Todd Oil Services (NZ) Ltd* [1994] 2 ERNZ 536). It is probably also a breach of s.12 of the Fair Trading Act 1986 to do so.

The Court went on to state:

...tampering with ratified terms of settlement is most improper. There are other regular ways of dealing with oversights by negotiators, including negotiating a variation and submitting it to ratification.

[38] It seems to me that both the PSA and the DHB's in this matter have taken it upon themselves to change the nationally agreed and signed off terms of settlement dealing with salary scales. I have already found that the intention of the parties when they signed off the NTS was that the salary scales were to be integrated into the Midland MECA and changes to the wording of the categories of those scales was not contemplated. The changes have significantly affected the meaning and application of the NTS. I have deferred to the terms of settlement, ratified by the PSA members in December and which were to have been integrated into the MECA without changes, in coming to my conclusions about the matters raised by the applicants in this case.

Issue 1 – what is the appropriate salary scale for Alcohol and Drug Clinicians employed by Waikato and Bay of Plenty (BOP) DHBs

[39] There is no definition to identify the group of employees to whom this scale would apply. The PSA says the scale applies to all employees employed in the Alcohol and Drug field who, as part of their role, undertake clinical duties (irrespective of tertiary qualification).

[40] The title A & D Counsellors was used interchangeably with the term A & D Clinicians by both parties throughout the investigation process. It was common ground that prior to the Midland MECA coming into force, not one of the DHB parties to the Midland MECA had separate salary scales for A & D Clinicians. Salaries for this category of employee had previously been covered under the allied workers scale.

[41] Since 2006, Waikato DHB has placed all employees, employed as Alcohol and Drug Counsellors, on the Health Promotion and Community Health Scale, while BOP DHB has placed those who have tertiary qualifications on the Allied and

Public Health Scale and those without a tertiary qualification, on the Health and Promotion and Community Health scale.

[42] The DHBs say that for an employee to fall into the Alcohol and Drug Clinician scale those employees must be a qualified health professional (such as a nurse) specialising in the treatment of patients with Alcohol and Drug problems. The problem with that argument is that the salary scale does not specify that as a requirement.

[43] I am satisfied the word "clinician" used in the title for the A & D salary scale connotes a requirement to for the position to require some formal health professional qualification.

[44] The Waikato DHB Job Description for the position of Alcohol and Drug Counsellor has as an essential requirement, that the employee hold a health professional qualification i.e. Bachelors in Psychology, Nursing, Social Science or a post graduate qualification, while the BOP job description requires, as an essential qualification, a certificate in A & D Counselling. It follows that A & D Counsellors are qualified health professionals and therefore are covered by the A & D Clinicians salary scale. However, it is a stretch to include anyone who works in the A & D field in this category as not all workers will require a health professional qualification.

In the absence of any definitions to the contrary, I find that only employees employed as Drug and Alcohol Counsellors for Waikato DHB and BOP DHB are entitled to be covered by the terms of the A & D Clinicians salary scale.

Issue 2 – What is the appropriate salary scale for Health Promotion Officers employed by Waikato, Tairāwhiti and BOP DHBs

[45] The PSA says that all Health Promotion Officers should be placed onto the Allied and Public Health scale.

[46] The Waikato and BOP DHB have placed all its Health Promotion officers on the Health Promotion and Community Health Workers scale as titled in the Midland MECA. Tairāwhiti DHB says it places all its Health Promotion Officers on the Health Promotion and Community Health Workers scale except for those employees who have a scope of practice under the Health Practitioners Competence Assurance Act 2003 and are subject to a regulatory Authority under that act. Those employees are placed on the Allied and Public Health scale.

[47] The ratified salary scales as set out in the NTS and incorporated into the Midland MECA, specifically lists Health Promotion Officers as one of the positions to be covered under the Allied and Public Health Scale. It was only as a result of the further negotiations between the PSA and the DHBs, after the ratification meetings in December 2005, that the words "Health Promotion Officer" were added to the heading for the salary scale applicable to Community Health Workers, and a qualification on coverage of the Allied and Public Health workers scale was added to limit coverage to those with tertiary qualifications.

[48] Those changes, as already mentioned in this determination, have never been to ratification and therefore have never been approved or rejected by the membership covered by the changes to these provisions.

The appropriate salary scale for employees employed as Health Promotion Officers is the Allied and Public Health salary scale as set out in the NTS.

Issue 3 – How is the additional progression from step 5 to step 6 for employees on the Allied and Public Health Salary Scale employed by Waikato, Tairāwhiti, BOP and Northland DHBs to be implemented?

[49] The Allied and Public Health salary scales consist of 15 progression steps. Employees progress from step 1 to step 5 automatically each year. The clause provides for progression from step 5 to step 6 in the following terms:

Progression from step 5 to step 6 is dependent on the achievement of mutually agreed objectives set prospectively at the performance review undertaken when the employee is on step 5. Progression shall not be denied where a performance review is not completed through no fault of the employee. [my emphasis]

[50] This clause only applies to employees who are "on step 5". While employees are on step 5 the clause anticipates that a performance review will be carried out and the parties will agree on objectives for the future. Where those objectives are achieved, the employee will automatically move from step 5 to step 6 of the salary scale.

[51] The application of the new salary scales was backdated to 1 July 2005. The practical effect was that employees received a monetary benefit. I am not satisfied that it can be correct that by backdating the salary payments, a person could be held out as being "on step 5" for the period covered by the backdating provisions of the salary scales.

[52] In order for progression to occur an employee must be "on step 5" at the time the performance review is held, and at which the prospective objectives are

agreed. It follows that an employee who translated to step 5 on 1 July 2006, the payment for which is backdated to 1 July 2005, can not be said to be “on step 5” at the time of their performance review. Step 5 did not exist until after the negotiations ended and the MECA came into force.

[53] The clause also makes a provision to allow for automatic progression where a performance review is not completed, and it is not as a result of a default by the employee. Given my findings above, it follows that where an employee who translates to step 5 on 1 July 2006, and does not have a performance review in the period between 1 July 2006 and their next anniversary date, and that failure is not the fault of the employee, they will automatically progress to step 6. I am supported in this finding by the wording of the NTS which states that step 6 is an “...additional progression step”. This wording has been omitted from the MECA document.

[54] The DHBs submitted that the words require two reviews. One to set the objectives and another to review whether they have been achieved. Further, the DHBs submit that it is the second performance review to which the default provisions apply.

[55] I do not accept that as being the case. The clause does not require two performance reviews, just one and it is at that performance review objectives are to be agreed for the coming period. On a plain meaning approach it is this performance review that applies to the default provision. That means that where a performance review has not taken place at which objectives could be set for the coming 12 months, and it is not the fault of the employee, the employee will automatically progress from step 5 to step 6.

In order to progress from step 5 to step 6 an employee must be on step 5 at the time the performance review has been held where prospective objectives are agreed. Those objectives must then be achieved.

If a performance review at which objectives can be set is not held while the employee is on step 5, and the failure is not attributable to the employee, the employee will progress automatically to step 6.

Issue 4 – How does an employee progress through merit steps on the Allied & Public Health Salary Scale?

[56] Progression from steps six through to step 15 on the Allied and Public Health Scale are Merit Steps or Designated Positions. Clause 7 of the NTS states:

For those staff members who translate into a step from which progression is based on merit, they shall be able to commence a merit progression criteria process where this exists within the DHB.

How the current merit criteria existing within a DHB apply to the new salary scales will be agreed at a regional level.

[57] Clause 9 of the NTS deals with Designated Positions:

As a result of the coming into force of the regional MECA's, DHBs may review the placement/progression of existing designated positions or the establishment of new designated positions as they deem to be appropriate. The PSA intends to raise this issue during the regional MECA negotiations.

[58] Clause 3.6 of the Midland MECA describes Merit or Designated Positions in the following terms:

The level of any designated position shall be established by the employer and that establishment level shall determine the extent of merit progression which will apply at each District Health Board. The employer will determine when any relevant merit criteria have been met by an employee and that employee shall advance in accordance with the employer's assessment.

[59] The NTS provides for a working party to be set up to determine national progression criteria. In the meantime where a DHB has merit criteria in place it was to be agreed at a regional level how that current criteria was to be applied. Clause 3.6 is the result of the agreements reached at a regional level as to how merit criteria would apply. That clause provides complete discretion to each DHB to determine how the criteria will apply to the new salary scales.

In accordance with clause 3.6 of the Midland MECA each DHB will determine when any merit criteria has been met by and employee.

Costs

[60] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority