

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 173/07

File Number: 5085799

BETWEEN The New Zealand Public Service  
Association Incorporated  
Applicant

AND Auckland District Health Board and 16  
Ors (Schedule 1)  
Respondents

Member of Authority: P R Stapp

Representatives: Peter Cranney and Fleur Fitzsimons for Applicant  
Nicola Ridder for Respondents

Investigation Meeting: Wellington 13 November 2007

Submissions received: 21 November 2007 from Applicant  
22 November 2007 from Respondent

Determination: 19 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] The employment relationship problem is about the interpretation of a clause contained in National Terms of Settlement (NTS) reached between the Public Service Association (PSA), and District Health Boards New Zealand Inc (DHBNZ), representing all of the District Health Boards (DHBs) cited in these proceedings. The interpretation required by the parties relates to scales of pay between community nurses represented by two different Unions (the PSA and the New Zealand Nurses Organisation (NZNO)) and the DHBs who employ community nurses.

[2] Arising out of the employment relationship problem is a jurisdictional issue that relates to the enforcement of the NTS agreed to by the PSA and DHBNZ. Also there is an issue about what terms were actually ratified upon the completion of the negotiations for multi-employer collective agreements (MECAS) locally. These issues have been

put to one side for the moment. The parties are agreed that it would be helpful in their employment relationship for the Authority to provide an interim opinion on the meaning of the clause to assist in negotiations to renew the various MECAS between the PSA and the DHBs. To support the relationship between the PSA and the DHBs I have agreed to the parties' request. This approach also supports the suggestion made by the PSA that the parties return to mediation services.

[3] This means that the following is only an interim opinion. Any enforcement of any remedies will require a determination on whether or not the NTS is enforceable and whether or not clause 11 from the NTS applies under any of the relevant PSA and DHB MECAS.

### **The Issues**

[4] This is an issue on the interpretation of the meaning of the NTS, particularly Clause 11, but for completeness clauses 10 and 11 state:

*10. Senior Nursing Positions*

*The parties will meet by 28 February 2006 to discuss the placement of positions on the senior nurse scale. The principle that will apply will be that of comparable pay for positions of comparable value. The parties are currently reviewing the applicability of the 1 July 2005-30 June 2006 translation scale for senior nurses based on equity with their colleagues.*

*11. Community nurses*

*The principle of comparable pay for positions of comparable value shall also apply in any subsequent agreement to review the extent to which community nurses can progress.*

### **The Background Positions of the Parties**

[5] The PSA and the DHBNZ reached agreement on NTS for negotiations to proceed on MECAs at a regional level with DHBs. At the same time negotiations with the NZNO and the DHBs. Those negotiations involved a "job scoping" an agreed exercise to take place concurrently with the PSA negotiations and its purpose was to scope the size of NZNO senior and community nursing roles. This situation caused the PSA and DHBNZ to consider any income disparity arising between nurses employed to do the same work but covered by different Unions. The above clauses: 10 and 11 were agreed. As it transpired the scoping exercise involved the NZNO reaching agreement

with the DHBs to a separate salary scale for community nurses very shortly after the PSA had concluded bargaining. The top and bottom steps of the scales for each union's members were the same when the two sets of negotiations were completed. However, as a result differences have emerged in the translations for pay from the old scales to the new scales for community nurses who are members of the PSA, particularly in the middle steps of the PSA members' scale in comparison with their NZNO colleagues. The problem is whether or not clause 11 intended the parties to revisit the salary scale itself.

### **Determination of the Matter**

[6] The DHBs considered that the plain meaning of the words and the surrounding factual matrix support the view that clause 11 was only intended to provide a mechanism for addressing any discrepancies between the end points of the salary scales agreed with NZNO and those with the PSA. The end points are the same.

[7] The PSA considered that clause 11 is to be construed as follows:

- The employer is obliged to apply a certain *principle* to any subsequent agreement to review the extent to which community nurses can progress.
- The principle to be applied was *comparable pay for positions of comparable value*. The PSA says that by using and including the word *value*, the parties were expressly acknowledging that employees were of equal value to the employer and should be paid the same or at least very close to the same earnings in respect to the steps in the salary scale.
- The PSA says that the principle of comparable positions based on comparable value applies to *any subsequent agreement* to review the extent to which community nurses can progress. The PSA says that this refers to a subsequent agreement contemplated between the employers and the NZNO. Its purpose, the PSA says, was to ensure equality of wages between the two groups.
- The PSA says that the purpose of the clause was to deal with *the extent to which community nurses can progress*. To support its position, it says the phrase does not say the "*maximum*" extent to which community nurses

can progress. It says that the clause plainly refers to the extent to which nurses can progress from time to time as they move up the scale.

[8] I was referred to clause 5 in the NTS by both parties to assist interpreting clause 11.

Clause 5 states:

*The salary scales shall be written into regional MECAs currently under negotiation and shall apply from 1/7/05-30/6/07. For terms and conditions, other than salary related items see Section C below. For other conditions see paragraph 11 and the term clause Section C paragraph 7.*

[9] The DHBs say that the negotiations contemplated that the top end of the community nurse salary scale agreed with the PSA (i.e. the extent to which community nurses could progress) might require revisiting in the event that the salary scale subsequently agreed with the NZNO following the “*job scoping*” exercise that that Union and DHBs were involved in, went higher than the agreement reached with the PSA. Clause 11 was therefore written into the NTS.

***Comparable pay for positions of comparable value***

[10] Clause 11 refers to “*the principle of comparable pay for positions of comparable value*”. I heard evidence that during negotiations the parties were keen to ensure there was no disparity between the *community nurses* occupational groups represented by both the PSA and NZNO. The clause contemplated, by those words, that comparable positions that are separately represented by both the PSA and NZNO should have a relative worth and should be remunerated at a similar (or “*comparable*”) level.

[11] I agree that the words of the phrase specifically refer to the classes or varieties of position in the context of employment or of a person’s role within the organisation. Each position will have a job description that outlines the accountabilities and responsibilities of the role and the education and attributes required of the incumbent holding that position.

[12] The use of the word *position* indicates and is consistent with the principle of applying to classes of occupational groups or roles within an organisation rather than require a *comparison* on an individual basis, employee to employee. The clause does not require a consideration of the individual employee as the PSA has suggested. I agree with the DHBs when they say that the meaning of the phrase is clear on an

ordinary interpretation of the words: positions of a similar *value* should be remunerated at a similar (or *comparable*) level, and that refers to the “*community nurses*” occupational group.

***Any subsequent agreement***

[13] This must relate to any agreement that occurs after the NTS was agreed. The clause is no more explicit than that. Both parties gave evidence before me concerning the timing of the upcoming NZNO settlement and referred to the NZNO “*job scoping*” exercise that was to be undertaken in respect of senior and community nurses.

[14] The DHBs say that the words *subsequent agreement* relates to the NZNO settlement that was to be finalised following the conclusion of the NTS with the PSA. That approach is consistent with the meaning of the words in the clause.

***The extent to which community nurses can progress***

[15] Under the existing MECAs that are in force, the words – the *highest point* – to which a community nurse can progress, refer to the maximum point or top end of the community nurse salary scale.

[16] There is no reference that the words may mean the extent of progression within the salary steps themselves. Clause 11 does not explicitly refer to salary steps but rather uses words that clearly mean the last step only of the salary scale. The parties negotiated certain steps in the salary scale and the consequence of that has meant that some of the steps have disadvantaged PSA community nurses compared with NZNO members working in the same places and certainly in the same roles.

**Interpretation-Interim Opinion**

[17] In applying the law on interpretation, I make the following interim findings:

- The words of clause 11 are clear: “*The principle of comparable pay for positions of comparable value shall also apply in any subsequent agreement to review the extent to which community nurses can progress*”. The words “*to review the extent to which community nurses can progress*” are entirely consistent with any change in the scope of the scales having regard to the rationale of what happened with the NZNO. There is no provision to change the scale during the term. The matter is entirely a

principle statement. The only option for any change would involve a variation that would require ratification.

- The interpretation of the words is consistent with the factual matrix and context of the negotiations that put in place a scale, translations made to the scale and the sequence of the PSA and NZNO negotiations on *comparable pay for positions of comparable value* and it is consistent to consider that in terms of the community nurses and the scales they are paid.
- I need not look any further than interpreting the clause.
- The clear meaning of the words match the intention of the parties in drafting the clause as they probably on balance did envisage the clause applying generally as a principle.
- Clause 5 does not necessarily help.

[18] In conclusion it is my opinion that clause 11 relates to ensuring the end points of the salary scales were comparable and not necessarily to have the same individual steps of the scales that were a matter of separate negotiation involving two different unions and translation exercises.

[19] Leave is granted to the parties to return to the Authority on this application if determinative findings and orders are required that will have to cover off the jurisdictional matters that have been put to one side. I understand the parties will now resume attending mediation services.

[20] There are no issues on costs between the parties.

P R Stapp  
Member of the Employment Relations Authority

**Schedule 1**

Capital and Coast District Health Board  
Canterbury District Health Board  
Counties-Manukau District Health Board  
Hawkes Bay District Health Board  
Lakes District Health Board  
Mid Central District Health Board  
Nelson-Marlborough District Health Board  
Northland District Health Board  
Otago District Health Board  
Taranaki District Health Board  
Tairāwhiti District Health Board  
Waikato District Health Board  
Wairarapa District Health Board  
Waitemata District Health Board  
West Coast District Health Board  
Whanganui District Health Board