

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 117/07  
5073321

BETWEEN                      NEW ZEALAND PUBLIC  
   SERVICE ASSOCIATION  
   INCORPORATED  
   Applicant

AND                              OTAGO DISTRICT HEALTH  
   BOARD  
   First Respondent

AND                              TAIERI HEALTH SERVICES  
   LIMITED  
   Second Respondent

Member of Authority:      Philip Cheyne

Representatives:              Greg Lloyd, Counsel for Applicant  
   Rachel Brazil, Counsel for the Second Respondent

Investigation Meeting:      13 August 2007 at Dunedin

Submissions received:      21 August from Applicant  
   21 August from Second Respondent

Determination:                28 September 2007

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The PSA is a union whose membership includes some staff working for the Otago District Health Board (ODHB). The ODHB for many years provided a service called The Mosgiel Family Health Counselling Centre. Staff employed in that service belonged to the PSA or another union and were covered by collective employment agreements with ODHB. Following a consultation process, ODHB transferred the MFHCC to the Taieri and Strath Taieri Primary Health Organisation which operates that service through a company called Taieri Health Services Limited (THS Limited).

The staff of the service became employees of THS Limited and their employment by ODHB came to an end. They remain members of the PSA.

[2] Against that background, several problems have arisen. It is agreed by all involved that the affected staff were offered and accepted employment by THS Limited on their existing terms and conditions. It was also agreed that those terms and conditions included coverage by a collective employment agreement. Accordingly, THS Limited and the PSA endeavoured to agree on appropriate wording for a collective employment agreement but found themselves at loggerheads. THS Limited sought wording that purported to restrict the coverage of the collective agreement only to those former ODHB employees whereas the PSA required a coverage clause that referred to the positions occupied by the employees. That impasse also gave rise to claims of breach of good faith.

[3] In its reply THS Limited saw the matter as a dispute about whether non-transferring staff employed by it were entitled to employment on the same terms and conditions as the former ODHB employees whose employment had transferred to THS Limited. THS Limited sought to reserve a right to negotiate other terms and conditions with any non-transferring employees.

[4] As lodged the statement of problem also raised issues about whether ODHB had breached the Employment Relations Act 2000 given that THS Limited was said not to have confirmed that the terms and conditions of the former ODHB employees would be the same as previously. However, during a telephone conference with all three parties it was agreed that the Authority should first investigate and determine matters as between the PSA and THS Limited. That may resolve any issues involving ODHB or further investigation may still be required. Accordingly, ODHB took no further part as party to the proceedings and the claims against ODHB stand adjourned.

[5] I should further note that during the investigation meeting it was accepted that the proper identify for the second respondent is the company Taieri Health Services Limited rather than the Taieri and Strath Taieri Primary Health Organisation.

### **The investigation meeting**

[6] Evidence was heard from several of the former ODHB staff. Most of the former staff are still employed by THS Limited. The gist of their evidence is summarised below for the purpose of giving some more context to this problem.

There was also evidence from an ODHB HR advisor and from several people involved in the management or governance of THS Limited.

[7] MFHCC is a service based in Mosgiel covering Taieri and Strath Taieri. Within that area, MFHCC provides community mental health services for clients with mental illnesses ranging from mild to moderate. Another ODHB service dealt with clients within that geographical area with severe mental illness. MFHCC operates a multi-disciplinary service with a clinical psychologist, social workers, a counsellor, a nurse and clerical support.

[8] THS Limited contracted with ODHB to provide community mental health services in Taieri and Strath Taieri for people suffering from mild to severe mental illness. There are some differences in the evidence about reports of comments and the extent to which there was any emphasis on the intended extension in the scope of the service. However, the consultation documents make it clear that this was always the intended scope of the service so I do not accept that there can be any proper criticism of THS Limited on that point.

[9] THS Limited recognises that the original job descriptions of the former ODHB clinical staff mean that they cannot be required to work with clients with severe mental illness. This is not a point about the qualifications or the capability of the staff to work with those with severe mental illness. It is about the scope of the role that they contracted with the ODHB to perform. Because MFCHH Limited now has an extended scope of service that has given rise to some difficulties. Clients have to be seen to be assessed. Assessment of a client's illness into mild, moderate or severe is often not straightforward. An individual's illness may improve or worsen over time resulting in them falling into a different classification. There are also therapeutic and collegial considerations that militate against a referral from one clinician to another within a single multi-disciplinary team based service as might be necessary given THS Limited's requirement to respect the terms of employment of the former ODHB staff.

[10] The position apparently taken by ODHB prior to the transfer is that the affected staff had the experience and qualifications to work in an expanded scope of service. However, that would be to overlook the contractual point explained above. The evidence of the ODHB advisor is also that they considered that only the terms and conditions of employment expressed in the collective agreement were covered by

the transfer obligations. That position would have to overcome authorities such as *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v The Christchurch Press* [2005] ERNZ 288 but for current purposes it is not necessary to say any more about this.

[11] THS Limited is wholly owned by the Taieri and Strath Taieri Primary Health Organisation. The PHO is a registered Charitable Trust governed by a Board with the main purpose of providing and improving primary health services in Taieri and Strath Taieri. The Board comprises people drawn from the community and from providers. John Kelly is the current chairperson. From the PHO's perspective, the transfer was always on the basis that the affected staff were entitled to be employed on the same terms and conditions. Inevitably however, matters of practice and procedure within the service have changed as it is now operated for the Trust within the aims and objectives and management structure of that organisation. Several issues were mentioned in evidence such as access to vehicles for work purposes and management oversight. Counsel for THS Limited referred me to *Cuttriss v Carter Holt Harvey Ltd*, AC 19/07, 27 April 2007. That and cases therein mentioned make the point that policies and procedures often are not necessarily contractual terms and conditions unless they form part of the employment bargain. Applying that approach here, none of the several issues amount to terms and conditions of the former employment carried forward. Therefore, I do not accept that these matters comprise a change in terms and conditions of employment.

[12] I should note that there is express agreement about the continued application of certain ODHB policies and procedures. The foregoing comments do not apply to those policies and procedures.

### **Proposed collective agreement**

[13] Before the date of transfer, those involved accepted that one of the protected terms and conditions that carried over was coverage by a collective employment agreement. THS Limited's offer of employment in January 2007 to affected staff stated *our offer is for a collective employment agreement on the same terms and conditions as your current employment*. Despite some effort however, no concluded document has been signed between the PSA and THS Limited. The date provided in the proposed collective employment agreement (30 June 2007) and the expiry dates of the ODHB collective agreements have all past now. But for the dispute about the

coverage clause, the parties would have signed the proposed collective agreement. I turn now to that dispute.

[14] In its submissions THS Limited drew a distinction between its circumstances and that of employers of specified employees under Part 6A of the Employment Relations Act 2000. Specified employees, pursuant to s.69I, may elect to transfer to the new employer. If they do so elect, by statute they become employees of the new employer but on the same terms and conditions as applied previously: see s.69I(2) of the Employment Relations Act 2000. Section 69M then provides that for transferring union members, the new employer becomes a party to the existing collective employment agreement in relation to and for the purposes of the transferring employees. By contrast, non specified employees have to look to the employee protection provisions that their employment agreement must contain: see sub-part 3 of Part 6A of the Employment Relations Act 2000. For employment relationships within the public health sector, there is also the code of good faith for public health sector set out at Schedule 1B of the Employment Relations Act 2000. This code applies subject to other provisions of the Employment Relations Act 2000 or other enactments: see Employment Relations Act 2000 s.100D(2).

[15] In the present case, that required ODHB to advise THS Limited that the code applied to THS Limited, clause 19(2) of the code entitled the affected staff to be employed by THS Limited on the same terms and conditions and clause 21 required ODHB to advise THS Limited of this entitlement. There is no dispute that these steps were taken.

[16] The code and the Act do not expressly make THS Limited a party to the collective employment agreement between the PSA and ODHB. I accept counsel's point that a collective employment agreement cannot come into existence by implication in these circumstances when a related part of the Act deals with that expressly. It follows that the union for the transferring staff and THS Limited were obliged to create a collective employment agreement in the usual way under Part 5 of the Employment Relations Act 2000. That required initiation of bargaining, putting the terms into writing and the signing of the collective employment agreement. However the bargaining for that agreement was constrained by the entitlement of the transferring staff under clause 19(2) of Schedule 1B to employment on the same terms and conditions.

[17] The bargaining was legally constrained in other ways as well. Section 33 of the Employment Relations Act requires parties to conclude a collective agreement unless there is good reason based on reasonable grounds not to. More particularly, the code of good faith for the public health sector requires parties to support collective bargaining where it is practicable and reasonable to do so and to support as far as practicable and reasonable the definition of coverage that best recognises the parties' commitment to collective employment arrangements: see clause 6.

[18] As mentioned, the issue that held up the signing of the proposed agreement was THS Limited's view that the coverage clause should simply list the names of the transferring staff so that the collective employment agreement would not apply to subsequent (non transferring) employees. That position did not pay sufficient attention to the legal constraints just mentioned. It also failed to adequately recognise the scope of clause 19 of Schedule 1B. The transferring staff were entitled to insist on a collective employment agreement containing the coverage clause from their previous collective employment agreement. THS Limited's position also did not take account of the effect of s.62(1A) of the Employment Relations Act 2000. Even if the coverage clause in the proposed collective agreement simply listed the names of the transferring staff, once in force the agreement had to be treated as covering the work or type of work done by the named employees for the purposes of ascertaining the terms of employment of any new employees.

[19] The different positions taken by the parties about their bargaining has given rise to claims of breach of good faith. However, they had conflicting legal opinions about how in practice the acknowledged employment on the same terms and conditions had to be recognised. The appropriate course now is to adjourn further consideration of whether there has been any breach of good faith and give the parties the opportunity to get their contractual relationship on foot in light of the foregoing discussion.

## **Conclusion**

[20] There was significant informality about the bargaining before the PSA and THS Limited reached their impasse. However, at this point, the parties are free to initiate bargaining for a replacement agreement as if the first agreement had been signed and its expiry reached.

[21] Regarding the impasse, one of the terms and conditions that the transferring staff brought with them was an entitlement to a collective employment agreement that had to include a coverage clause that would have relevance for any new employees engaged in the same work or type of work as the transferring employees. The position taken by THS Limited on that point was wrong.

[22] I have endeavoured to describe the proper application of the law to the situation as between the transferring staff and THS Limited but leave is reserved if there is any further difficulty arising from the unsigned agreement.

[23] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority