IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 175
5358852

	BETWEEN	HEALTHCARE OF NEW ZEALAND LIMITED Applicant
	AND	CAPITAL AND COAST DISTRICT HEALTH BOARD First Respondent
		ACCESS HOMEHEALTH LIMITED Second Respondent
		PRESBYTERIAN SUPPORT CENTRAL Third Respondent
		PUBLIC SERVICE ASSOCIATION AND BERYL BARR Fourth Respondent
Member of Authority:	James Crichton	
Representatives:	Megan Richards, Counsel for the Applicant Hamish Kynaston, Counsel for the First Respondent Rachael Brown, Counsel for the Second and Third Respondents Peter Cranney, Counsel for the Fourth Respondent	
Investigation Meeting:	12 October 2011 at Wellington	
Determination:	8 November 2011	

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant (Healthcare) seeks orders from the Authority against the first, second and third respondents concerning the consequences of a tendering process

undertaken by the first respondent (the Board) in respect to the provision of home and community support services in the Wellington region. As a consequence of the request for proposal process initiated by the Board around 24 June 2011, Heathcare lost its contract to deliver home support services to the Board and the effect of that decision would have been the termination of Healthcare's contract with the Board with effect from 31 October 2011.

[2] The essence of the proceedings before the Authority in the present case concerns the effect of that decision on the staff of Healthcare who provided the services which Healthcare had contracted to deliver, and in particular the entitlements or otherwise of those staff to the benefits of Part 6A and Schedule 1B of the Employment Relations Act 2000 (the Act).

[3] Healthcare initially sought determinations about the application of those two parts of the Act to the present situation, compliance orders requiring the respondents to conform to those decisions of the Authority and an injunction preventing the Board from terminating its contract with Healthcare effective 31 October 2011 until such time as the matter can be disposed of by the Authority's decision.

[4] The application filed by Healthcare sought urgency on the footing that an urgent consideration of the matter by the Authority was required in order to facilitate the staff of Healthcare having both the time and all of the information they were entitled to, in order to make full and meaningful decisions about their future.

[5] Implicit in the application for urgency was the fundamental question of whether staff currently employed by Healthcare to deliver the contracted services to the Board up to and including the present termination dated 31 October 2011, might want to contemplate seeking employment with one or other of the successful tenderers in the Request For Proposal Process (RFP), namely the second respondent (Access) or the third respondent (Presbyterian Support). It was contended on behalf of Healthcare that its staff were precluded from making those reasoned judgements by reason of the process adopted by the Board and the alleged unwillingness of the Board and the other respondents to share with Healthcare, relevant information. On the basis of that application, the Authority chose to accord a measure of urgency to the application and dealt with it as quickly as was possible in the circumstances.

[6] To complete the background picture, it is appropriate to note that concurrent with its application to the Authority, Healthcare also brought proceedings in the High Court at Wellington seeking a review of the RFP process undertaken by the Board. However, Healthcare noted in its application for urgency, and the Authority accepted, that the resolution of the matter by the High Court would not necessarily deal completely with the issues concerning Healthcare's affected employees and so the application to the Authority was required as well.

Process

[7] Having determined to grant the application a measure of urgency, the Authority arranged with counsel to deal with the matter exclusively by the consideration of oral argument supported by written submissions underpinned by affidavits from the principal protagonists.

[8] By virtue of the nature of the proceeding just recited, the Authority must express its conclusions cautiously having regard to the fact that the evidence is untested either by questioning from the Authority or by cross examination. Notwithstanding that rider, the Authority expresses its gratitude to all of the counsel participating in this hearing for their willingness to engage appropriately with each other during the course of the proceedings and for their erudite and helpful submissions both orally expressed and when reduced to writing.

[9] It was a consequence of the willingness of counsel to engage with each other in a practical and common sense way that a deal was brokered which gave the parties both a resolution (by agreement) of two of the matters in dispute between them and some breathing space before the effective start date of the new arrangements. This agreement between the parties was recorded by a consent determination of the Authority dated 14 October 2011. That determination speaks for itself but it is worth noting at this juncture that a principal effect of that determination is to resolve one of the issues that Healthcare sought a determination from the Authority on, namely whether Part 6A of the Act applied to Healthcare's affected staff, or not. The determination of the Authority dated 14 October 2011 decides that Part 6A does apply; the consequences of that decision are first that there will be no consideration in the present determination of that issue, because it has already been decided, and secondly that aspect of the matter will inform the Authority's consideration of the

other matters on which Healthcare has sought a decision. Also disposed of by the consent determination is the Board's counterclaim.

[10] It is appropriate for the Authority to emphasise that the terms of this determination deal exclusively with the matters in the application for relief for which urgency is sought. It is axiomatic that, depending on the answers that the Authority gives to the questions it has been asked, there may well be further determinations required from the Authority after further investigation. This view of matters is consistent with the telephone conference the Authority convened with the parties on 4 October 2011 prior to the investigation meeting.

Issues

[11] Two matters require determination by the Authority in order to dispose of the urgent aspects of the present claim. The first is whether Schedule 1B of the Act (including clause 19 and 20) apply to the present factual matrix and whether Healthcare is entitled to have an interlocutory injunction from the Authority preventing the Board from terminating its existing contract with Healthcare so as to protect the status quo.

[12] It will be convenient if the Authority considers each of these aspects in turn. It is noted that the claim for an interlocutory injunction needs to be considered first on the footing of whether the Authority has the power to grant such relief.

Schedule 1B of the Act

[13] Schedule 1B of the Act is a *Code of good faith for public health sector*. Pursuant to clause 1 of the Schedule, the Code is stated to apply, pursuant to clause (1)(d) to *other employers (that is other than District Health Boards) to the extent that they provide services to District Health Boards* … and goes on to cover *employees of the employers referred to in para.(d) to the extent that they are engaged in providing services to District Health Boards* … . For the sake of completeness I note that sub.para.(f) of clause 1 provides that Unions whose members are employed by outside providers of services to District Health Boards are also covered.

[14] However, the particular focus of Healthcare's application revolves around the interpretation of clauses 19 and 20 of the Code. These clauses govern the entitlement

or otherwise of staff in the health sector to be treated as having continuity of employment where they are affected by a change in provider.

[15] But the terms of the provisions in question are circumscribed. Clause 19 is expressed to apply where a District Health Board obtains services from its employees and arranges for another employer to provide some or all of those services to the District Health Board (which is referred to as outsourcing) or directly to patients which is referred to as direct provision. .

[16] Healthcare say that their employees fall within the outsourcing provision because were it not for the contract between Healthcare and the Board, the services in question would have been provided by the Board. By virtue of the existence of the contract between the Board and Healthcare, the Board has, so the argument goes, outsourced to Healthcare the services it needed to provide and so the benefits of the provision should fall on Healthcare's staff.

[17] The Board's position (supported by Access and Presbyterian Support) is that clause 19 of the Code cannot apply because in effect, one of the steps set out in the statute is missing. It will recalled that clause 19 requires that the Board first obtains the services in question from its employees and then engages an outside provider to provide those services. But the factual position here, according to the Board, is that it has never provided these services and so clause 19 cannot apply to create an outsourcing situation. Without that definition of outsourcing being made out, the provisions of clause 20 cannot apply. As if to underline that conclusion, the Board also points out that the services in question have been provided by the Board directly to its patients and so the correct definition of the provision of those services is direct provision, not outsourcing. On that basis, Healthcare's claim must fail.

[18] I take the point made by Healthcare in its submissions on this matter that there is no discernible case law on the interpretation of clauses 19 and 20 of the Schedule. But that does not mean that they are incapable of interpretation. The meaning seems to the Authority to be clear enough. Healthcare has chosen to look at the two provisions in the round and by doing so, has overlooked the clear requirements of clause 19 which are a precursor to the application of clause 20. As the Board observes in its submissions, clause 20 applies only where the services have been outsourced as that concept is defined in clause 19. As a matter of fact, the Board has never obtained these services from its own employees. The affidavit in support of the

Board's position filed by Karina Kwai who is the Board's service development manager has this to say on the point:

> *(the Board) has never provided the home based support services covered by Healthcare's contract using its own employees. Instead, it has always purchased them from external providers.*

[19] I am satisfied that that factual position is a complete answer to Healthcare's claim that Schedule 1B applies to its affected employees. In order for Schedule 1B to apply, Healthcare must identify how its affect staff fall within the terms of clause 20 of the Schedule. In effect, clause 20 provides the relief which Healthcare seeks for its staff. However, access to clause 20 is controlled by the definition of outsourcing contained in clause 19 and I am satisfied that that definition requires that the Board must have at some point in the past provided the services in question using its own employees and then decided to provide the same service using a contracted in provider. Factually, that is simply not what happened in this case; I am satisfied with the Board's affidavit evidence that it has never provided such services using its own staff and that seems to me fatal to Healthcare's claim that this part of the statute applies.

Can Healthcare have its interlocutory injunction?

[20] This matter can be dealt with shortly. The Authority's jurisdiction to grant injunctive relief is limited by statute. Section 162 of the Act confers the Authority's only right to grant this remedy and provides relevantly as follows:

> *The Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts …*

[21] Significantly, the Authority's powers are limited to the making of such an order where it relates to an employment agreement. The Board along with Access and Presbyterian Support argue that the nature of the relief sought in the present case does not relate to an employment agreement and despite the efforts of Healthcare to persuade me otherwise, I agree. The essence of the relief sought is a stay in the conclusion of a contractual relationship between two principals, namely Healthcare on the one hand and the Board on the other. It is not, I am satisfied anything other than a commercial arrangement between two significantly resourced parties and it seems to

the Authority to draw a very long bow indeed to say that there is any sense in which the relief sought is a matter related to an employment agreement. It is true that there are and will be employment agreements which are affected by the contractual relationship between the principal protagonists but that is not to say that the relief sought by Healthcare relates to an employment agreement because it does not; it relates to a commercial agreement which has employment consequences flowing from it. I am satisfied that those employment consequences are not of themselves sufficient to fall within the terms of the enactment.

[22] I do not accept Healthcare's argument that they are effectively in a jurisdictional void if the Authority refuses the grant of injunctive relief. The Authority is a creature of statute and it cannot act outside its remit. The Authority, in the present case, is not persuaded that it has the jurisdiction to grant the relief sought.

Determination

[23] It follows from the foregoing sections of this determination that Healthcare's various applications to the Authority, in so far as they have been dealt with in the present determination, fail in their entirety.

[24] Leave is reserved for the parties to revert to the Authority for the resolution of other issues relating to these parties, should that be necessary. During the course of the investigation meeting, a number of matters were debated by counsel including, for instance, the incidence of holiday pay and the liability of each of the protagonists for that. The Authority is reluctant to issue determinations on those sorts of matters without having the benefit of a more developed argument from counsel.

Costs

[25] Costs are reserved.

James Crichton
Member of the Employment Relations Authority