IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 79
5376589

	BETWEEN	NEW ZEALAND NURSES ORGANISATION INC Applicant
	A N D	CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority:	P R Stapp
Representatives:	Jock Lawrie, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation meeting (including submissions):	3 April 2013 at Christchurch
Date of Determination:	3 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute in regard to the interpretation, application and operation of a clothing allowance clause contained in the District Health Board's/NZNO Nursing and Midwifery Multi-Employer Collective Agreement 1 April 2007-31 March 2010 (the second MECA).

[2] The New Zealand Nurses Organisation Inc (the NZNO), claims that the respondent is required to comply with clause 32.4(i) and (ii) of the second MECA, and subsequent MECAs, by paying the daily uniform allowance provided for under clauses 32.4 and 32.5 to affected members.

[3] The Canterbury District Health Board (CDHB) denies the claim. The CDHB relies on estoppal, that terms agreed between the parties on the operation and

application of the clothing allowance is binding, and that the NZNO has not established the claim for a clothing allowance.

The issues

[4] There is common ground on the approach to be taken on the interpretation of the MECA. The issues in the matter are:

i. Whether the NZNO is estopped from bringing the claim because of an recommendation reached between the parties in a MECA Interpretation Sub Committee called "MISC" and endorsed by a Joint Action Committee (JAC)?

ii. Whether the arrangement is binding on the parties and that the parties agreed the clothing allowance is not payable to the affected employees?

iii. Whether the CDHB is required to pay the affected employees the appropriate daily uniform allowance for each day worked from 12 September 2007, until such time as a uniform is made available to the affected employees by the CDHB.

iv. Has the NZNO deliberately delayed raising this matter to imply that they agreed that the clothing allowance claim had been settled?

The facts

[5] The NZNO is a trade union registered under Part 4 of the Employment Relations Act 2000 (the Act).

[6] The CDHB is a Christchurch-based hospital and health care provider for the Canterbury region. The NZNO has members employed by the CDHB to undertake duties associated with the provision of hospital and health care services.

[7] The NZNO and CDHB were parties to the District Health Boards/NZNO Nursing and Midwifery Multi-Employer Collective Agreement 1 July 2004-31 December 2006 (the first MECA). Some of the NZNO's members, whose duties fell within the coverage of the first MECA, were required by the CDHB to wear a uniform which was provided free of charge by the respondent. Other members of the CDHB, whose duties fell within the coverage clause of the first MECA including, but not limited to, those members employed in the Specialist Mental Health Service

(SMHS), older persons health service/community NASC employees, public health nurses and community midwives, were not required by the CDHB to wear a uniform, but instead wore civilian clothing (civvies).

[8] Clause 32.4 of the first MECA providing the clothing allowance made the following provision:

> ***32.4*** ***Clothing allowance –*** *An allowance of $3.07 per day (or proportionate part thereof for nurses/midwives employed part-time) shall be paid for each working day on which, because of therapeutic requirements or in the interests of patient care/rehabilitation, a nurse/midwife is instructed or required by the employer to wear civilian clothes instead of the normal uniform. Provided that this allowance shall not be paid to tutorial staff, staff wholly or mainly employed in an administrative role, students undertaking classroom tuition, or staff who, with the employer's permission elect to wear civilian clothing on duty.*

[9] Subsequent negotiations (in 2007) resulted in an agreement between the NZNO and CDHB to amendments to clause 32.4 of the above first MECA. This included a new clause 32.5 The second MECA provided clause 32 as follows:

> ***32.0*** ***Uniforms and protective clothing***
>
> ***32.1*** *Where the employer requires an employee to wear a uniform, it should be provided free of charge, but shall remain the property of the employer.*
>
> ***32.2*** *Suitable protective clothing shall be provided at the employer's expense where the duty involves a risk of excessive soiling or damage to uniforms or personal clothing or a risk of injury to the employee.*
>
> ***32.3*** *Damage to personal clothing – An employee shall be reasonably compensated for damaged personal clothing worn on duty, or reimbursed dry-cleaning charges for excessive soiling to personal clothing worn on duty, provided the damage or soiling did not occur as a result of the employee's negligence, or failure to wear the protective clothing provided. Each case shall be determined on its merits by the employer.*
>
> *32.4* ***Clothing Allowance***
>
> *(i)* *From 12 September 07 an allowance of $3.16 per day (or proportionate part thereof for nurses/midwives employed part-time) shall be paid for each working day on which, because of therapeutic requirements or in the interests of patient care/rehabilitation, a nurse or midwife is required by the employer to wear civilian clothes instead of the normal uniform (such requirement or direction shall*

be in writing and a copy shall be forwarded to NZNO).

(ii) In the absence of a written requirement or direction, either a uniform shall be made available or an allowance of $3.16 per day shall be paid until such time as a uniform is made available. Provided that no allowance shall be payable to tutorial staff, staff wholly or mainly employed in an administrative role, students undertaking classroom tuition, or staff who, with the employer's permission elect to wear civilian clothing on duty.

32.5 With effect 31 March 2008, the allowance rates shall increase to $3.28 and there shall be a further increase to $3.42 with effect 31 March 2009.

[10] Once the MECA had been signed off an implantation plan was put in place. Subsequently the parties met in the MECA Interpretation Sub Committee (MISC). Recommendations were endorsed by the Joint Action Committee (JAQ). CDHB says that its involvement in the MISC and JAC satisfied them that the NZNO had reassured them that the clothing allowance matter had been covered off. CDHB also asserts that the NZNO's delay in taking up the matter implies an acceptance of the application and operating of the clothing allowance in 2008. The first written claims for the allowance were made by NZNO in August 2010. Prior to that the NZNO says that the issue was previously raised and was an issue for the NZNO.

[11] The NZNO claims first that affected members have not at any time since 12 September 2007 received a written requirement or direction from the CDHB to wear civilian clothes instead of the normal uniform. Second, the affected members have not at any time since 12 September 2007 had a uniform made available to them by the CDHB. Third, the affected members have not at any time since 12 September 2007, with the CDHB's permission, elected to wear civilian clothing on duty.

[12] It is the NZNO's position that the absence of a written requirement or direction as generally referred to in clause 32.4(i) and (ii), the CDHB is required to pay the affected members the daily uniform allowance for each day worked from 12 September 2007 until such time as a uniform is made available. The CDHB's position is that no allowance under clause 32.4 of the second (and subsequent) MECAs is payable.

[13] The CDHB says that there are certain groups of employees where there is not a uniform available and there was no intention of them wearing a uniform and/or who have never worn a uniform. It says that, based on the agreement reached by MISC

(meeting on 17 November 2008), affected employees have not been provided with a uniform or received payment of a uniform allowance.

[14] The CDHB relies upon a minute of the meeting held on 17 November 2008 that stated:

> *(a) If no uniform is provided and there is no instruction to wear civvies should the allowance be paid?*
>
> *(1) If the employee requests to wear the normal uniform and the DHB cannot provide a uniform due to supply problems, the allowance will be paid until the DHB can supply a uniform.*
>
> *(2) If the normal uniform is not available on request from the employee then the allowance is paid.*
>
> *(3) If an employee opts not to wear the uniform then the allowance is not paid.*
>
> *(4) If a uniform is available to be worn then the allowance is not paid.*
>
> *(b) There are certain groups of employees where there is not a uniform available and there was no intention of them wearing a uniform, do you pay the allowance?*
>
> *No, assuming there is no uniform available or a requirement by the employer to wear civilian clothes for therapeutic purposes.*
>
> *(c) There are certain groups of employees who have never worn a uniform, do you pay the allowance? No, assuming there is no normal uniform available or a requirement to wear civilian clothes for therapeutic purposes.*
>
> *(d) If not therapeutic and the employer has not written to the employee do you pay the allowance? No, assuming there is no normal uniform available or requirement by the employer to wear civilian clothes for therapeutic purposes.*

[15] The CDHB says that the NZNO did not raise any concern about the non-supply of uniform or the non-payment of a clothing allowance until 19 August 2010. The matter was not subsequently taken up again until further correspondence was received from the NZNO by the CDHB on 9 March 2012.

[16] Both parties attended mediation in an attempt to resolve the dispute. The attempts have been unsuccessful and it falls to the Authority to make a determination.

Determination

[17] First the matter has been filed in the Employment Relations Authority and I am satisfied that the NZNO has met the requirement to notify other parties to the MECA of the existence of the dispute in accordance with s 129(2) of the Employment Relations Act. For certainty this was done in writing by the NZNO.

[18] Second the application in the Authority is not "estopped" because the parties cannot override the rights that exist in accordance with the Act to have disputes over the interpretation application and operation of a collective agreement dealt with by the Authority and the Court. In this case any agreement reached on the interpretation application and operation of the MECA has more to do with the parties' interaction than the Authority and or Courts dealing with the matter. Thus I am confident I have jurisdiction to proceed.

[19] Third the NZNO has never appeared to have waived any rights on the interpretation application and operation of the provisions of the MECA by any involvement in the MISC and the JAC. There are no terms of reference as such with any particularised arrangements. Moreover the MECA has not been varied in any proper way to reflect what the CDHB says occurred. Further even if any recommendation was binding the enforceability of the collective agreement under the Act remains a right of any party to the MECA (the agreement), especially since there has been no variation formally approved and embodied in the agreement

[20] This leaves the interpretation of clause 32, and the extent that I am able to rely on the background and context of both NZNO's and CDHB's actions and omissions.

[21] I do not accept that the NZNO has waived its rights by any delays. Even if the matter has been raised late it still is able to be claimed within the 6 years applying under the Act. At the earliest the NZNO has confirmed in writing the claim on 19 August 2010. Any delay from the NZNO in pursing the claims is immaterial because the NZNO is entitled to bring a claim at any time in the statutory time available. That is the situation that applies here.

[22] The plain meaning of the words does not give rise to any ambiguity. The convenience of the parties is not a relevant factor, including the CDHB's liability and decision to not provide uniforms to mitigate the claim earlier.

[23] The meaning of the clause is as follows:

[24] The **Clothing Allowance** part of clause 32 stands on its own. The earlier provisions of clause 32 are discrete provisions with their own purpose as to the provision of a uniform and the reimbursement for specified costs. I am supported in this conclusion by the separate heading for clause 32.4 as it applies to a clothing allowance.

[25] The clause requires the CDHB to provide written directions for wearing civvies, and or to make available a uniform and the CDHB is required to grant permission for the election to wear civvies.

[26] Where the CDHB has not made a written requirement or direction for the relevant members covered by the collective employment agreement to wear civilian clothes instead of the normal uniform and the affected members have not at any time since 12 September 2007 had a uniform made available to them by the CDHB and the affected members have not at any time since 12 September 2007, with the CDHB's permission, elected to wear civilian clothing on duty the relevant nurses under the collective employment agreement are entitled to the clothing allowance.

Orders of the Authority

[27] The CDHB is required to pay the clothing allowance in the prescribed circumstances that would need to be met by each nurse covered by the MECA who makes a claim.

[28] This is not a matter for a compliance order because the CDHB needs to have the opportunity to comply on any specific claims brought by the NZNO, and the claims will have to be dealt with on a case by case basis for entitlement.

[29] The NZNO will now have to detail and quantify the members' claims at CDHB individually.

Costs

[30] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority