

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 239  
5378127

BETWEEN JAYA KINGI, GRANT  
HUGHES, KARINA KAU  
KAU, HANNA AKURANGI,  
ROBYN BOYNTON,  
JANETTE HUNT, BARBARA  
ALLISON, ANNE  
O'HALLORAN, DAYLE  
WILLIAMS  
Applicants

AND BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicants  
G Bingham, counsel for respondent  
C Mayston for New Zealand Public Service Association,  
as party given leave to be heard

Investigation Meeting: 12 and 13 November 2012 at Whakatane

Additional submissions received: 8 and 15 March 2013

Determination: 10 June 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The job sizing committee is to give the applicants an opportunity to respond to the disputed tasks identified in their questionnaire, and to reconsider the scoring for the position with reference to the response.**
- B. The translation from one grade to another is to be on a 'next highest salary' basis.**
- C. Increases in remuneration resulting from any regrading are to take effect on 1 August 2009.**

## **Employment relationship problem**

[1] Jaya Kingi, Grant Hughes, Karina Kau Kau, Hanna Akurangi, Robyn Boynton, Janette Hunt, Barbara Allison, Anne O'Halloran and Dayle Williams are employed by the Bay of Plenty District Health Board (BOPDHB). For convenience I will refer to them as 'the applicants.'

[2] The applicants are employed as telephonists at Whakatane Hospital. According to their letters of appointment their terms of employment are the same as those in the collective agreement applicable at the date of their appointment. For present purposes the applicable agreement is the Tairāwhiti, Waikato, Lakes and Bay of Plenty District Health Boards and the Public Service Association Clerical, Administrative and Related Employees Multi Employer Collective Employment Agreement, (the meca)<sup>1</sup>.

[3] The applicants were members of the New Zealand Public Service Association (the PSA) throughout their employment, and were covered by the meca. The exceptions are Anne O'Halloran, who was never a member of the PSA, and Barbara Allison, who has been a member from time to time.

[4] The remuneration for all of the applicants is set under the clerical workers' salary scales in the meca. The applicants' positions were paid on the grade C scale - more recently regraded to grade D - while the telephonists at Tauranga Hospital and the receptionists in the Emergency Department (ED) at Whakatane Hospital are paid on the grade E scale. The applicants say they are employed on the same terms and conditions, and perform the same or equivalent duties, as those employees. They say they should also be paid on the grade E scale.

[5] The salary scales reflect a remuneration system introduced in 2003-2005 during bargaining for a single employer collective agreement between the Bay of Plenty District Health Board and the PSA (the 2003-2005 agreement). The system was continued in the meca which came into force in 2006 (the 2006-2008 agreement), and its successors. The system is based on job-sizing.

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<sup>1</sup> For the most part there is no need to identify which of the successive mecas is being referred to. The global reference to them as 'the meca' is intended to mean 'the meca in force at the relevant time'.

[6] Thus a major job sizing exercise for positions covered by the 2003-2005 agreement accompanied the introduction of the system. Steps in the exercise were:

- a joint PSA/employer job sizing committee conducted the exercise;
- individuals were asked to complete a detailed questionnaire addressing aspects of their positions, with the questions grouped under headings corresponding with the criteria under which the jobs were being sized;
- completed questionnaires were forwarded to the individuals' manager for endorsement and signature, before being provided to the job sizing committee for its consideration;
- the committee allocated job sizing points based on the criteria in a proprietary job sizing manual agreed on for the purpose, and added the points together to give an overall score; and
- individuals were given an opportunity to review the outcome according to an agreed review procedure.

[7] Members of the job sizing committee receive training in job sizing.

[8] Each of the employer parties to the meca undertook job sizing exercises. The 2003-2005 agreement was a transitional agreement for the BOPDHB in that respect. Accordingly the agreement identified a list of positions under each grade, made provision for the job sizing exercise, and provided expressly that a particular range of scores corresponded with a particular grade.<sup>2</sup> The meca dispensed with the list of positions, instead setting out a chart listing ranges of job sizing scores and the grades to which each range of scores corresponded.<sup>3</sup> A second chart listed each grade, and each step within that grade, together with the salary payable at each step<sup>4</sup>. I do not accept that the absence from the meca of words explaining the purpose of the first of these charts means the chart has no contractual force. It is integral to the remuneration system agreed on by the parties.

[9] The job-sizing process led to the positions of both Whakatane Hospital telephony staff and Tauranga Hospital telephony staff receiving scores which placed them in grade C.

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<sup>2</sup> At cl 24

<sup>3</sup> In an agreed attachment to the meca

<sup>4</sup> At cl 3

[10] The job sizing system has remained in place since then. There was discussion in the evidence about what would trigger a job-sizing exercise, with the BOPDHP representatives suggesting a 30% change in a role would be likely to do so. There was no evidence about any policy or agreement to that effect, although I accept in general that the system would be undermined if there was an unfettered ability to ask that a job-sizing exercise be commenced. The BOPDHB has not relied on the point as a defence to this employment relationship problem, and in the unusual circumstances nothing turns on the matter.

[11] In 2008 the Tauranga Hospital telephony staff submitted completed job sizing questionnaires, endorsed by their manager. Based on the information they provided their jobs were re-sized, gaining sufficient points for a regrading of their positions into grade E. The change took effect from 31 March 2008.

[12] In April 2009 the Whakatane Hospital ED administration staff submitted completed job sizing questionnaires, also endorsed by their manager. Based on that information they were also re-sized into grade E, backdated to 14 August 2008.

[13] The nature and extent of the participation in those exercises of the applicants - the Whakatane Hospital telephony staff - was not clear. In particular it is not clear whether they were aware of the request made by the Tauranga Hospital telephony staff, and if so what their response was. I accept they were unaware of the request made by the Whakatane Hospital ED administration staff. They did not submit questionnaires on either occasion, and their jobs were not re-sized.

[14] After becoming aware of the regrading in the ED, on 20 May 2009 Jaya Kingi asked her then-manager, Kevin Marden, to support a re-sizing request for the telephonists. She cited the telephonists' role in: carrying out reception duties for the ED at night; providing cover for the ED receptionist in the evenings, at weekends and on public holidays; having on call duties at night; and preparing ACC lodgements at night.

[15] Mr Marden considered the matter and prepared a written account of his views dated June 2009. He paid particular attention to the nature and amount of work the telephonists carried out in the ED, and whether new applications affecting the telephony role had been implemented. He concluded that, although certain duties were carried out in the ED, the limited amount of time worked in the ED meant that

overall a re-sizing exercise was not warranted. Mr Marden also found no new applications relevant to the telephony role had been implemented. He concluded there were no significant changes supporting a change in grading and there was no need to re-size the jobs.

[16] The applicants disagreed. On 29 July 2009 a meeting to discuss the matter was held between Mr Marden, members of the telephony staff, their PSA organiser, and the human resources advisor Sharon Stephenson. The outcome was: Mr Marden would complete a re-drafted job description; and a single job sizing questionnaire would be completed and submitted on behalf of the staff.

[17] The parties were unable to agree on the job description and the matter was not progressed at the time. In or about July 2011 the applicants put their claim for payment at grade E directly to the BOPDHB, and by letter dated 11 July 2011 they declined an invitation to request re-sizing. The parties attempted mediation, following which the applicants completed a job sizing questionnaire dated December 2011. The fate of the original version of that questionnaire was not clear, but on request a 'Word' version was received in April 2012. The questionnaire was not endorsed by the applicants' manager.

[18] A job sizing exercise was conducted in May 2012. The exercise addressed the telephony position as it was in 2009.

[19] In June 2012 the applicants were notified that the exercise had lifted their positions from grade C to grade D, and the change would be backdated to 1 August 2009.

[20] The applicants seek an order for the payment of arrears of wages in respect of a period to be determined.

[21] Regardless of whether their remuneration should be further translated to the grade E scale, the applicants also say their salaries should be translated to a new grade on a point to point basis. In other words, an individual's current step on one grade should be translated to the same step on the new grade. The BOPDHB says the applicants' remuneration should be translated to the step in the new grade with a salary higher than but closest to the salary for the step on their existing grade.

[22] The issues are:

- are the applicants entitled to remuneration on the grade E scale;
- should the translation from one grade to another be on a point to point basis,; and
- if the applicants are entitled to remuneration on the grade E scale, on what date did the entitlement commence.

### **Parties given an opportunity to be heard**

[23] For reasons indicated by the discussion later in this determination, I regard this employment relationship problem as a dispute about the interpretation, application or operation of an employment agreement<sup>5</sup>, brought by the applicants themselves as persons bound by the agreement. Since I also consider the dispute relates to a collective agreement, s 129 of the Employment Relations Act 2000 applies. In accordance with that section, the union and remaining employer parties to the meca were notified of the existence of the dispute and offered an opportunity to be heard.

[24] The New Zealand Public Service Association Inc (PSA) accepted the offer and has made submissions.

[25] The Waikato and Lakes District Health Boards both advised the Authority they wished to present evidence by way of affidavit, and to provide submissions. A timetable was set accordingly. No affidavits and no submissions were lodged, and no advice was provided to the Authority that these Boards no longer wished to be heard. What proved to be an unnecessary arrangement to accommodate the Boards' request has, unfortunately, caused a delay in the completion of the investigation in the Authority and the issuing of this determination.

### **Are the applicants entitled to remuneration on the grade E scale**

[26] The applicants who are members of the PSA are covered and bound by the meca and the system of remuneration established under it. The 2003-2005 agreement applied at the relevant time and remains relevant for present purposes because, for the

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<sup>5</sup> More particularly, the latter two of these.

BOPDHB, it laid the groundwork for that system. Ms O'Halloran, too, is bound by the terms of the meca through: her acquiescence in, reliance on and adherence to the contents of the meca in other respects; and the express incorporation of terms of the meca into her individual employment agreement.

[27] If I am wrong in this and the terms of the meca do not apply to her, then Ms O'Halloran would simply be asking the Authority to set her remuneration at the rate to which she considers she is entitled. This is outside its jurisdiction.

[28] The scheme of the meca is that grading is determined by the number of points a position scores as the result of a job-sizing exercise. If the Authority is to determine whether a position has been graded correctly, at most it can consider the conduct of the job sizing procedure and whether anything in it means the number of points scored should be revisited. It cannot:

- stand in the shoes of the job sizing committee and substitute its own conclusions on the points to be allocated under each of the criteria;
- determine for itself whether, for example, the Whakatane Hospital telephonists should be paid on the same grade as the Tauranga Hospital telephonists; or
- determine for itself the grade appropriate to any position.

[29] Actions of this kind are outside the scheme of the meca and amount to the Authority setting terms and conditions of employment. With limited exceptions not relevant here, this is outside its jurisdiction.

[30] As their position on grading was initially set out, the applicants relied on the employer's duty to be a good employer and to act in good faith. Further to that, they also relied on notions of fairness through similar treatment and an argument of disparity of treatment between the applicants on the one hand and the Tauranga Hospital telephonists and Whakatane Hospital ED on the other. Finally, Mr Austin submitted that the 2003-2005 agreement was not relevant here, and that in various respects the meca was silent or its terms did not apply. However I find the collective agreements are relevant and do apply. I find further that the employer's general

statutory duties cannot be invoked in support of obligations which are inconsistent with its specific and agreed duties under the meca.

[31] In addition, to the extent that the submissions rely on an argument that fair and equal treatment requires a regrading of the applicants' positions to grade E, they amount to a request that the Authority make its own determination of the appropriate grade for the applicants. Further, Mr Austin advised the Authority as late as 20 June 2012 that the applicants' claim was not founded on or reliant on the job sizing exercise. For the reasons indicated above, I find that was a wrong approach.

[32] The conduct of the job sizing exercise was discussed during the investigation meeting, resulting in a number of submissions from Mr Austin. I do not consider it necessary to address the exercise in the detail Mr Austin urged, but one of the submissions is significant. It concerns the role in the committee of Penny Sanderson, the regional manager, clinical support services, for the BOPDHB. In particular Mr Austin challenged Ms Sanderson's input into identifying the tasks carried out by the telephonists.

[33] A major underlying problem had been the inability of the applicants and their manager to agree on a job description, so that the request for re-sizing was put before the committee without the benefit of such agreement and without the required endorsement by the applicants' manager. When she saw the completed questionnaire, Ms Sanderson did not accept as accurate a number of the tasks the applicants had identified, and said so to the committee.

[34] Ms Sanderson said the areas of disagreement were not raised first with the applicants because the BOPDHB was under time constraints associated (at least in part) with procedures in the Authority. This employment relationship problem was lodged in the Authority on 17 April 2012, before the job sizing exercise had been completed but not in any event in reliance on it. On 26 April 2012 I directed that, within 14 days, the BOPDHB report to the Authority on: the steps taken to date to further the exercise; what steps were planned and when they would be taken; and whether there were any difficulties of which I should be aware. The information was duly provided. None of this should have been a reason either to delay the exercise, or to take short cuts with it.

[35] Returning to the scheme of the meca, an appropriate procedure for addressing the applicants' disagreement with the outcome could be to seek a review of the committee's grading. The difficulty is that, although an agreed review procedure was in place for the purposes of the 2003-2005 agreement, both the applicants and later the Authority were told that the procedure was a 'one-off'. Since then, no review procedure has been in place and no review was attempted.

[36] As I have indicated, the Authority can at least address the conduct of the job sizing procedure. The procedure involves an exercise of discretion by the job sizing committee in assessing the scores under the job sizing criteria, and in that respect is not a matter for the Authority. However it is appropriate to consider whether the committee had accurate information when it made its assessments. In particular, there was an unresolved dispute about the job description when the questionnaire was put to the job sizing committee. One party's view of that dispute was put to the committee in the form of Ms Sanderson's input. The applicants should have had an opportunity to comment for the benefit of the committee.

[37] I resolve the matter by making the following orders:

- the matter of the applicants' grading is referred to the job sizing committee;
- the applicants are to be given an opportunity to respond to the aspects of Ms Sanderson's disagreement with the tasks identified in the questionnaire, as noted by Ms Sanderson on her copy of the questionnaire dated 8 December 2011 and produced in evidence; and
- the job sizing committee is to reconsider their scoring with reference to the response; and
- the reconsidered score will determine the appropriate grade.

[38] As I have also indicated, it is not for the Authority to determine for itself whether the applicants should be paid at grade E. I decline to do so, and refer the matter to the job sizing committee in the above terms.

**Should the translation from one grade to another be effected on a point to point basis**

[39] When their remuneration was translated from grade C to grade D, several of the applicants who had been on grade C step 8 were moved to grade D step 6. This

was the step with the nearest but higher salary, and on the figures in the 2009-2012 meca the increase was \$559. The affected applicants believe they should have been moved at least to grade D step 8, although since they say they should be paid on grade E they also say the appropriate move is to grade E step 8. The corresponding increases are \$2,253 and \$4,918 respectively. Other applicants on other steps in grade C also experienced an apparent downward step in the translation to grade D, while some experienced no downward step. These applicants also received an increase in salary.

[40] Except for provisions applying in particular circumstances addressed during bargaining, the meca is silent on the approach to translations when positions have been regarded after a job sizing exercise. Sharon Stephenson, a human resources advisor for the BOPDHB from 2002 and familiar with the remuneration system, gave evidence that the approach taken to such translations is to move to the 'nearest highest salary'. There is some support for that approach in the 2003-2005 agreement and the meca, and I accept it is appropriate. There is no support for the applicants' approach, beyond their sense that it is unfair.

[41] I conclude that the 'next highest salary' approach is the approach to be adopted and order accordingly.

### **On what date should an entitlement to payment at the regraded rate commence**

[42] Payment to the applicants at the regraded rate was backdated to 1 August 2009, to reflect the date on which the applicants took steps to pursue their request for regrading. Further, their sizing for their positions was assessed as at that date.

[43] As at April 2006, the earliest date to which there could be any backdating<sup>6</sup>, the applicants' positions were on the grade set by the job sizing and review process conducted in 2003-2005. There are no grounds on which to disturb that outcome and the grade set by that process must be considered correct.

[44] The remaining alternative is that the payment be backdated to the date on which the new grading for the Tauranga Hospital telephony staff or the Whakatane

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<sup>6</sup> Because of the limitation period in s 142 of the Act

Hospital ED staff commenced. Since that is not the date at which the Whakatane Hospital telephony positions were assessed, I do not consider it appropriate date.

[45] For the above reasons, I find payment in respect of any regrading is to be backdated to 1 August 2009.

**Costs**

[46] Costs are reserved.

[47] The parties are invited to resolve the matter themselves. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority