

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 13
5359546

BETWEEN

ASSOCIATION OF
PROFESSIONAL AND
EXECUTIVE EMPLOYEES
INCORPORATED
Applicant

A N D

BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Bill Manning and Anna Paton, counsel for Applicant
Mark Beech and Elizabeth Smith, counsel for Respondent

Investigation Meeting: 7 and 8 June 2012

Submissions Received: 18, 20 and 28 June 2012

Date of Determination: 15 January 2013

DETERMINATION OF THE AUTHORITY

- A. The application by the respondent employer District Health Board for rectification of a provision of a collective agreement is declined.**
- B. The Authority declares that the disputed provision is to be interpreted as contended by the applicant union APEX; Medical Radiation Technologists employed by the respondent Board at Tauranga Hospital are to be paid at T2 when called back to work between 2000 and 0800 hours on any night of the working week from Sunday-Monday midnight through to midnight Friday.**

- C. The Authority declares that Medical Radiation Technicians who have been paid under the disputed provision at T1:5 where T2 is the appropriate rate, are entitled to arrears of wages as from 1 March 2007.**
- D. Costs are reserved.**

Employment relationship problem

[1] On 16 March 2011, a Medical Radiation Technician (MRT) employed at Tauranga Hospital by the respondent Bay of Plenty District Health Board, questioned the rate of payment made for a call back to work. The issue raised by her in an email to a payroll administrator was about a particular call back she had worked overnight from late on a Friday until early Saturday morning, but she also questioned evening call outs on other week days, as follows:

*On closer inspection of this clause I believe **ALL** evening call outs are being paid incorrectly and any call between the hours of 2000-0800 should be paid at T2; along with calls between midday Saturday-Sunday/Monday midnight, a public holiday, and between Midnight Friday to 0800 Saturday.*

[2] The clause referred to was a provision of a multiple employer collective agreement, or MECA, made under the Employment Relations Act 2000 between a number of District Health Board employers, including the respondent Board, and the Association of Allied Professional and Executive Employees Inc (APEX), a union representing MRT's.

[3] The payroll administrator responded promptly with advice that back pay would be calculated and paid to the MRT who had raised the issue and to any others paid incorrectly for call outs. Back pay was sought for periods covered by earlier collective agreements in force from 2007 and which had contained the same clause.

[4] Some back payments were processed and received by a few MRTs until further adjustments were stopped, upon the Board revising its view of its obligations under the clause. The provision became the subject of a dispute between APEX and the Board about the interpretation, application or operation of it.

The dispute and claim for arrears by APEX

[5] The parties were unable to resolve the problem and in October 2011 the MRT's union referred it to have the Authority determine whether:

1.1 ... Medical Radiation Technologists (MRTs) employed by the respondent (BOPDHB) at Tauranga Hospital are entitled to be paid at T2 or alternatively at T1:5 in circumstances where, after completing their rostered shift duty, they are called back to work between the hours of 2000-0800 (other than Saturday midday to Sunday/Monday midnight, or midnight Friday to 0800 Saturday or on a Public Holiday);

1.2 ... MRTs employed by BOPDHB at Tauranga Hospital who have been paid T1:5 in circumstances where, after completing their normal rostered shift duty, they have been called back to work between the hours of 2000-0800 are entitled to arrears of wages as from 1 March 2007.

[6] To resolve the problem, APEX sought declarations:

1.1 That MRTs were entitled to be paid at T2 when called back to work between the hours of 2000-0800, and

1.2 That MRTs who had been paid at the rate of T1:5 for call-backs between those hours were entitled to arrears of wages as from 1 March 2007.

Rectification sought by the Board

[7] The Board's most recent response to the application has been a claim that the dispute arises from a drafting error in the collective agreement. The employer claims that contrary to the intention of both parties, by mistake the provision was transcribed into the printed agreement as if it had been consented to by them. APEX has been accused by the Board of trying to take advantage of this alleged mistake. The employer has implied that evidence given on behalf of the union has been tailored to exploit an opportunity.

[8] To resolve the problem the employer seeks rectification of the disputed provision, so that its wording correctly states the actual agreement of APEX and the Board, which the latter contends was misstated in the drafting and production of the collective agreement.

[9] There has been no real disagreement in this case about the legal principles that are to be applied by the Authority. It is not disputed that the remedy of rectification is available under s 162 of the Act (which expands the Authority's jurisdiction) where

both parties have made the same mistake about the same matter, as contended by the Board occurred in this case. Where it has been ordered, the purpose of rectification is not to vary the existing terms of an agreement or create new terms but to give effect to the parties' real agreement and state their agreement correctly in the document they intended would reflect that.

Acquiescence by the Board

[10] The disputed provision is contained in three successive collective agreements. By the time the second and third of those was negotiated, the Board was aware of the issue in relation to the provision but nevertheless agreed to having a term containing the same wording continued in those two agreements. APEX contends that by doing so the Board acquiesced in making the disputed provision part of the agreement, preventing it from obtaining now the remedy of rectification in relation to them.

Evidence

[11] Evidence was presented by APEX and the Board and witnesses were cross-examined by counsel for the parties. Much of that evidence related to the negotiations between APEX and the Board which had led in 2007 to the first collective agreement which contained the disputed provision.

[12] The principal negotiator for APEX then was Dr Deborah Powell, who has been the union's National Secretary for 14 years. She was confident and clear in her evidence that the disputed provision was not a mistake but had been intended by APEX to become a term of employment, so that the writing of it into the collective agreement reflected the true intention of both APEX and the Board.

[13] The Board's principal negotiator was Mr Craig Coburn. He was not called as a witness but the parties apparently did inquire of him whether he was available to attend the Authority's meeting, presumably because it was expected that he would be able to give material evidence about the negotiations. When the Authority contacted him about assisting the investigation Mr Coburn confirmed that he had been the lead employer advocate in the negotiations which had resulted in settlement of the MRT collective agreement between APEX and the Board for the term of 1 March 2007 to 30 September 2009. Mr Coburn advised however that he could not recall any details of the negotiations, particularly in relation to the disputed provision, and that the

Christchurch earthquake had resulted in the loss of all records he had kept in any form relating to the bargaining.

[14] Mr Coburn subsequently provided a written statement about his involvement in that exercise, as follows:

5. *The process to involve and seek DHB agreement prior to the presentation of offers made to the Union, occurred throughout the 14-16 month bargaining period. This included various meetings, written updates, emails and telephone conversations with DHB staff involving the lead DHB Employer Advocate [Mr Coburn] and/or the DHB NZ representative Mick Prior.*
6. *A terms of settlement was drawn up at the conclusion of the bargaining (December 2007) to record the specific matters agreed between the parties.*
7. *A Collective Agreement was also drafted at the conclusion of the bargaining, my recollection is that in early 2008, DHB NZ then liaised with each of the DHB's and arranged signing of the collective agreement with each of the 20 DHB's.*
8. *I have no specific recall of any of the detail relating to the Bay of Plenty DHB and the matter in dispute and in the absence of my own documents, files, emails etc am unable to provide any specific recollection or detailed views on this matter.*

[15] Counsel for APEX and the Board advised the Authority that they did not require Mr Coburn to be presented for examination or cross-examination as to the bargaining he had participated in for the Board, his ability to recall that bargaining and provide any record of it.

[16] The determination of this dispute necessarily turns on whether the Authority accepts or rejects Dr Powell's direct evidence given of the bargaining that took place in late 2007. If she is correct that APEX had negotiated the disputed provision to become a term of the collective agreement, as on the face of that document the provision appears to be, there is no factual basis for ordering rectification because no mistake has been made by both parties about the inclusion of the term in their agreement.

The Moving Forward document

[17] The legal principles applying to rectification for common mistake include;

That there was a concluded agreement antecedent to the document which it is sought to rectify.

see; *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 (HC) per Davison CJ (upheld on appeal)

[18] The High Court held that while a common intention must be shown to have existed, it is not necessary to show as well that the antecedent agreement was a binding contract. Also, any common intention in the parties' minds must continue down to the time of execution of the document to be rectified. The Court held the parties' common intention is to be established by "convincing proof."

[19] The Board submitted that the parties' common intention was to conclude a MECA incorporating the same call back provision for MRT's employed at Tauranga Hospital as applied under the 2004-2006 Collective Agreement negotiated by the Board and the New Zealand Nurses Organisation.

[20] A common intention, the Board submitted, can be first discerned from the "Moving Forward" document signed by APEX and the several employer Boards in early July 2007. There were two written agreements signed at the same time, on 4 and 5 July. In the first, the parties had agreed that "APEX shall initiate a national MECA as soon as possible." There was also express agreement that MRT's would be entitled to terms and conditions already settled with other employees in earlier bargaining "until an agreement to the contrary is reached." The value of such terms was to be "at least maintained" in any subsequent collective agreement, and it was agreed, "both parties have the right to table claims."

[21] The second document signed on the same dates as the first is headed "Proposed MRT 'Moving Forward' Document." Materially it provides that "the parties agree on a settlement" (of a collective agreement) and that existing provisions in current employment agreements "shall apply and shall be schedules to the agreement." "Call back payments" were among the existing provisions listed.

[22] The Moving Forward agreement was expressed to be subject to APEX "successfully balloting and initiating bargaining for MRT's."

[23] The contractual effect or enforceability of this apparent *agreement to agree* has not been a matter of submission. The point to be taken from the document is that it indicates the presence of a common intention held by APEX and the employer Boards. That was true at least in July 2007, although bargaining for a collective had not then been initiated by APEX. Notwithstanding their common intention at that time, did the parties maintain that intention until or after December 2007, when the collective agreement was concluded and ratified?

[24] The evidence of Dr Powell is that during bargaining on 7 December 2007 APEX intentionally introduced the disputed Tauranga Hospital clause, which provides for on call rates to be paid at T2 in various circumstances. This was done by APEX putting forward an amended draft of the proposed collective agreement. Draft 6 she said was tabled as a response or counter offer to the employers' offer which had largely retained the provisions of the 2004 – 2006 document.

[25] The employer Boards' offer was an increase to the minimum call out payment from T1 to T1:5. This in itself was a departure by the Boards from the principle of the Moving Forward agreement that existing provisions would continue to apply. If Dr Powell's evidence is accepted it must follow that by December 2007 there had been a clear change of intention from that evidenced by the parties in July when they signed "Moving Forward."

[26] Dr Powell's evidence is that the 2004 – 2006 call out provision contained in the agreement negotiated by the nurses union, was discussed with Mr Coburn. She said the employer Boards' proposed move from T1 to T1:5 as the minimum rate was not regarded as sufficient by APEX and Mr Coburn had agreed with her that the provision needed to be revised. Dr Powell said that the rationale for increasing the rate of payment to T2 for call back during normal work at Tauranga Hospital was the need to achieve consistency with payment made for work at other hospitals in the public health sector. The disputed provision was introduced she said as a counter offer, combining wording found in the nurses union agreement and a new minimum payment requirement.

[27] While the parties are not in dispute about the availability of rectification as a remedy in principle, I bear it in mind that the cases in which that relief has been granted by the courts have largely been in relation to commercial contracting rather than the particular process of bargaining for a collective employment agreement. That

distinctive form of negotiation as it occurred in this case was detailed by Dr Powell, and also by Mr Coburn in his statement and by Mr Mick Prior who had assisted him as the back up advocate. The bargaining had involved the usual meetings between the parties with claims and counterclaims being made and addressed by them over a period of time through their agents or representatives.

[28] The ability of parties to develop or change positions earlier held over provisions is one reason why no great weight should be placed by the Authority on documentation that came into existence at the earlier stages of the bargaining, unlike the written material that immediately preceded the final drafting of the collective agreement, its ratification as terms of employment and the introduction of it into binding effect as concluded terms.

Acceptance of Dr Powell's evidence

[29] The evidence of Dr Powell is clear, I find, that the disputed provision was introduced into bargaining near the end of the process and was intended to become a provision of the concluded agreement. Dr Powell's evidence given about her direct involvement with Mr Coburn in particular during the negotiations has not been impeached by the direct material evidence of any other witness. It should be given more weight than the less direct evidence of circumstances, including conduct and statements made, arising *after* the collective agreement had been ratified by the parties and had commenced in force.

[30] I am satisfied from Dr Powell's evidence that the collective agreement in its disputed provision reflected the intention of APEX to have the call out rate of T2 for all days of the week, including Monday to Friday, applied to MRTs.

[31] In principle, therefore, the remedy of rectification is not available, as APEX and the Board did not both form and maintain a single corresponding intention on the point in question. If initially they formed such an intention, they did not continue to hold it at the time bargaining concluded. The words or actions of each party make it apparent that they did not hold and continue to hold an intention that all days would be paid at T1:5 for a call out. APEX negotiated that the rate was to be T2. The union's intention was manifested in an offer or counter offer the union made in bargaining. This development was ultimately reflected in the wording of the disputed provision and by its inclusion in the collective agreement.

[32] In the absence of evidence from Mr Coburn, the Authority may only conclude that given his role he is likely at the time to have been aware of claims introduced up to the end of the bargaining, including any for the increased payment for call backs which was subsequently printed as a provision in the ratified collective agreement.

[33] I find that the disputed provision in the concluded MECA conformed to the agreement the parties had reached at the time the provision was recorded in December 2007. There was therefore no common mistake made about that provision becoming part of the formal instrument. It seems to me unlikely that the Board could have been unilaterally mistaken about that, given the process between final bargaining and ratification of the collective agreement. One stage of that process was the execution of a terms of settlement document.

Terms of Settlement document

[34] I find it significant that settlement of the collective agreement in 2007 was, at the insistence of the employer Boards, recorded in a Terms of Settlement document. I accept Dr Powell's evidence that her initial reluctance about being a party to that arrangement was only overcome when a compromise was reached with Mr Coburn. The settlement as recorded included a term that all of its terms were subject to a side-agreement dated 10 December 2007, which provided the following:

- [The Terms of Settlement] *shall be read in conjunction with the "Final Draft" document*
- *The terms of settlement document has been written by the employer parties and not by APEX*
- *In the event of any discrepancy between the terms of settlement and the MECA, the provision of the signed MECA shall apply.*

[35] At clause 9 – “ON CALL” – the terms of Settlement also provided;

Call-back rates of pay are detailed in schedule 4.

[36] The disputed provision contained in Schedule Four sets out “**On Call Rates**” for Tauranga Hospital. It stipulates payment at T2 for;

... calls between 2000–0800, Saturday midday to Sunday/Monday midnight, on a Public Holiday and from Midnight Friday to 0800 Saturday.....

[37] In accordance with the Terms of Settlement, a MECA dated 19 February 2008 was subsequently ratified by members of APEX and signed by the union and the employer Boards. It contained the same clauses for call back payments at Tauranga Hospital as had been in the Terms of Settlement dated 11 December 2007, which Dr Powell and Mr Coburn signed.

Meaning of the disputed provision

[38] The parties do agree in this case that the disputed provision could have been better drafted. The Authority accepts from Dr Powell that APEX put the wording forward, at the very end of the bargaining. I find that the provision can be interpreted and applied on the basis that the parties expressed in it, clearly enough, an intention to pay for call outs during weekdays at T2. The clause contains four distinct parts, with demarcation between those parts by punctuation in commas. There is plainly some overlapping of them, in relation to the hours on Saturdays and Sundays of midnight to 0800, and of 2000 to midnight, but this I find does not detract from the clear meaning of the provision.

[39] My finding means there is no basis in fact or law for applying the remedy of rectification. Accordingly, the acquiescence argument does not require a decision. Neither does an issue arise as to whether the concurrence of all Board employer parties to the MECA was needed before rectification to their agreement with APEX could be sought or granted.

Determination

[40] The Authority therefore gives the first declaration sought by APEX as to the meaning and application of the disputed provision. In relation to the second, the Authority sees no reason why it should not also be given. The claims back to 2007 are within the six year time limitation period from the date the Statement of Problem was lodged in 2011.

[41] Some of the circumstances raised in this case might have had a bearing on the Authority's jurisdiction to order compliance with the disputed provision, but that is not a remedy being sought and matters such as delay by a party in claiming an entitlement, or silence, could not defeat a claim for arrears of wages or other money due under an employment agreement.

Costs

[42] Costs are reserved. It may be appropriate in the circumstances for the parties to bear their own costs, which is the outcome in many cases where a dispute has had to be resolved under the Employment Relations Act by the Authority or Court.

[43] Any application for costs is to be made in writing within 14 days of the date of this determination, and any reply within a further 14 days.

A Dumbleton
Member of the Employment Relations Authority