

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 275
5455062

BETWEEN	NEW ZEALAND NURSES ORGANISATION First Applicant
AND	LISA MARSHALL Second Applicant
AND	TAIRAWHITI DISTRICT HEALTH BOARD Respondent

Member of Authority:	Robin Arthur
Representatives:	Jock Lawrie, Counsel for the Applicants Susan Hornsby-Geluk, Counsel for the Respondent
Investigation meeting:	17 February 2015
Determination:	10 September 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The New Zealand Nurses Organisation (NZNO) and Lisa Marshall, an NZNO member and a registered nurse currently in her fourth year of practice and employed by Tairāwhiti District Health Board (TDHB), sought the Authority's determination of a dispute about the interpretation of clauses regarding service and salary steps in the District Health Boards/NZNO Multi-Employer Collective Agreement in effect from 1 March 2012 to 28 February 2015 (the 2012 MECA). The 2012 MECA covered members of the New Zealand Nursing Organisation employed in nursing or midwifery positions in 20 District Health Boards (the DHBs).

[2] The dispute was over an aspect of how the service of employees was to be counted when they moved from working for one DHB to another DHB. As a result of different views on how certain clauses should be interpreted and applied, the parties

had different views on when an employee should or could move up the salary scales set in the 2012 MECA. On NZNO's argument an employee – who met specific criteria about what amounted to current continuous service – was entitled to have the anniversary of her original date of employment with the first DHB used as the relevant date for determining when she moved up the steps of the salary scale. The scale provides for an annual increment for registered nurses and midwives in their first four years of service. On TDHB's argument the relevant date for the annual move up that scale was to be taken from the date of starting employment with the latest employer and the employee need not be employed at the same salary step as she was on at the previous DHB. The effect of the difference in the two interpretations was that a nurse who moved from employment at one DHB to another could take longer than one who remained employed at just one DHB to move up the salary scale. This was because 'part years' of service with the previous employer would not be counted and the (at least theoretical) notion that a DHB could appoint a nurse on a lower step of the salary scale than she was on with her previous DHB employer. When, or how quickly, an employee went up the salary scale had a practical effect on when she got the associated pay rises and also, potentially, effected recruitment and retention between DHBs. The dispute concerned the minimum or 'default' position in the terms provided in the 2012 MECA as a DHB could agree with an individual employee to place her on a higher step of the salary scale or to advance her on the scale sooner than due under an annual increment (such as by agreeing to take her anniversary date with a previous employer as the relevant date). Such more advantageous arrangements might occur for particular reasons of recruitment or retention – for example, in areas or times where there was a shortage of experienced staff in particular DHBs or particular hospital departments or services. DHBs – from my understanding of the evidence heard in the Authority investigation meeting – also wanted to preserve what they saw as a present legitimate option of being able (where labour market conditions allowed) to recruit and appoint an employee to a lower step on the salary scale than she had reached while working for a previous employer.

Investigation

[3] For the Authority's investigation of this interpretation dispute five witnesses gave evidence by way of written witness statements and orally by answering questions from me and the parties' representatives: Ms Marshall; Glenda Alexander,

an NZNO official involved in MECA negotiations since 2003; Lesley Harry, an NZNO advisor and MECA negotiator; Kevin McFadgen, a District Health Board Shared Services advisor and member of the the DHB MECA negotiating team since 2007; and Mark Lennox, employment relations manager of Waitemata DHB. The representatives also provided written and oral submissions on the facts and law. As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination has not set out a record of all evidence and submissions received but has stated what I considered to be relevant findings of fact and law and expressed conclusions on the issues for determination.

[4] The parties had agreed an alternative claim regarding Ms Marshall's terms of employment – about the operation of clause 8.1(b)(ii) of the MECA – did not presently require investigation and would be discussed by them (if necessary) after this determination was issued.

[5] NZNO provided the Authority with copies of correspondence to other Boards that confirmed it had met its obligation under s129(2) of the Act to advise other parties to the MECA of the existence of the dispute.

The issue

[6] The issue for determination was when, correctly interpreted, the terms of the 2012 MECA – and specifically its clauses 5, 8.0.1 and 8.1(e)) – required the automatic annual increment on Ms Marshall's pay scale to occur. Broadly, or simplistically, the relevant date was described as occurring on the anniversary of her commencement of her service with *either* her previous (and first) employer, the Bay of Plenty DHB (BoPDHB), *or* her present employer, TDHB.

[7] A colloquial way of putting the issue was whether Ms Marshall should have kept her initial 'start date' for service steps (and associated pay rises) under these clauses when she moved from working for BoPDHB to take up a position working for TDHB from 24 September 2012. She was employed at BoPDHB from 10 January 2011 until 18 September 2012. She had started work on Step 1 of the scale (referred to as the "new grad" step) so had completed a full year of service before moving to TDHB where she was appointed to a position at Step 2 of the salary scale. The anniversary date for her to move to Step 3 would have been 10 January 2013 if she

had stayed at BoPDHB but she found out in around mid-May 2013 that TDHB would not move her to the next step of the scale until she completed one full year of service with it – that is by 24 September 2013 – rather than using the anniversary date of her initial employment with BoPDHB. She has since reached that later date and advanced up the scale but the effect of the DHB’s interpretation, from her point of view, was that she lost the benefit of around eight months service because of a change of employer. In her evidence she contrasted her situation with a fellow employee at TDHB with whom she had trained and graduated. They had both begun work at around the same time but in different places with different DHBs as their first employer. The other employee – who had worked solely at TDHB during that time and so had the same single employer throughout that period – advanced to Step 3 on the registered nurse salary scale while Ms Marshall remained on Step 2. She would effectively remain eight months behind that colleague each year subsequently. She calculated that the effect on the amount of pay she received up to February 2015 (compared to her colleague and excluding the value of penal rates) was around \$5000.

[8] NZNO’s argument, in a much paraphrased form, was that there were mandatory or automatic elements in the application of the relevant MECA clauses that made TDHB’s actions in respect of Ms Marshall’s salary entitlements incorrect.

[9] TDHB’s argument, again much paraphrased, was that there were discretionary elements in those clauses meant it had correctly applied the MECA terms by relying on the anniversary of Ms Marshall beginning employment with it.

The relevant clauses

[10] The definition of “service” at clause 5 of the MECA reads:

“Service” means the current continuous service with the employer and its predecessors (Hospital and Health Services, Crown Health Enterprises, Regional Health Authorities, Health Funding Authority, Area Health Boards and Hospital Boards), except where otherwise defined in the applicable clause. As of the commencement of the previous MECA07 service will transfer between DHBs and service shall not be deemed to be broken by an absence of less than three months. However, where the employee remains actively engaged on nursing or midwifery related work or study while absent, the period of three months shall extend to twelve months. This period of absence does not count as service for the purpose of attaining a service related entitlement.

[11] Clause 5 defined the word employer as meaning “the relevant District Health Board employing the particular employee”. Employee is defined as meaning any person employed by an employer and whose position is covered by this MECA.

[12] Clause 8.0.1 comprised a table setting out a salary scale for various positions including, for registered nurses and midwives, five steps starting with a “new grad” step as Step 1. The table has this note at its foot: “Progression: by annual increment through all steps in each scale at anniversary date”. The nature of the “anniversary date” referred to in this note (or what service, and with whom, counted in reaching it) was at issue in the dispute.

[13] The relevant parts of clause 8.1, headed “operation of salary scales”, read:

...

(b) On appointment, the employer shall place employees on any step of the relevant scale, taking into account the following factors:

- (i) previous nursing/midwifery experience or other relevant work and life experience – the employer may credit this service;
- (ii) degree of difficulty in recruiting for specific skills and/or experience required for the position.

...

(e) Movement through the salary scales shall be by automatic annual increment, except for senior nurses or midwives whose advancement through the steps in their salary grade shall be annual, subject to satisfactory performance ...

Interpretation principles

[14] The parties’ respective arguments on the interpretation and relationship of relevant clauses of the 2012 MECA were considered in light of established principles for the interpretation of employment agreements. The primary focus was the ordinary or plain meaning of the words with extrinsic material considered, where necessary or helpful, to objectively identify the parties’ intent. Business common sense and the context in which the agreement or agreed term was entered may also guide interpretation.¹ Statements by the parties about what they thought words meant or what they intended are not relevant but the conduct of the parties subsequent to the agreement and the history of the clause in prior collective agreements may assist as further means to cross check the natural meaning of words used.²

¹ *Silver Fern Farms v New Zealand Meat Workers Union* [2010] NZCA 317 at [36] and [37] following *Vector Gas v Bay of Plenty Energy Limited* [2010] NZSC 5.

² *ASTE v Hampton* [2002] 1 ERNZ 491 (EC) at [23] and *Hansell (NZ) Limited v Ma* [2007] ERNZ 637 at [25] and [38].

Interpretation

[15] Because I concluded the interpretation of the clauses argued for by NZNO was essentially correct, this section of the determination has explained the reasons for not accepting the analysis advanced by TDHB.

[16] The interpretation argued for by TDHB aimed to preserve what it considered to be a discretion for a DHB to place a new employee on “any step” of the salary scale in a way that would in some cases – as it had in that of Ms Marshall – be inconsistent with the clause 5 provision ensuring employees retained the value of their current continuous service when they took up a job with another DHB. The purpose of the provision was to retain access to entitlements triggered by length of service. The TDHB approach in turn resulted in a debate about the application and supposed ‘transfer’ of the employee’s ‘anniversary date’ that, I concluded, proved unhelpful and unnecessary to resolving the interpretation and application of the clauses. The following questions were addressed in reaching that conclusion:

- (i) Is placement on a salary step for a new employee truly discretionary?
- (ii) Is the ‘anniversary date’ relevant?
- (iii) Read in the context of other clauses, should some other interpretation be given to the service definition?
- (iv) Did the interpretation given offend business common sense?
- (v) Did the conduct of the parties indicate some other meaning was intended and agreed?

(i) Is placement on a salary step for a new employee truly discretionary?

[17] TDHB argued that, properly read, the reference in clause 8.1(b) to placing an employee on “any” step of the salary scale provided an employer with the discretion to offer employment at a lower step than that on which the employee previously worked elsewhere. This view, it submitted, was supported by the reference in sub paragraph (i) of clause 8.1(b) to previous nursing/midwifery experience being service “the employer may credit” – with the emphasis on the use of the word ‘may’ allowing for the *possibility* of such credit rather than a requirement for it to be given. On that argument, while the use of the word ‘shall’ earlier in the clause required previous experience to be taken into account as a factor in deciding on which step to place the

new employee, the subsequent use of the word ‘may’ still left the employer with a discretion on whether to give a little, a lot, or no credit whatsoever for that experience.

[18] The decision about the appropriate level of credit (if any) was said to be a matter for negotiation with the individual employee prior to their appointment to a position with the DHB. An employee could, for example, seek to be placed on a higher salary step sooner than she might otherwise have qualified to do so if she had remained working for her previous employer. An employing DHB might agree to that request where the employee’s skills were particularly needed for the specific position (perhaps in an area of specialised practice) and the DHB wanted to secure that employee’s service. Alternatively the employee might not have the experience for a specialist position at that salary level and the DHB might choose to offer her employment at a lower salary step than she had already reached in her employment at her previous DHB. An employee (on TDHB’s argument) might agree to accepting a lower step if she wanted to move to another district for family or lifestyle reasons or to get experience in an area of nursing where she would not get appointed on a higher step. Either way, TDHB’s argument was that the clause referred to placing the employee on ‘any’ step, not only one that was the same or higher than the step on which the employee worked for her previous DHB employer. Negotiations about the appropriate salary step for appointment were said not to be “completely unfettered” but were subject to the employer’s discretion within the terms of the agreement (which included at least “taking into account” previous experience as a factor).

[19] It was not an analysis that I concluded was consistent with an ordinary and plain reading of clause 8.1(b) in the context of the wording and requirements of the clause 5 definition of service.

[20] The clause expressly stated that “service will transfer” – from the date that the terms of the 2007 MECA had become effective – between DHBs. The use of the word ‘will’ confirmed the transfer was intended to be mandatory and not a matter of discretion for the new employing DHB. Within the clause ‘service’ is defined to mean “current continuous service” with the employer, so it is the length of time of that unbroken service that transfers to the new employer. The result is that an employee cannot have started work for a DHB with any less ‘current continuous service’ credited to her than that she had with the previous DHB (subject to having

met certain conditions about the amount of time between leaving one job and starting the next). The further definition of the terms on which that 'transfer' is to be effected provides that continuity of service is not "deemed" broken by a gap of less than three months between leaving the previous employment and starting with her present employer. It obviously excluded any period of service with the previous DHB that was not part of the 'current continuous' block, such as where an employee had left that employment and worked elsewhere (for an employer not party to the MECA) before returning to take up the 'current continuous' period of employment.

[21] The second qualification within the definition of current continuous service is more complex. It allows for a nurse or midwife to have a longer break from their employment by a DHB, without losing their 'deemed' continuity of service, provided she is doing either nursing or midwifery work or study. The break may be more than three months but no more than 12 months.

[22] What is also clear, on a plain reading of clause 5, is that the days or weeks of 'absence' (whether it is less than three months for any reason, or is between three and 12 months for the defined work or study purposes) are not to be counted as part of the accumulated and transferred service. The clause states that the period of absence itself "does not count" as what is transferred as the credit for current continuous service then used in determining whether the employee has met the requirements for service related entitlements. Effectively the service 'clock' stops on the last day of work at the previous DHB and then, provided the employee starts at the new DHB within the time allowed by the 'deemed' unbroken periods, the 'clock' starts again from her first day of work at the new DHB. In that respect Mr McFadgen's evidence was correct that the clause, properly applied, did not allow for an employee to resign from their employment with one DHB, take a holiday for just under three months, and then start work at another DHB where they could then move up the salary scale after only nine months experience rather than the 12 required by the salary clauses. A qualification to his general point would be that agreed leave entitlements taken during that time would count as 'service'. I took the 'holiday' to which he referred as meaning a period between employment that was not such leave and which would not normally be counted as 'service'.

[23] Put another way, the clause protects as continuous (and for transfer) the total amount of service accumulated up to the last day of work but does not attribute

additional days of absence as if they were days of actual service. What counts as the last day of work might, of course, be notionally extended for time taken using statutory or contractual leave entitlement – which would normally part of an employee’s period of continuous service - before starting a new job

(ii) The unnecessary ‘anniversary date’ debate

[24] TDHB made a number of submissions based on the notion that NZNO’s argued interpretation amounted to a transfer of an ‘anniversary date’. It argued that could not be correct in the context of how other clauses in the MECA referred to anniversary dates.

[25] In light of the analysis above about the transfer of what was effectively a ‘credit’ for actual continuous service (including Mr McFadgen’s example at paragraph [22] above), the emphasis on an ‘anniversary date’ was misplaced. The date 12 months after an employee had started work with the previous DHB – that is the ‘anniversary date’ – was not necessarily the marker or gauge to determine the amount of service to be credited as continuous by their new DHB employer. If that employee had taken a period of absence within either of the two excepted categories, those days would not be counted. As a result the raw ‘anniversary date’ would not necessarily identify the required point at which the entitlement to move to the next service step would apply. Rather the amount of accumulated current continuous service needed to be taken as a ‘credit’ for the relevant number of completed years and a part year (in weeks or days). For each employee their ‘current continuous service’ tally at the required point in time is a specific figure capable of quantification from pay and leave records. The automatic annual increment on the salary scale is then triggered when the employee has completed the ‘part year’ by further service at the new DHB. It is the number of days of service that counts (and was plainly intended to be credited by the clause 5 transfer provision), not the anniversary date *per se*.

(iii) Did the context of other clauses suggest another meaning?

[26] TDHB made various submissions about the use of the phrases “on appointment” and “anniversary date” in other clauses of the MECA in support of its argument that the interpretation proposed by NZNO was at odds with the scheme of the MECA. Although I considered those contextual points, they did not assist in light

of the conclusions set out above or disclose any ambiguity sufficient to displace what I concluded was the natural and ordinary meaning of clauses 5, 8.0.1 and 8(1)(b).

[27] One contextual point required further explanation regarding the relationship between the requirements of clause 5 and the provision of clause 8.1(b)'s reference to "previous nursing/midwifery experience". The wording of that clause was the same as in an earlier iteration of the MECA – the 2004 MECA operative from 1 July 2004 to 31 December 2006 – and before the change to the clause 5 definition of service agreed in the 2007 MECA that required *transfer* of continuous service. Before 2007 the reference to previous experience included service with previous DHB employers as at that time 'current continuous service' was defined as being only that given to the present employer. The context, post 2007, was clearly different. Consequently the meaning ascribed to the reference in clause 8.1(b) to previous experience changed. TDHB submitted there was no evidence of any intention by the parties to change the meaning of clause 8.1(b) in the 2007 MECA (and subsequent MECAs) and Ms Alexander was said to have accepted, when questioned, that no change of meaning was discussed at the time. However that submission was based on a subjective standard inconsistent with a plain, objective reading of the clauses as they stood in the 2012 MECA. The 'service' definition adopted from 2007 onwards expressly contemplated an effect on service related entitlements by expanding what would count as service for that purpose. The wording demonstrated the intention rather than subsequent subjective recall or explanation.

[28] In the 2012 MECA "previous nursing/midwifery experience" referred only to experience that was not part of the employee's current continuous service transferred to the new employer. On a plain or common sense reading of the whole clause, in the context of other clauses including the clause 5 definition of service, it referred to experience that the employer could but was not obliged to take account of – such as nursing or midwifery experience gained in employment outside the DHBs and including "other relevant work and life experience". Such experience might include work in the private health sector (either as employee or in business on one's own account), work outside New Zealand or work or 'life experience' of the employee prior to her completion of training and professional registration. Another relevant category of experience would be prior work for a DHB that – due to a break in service (such as for travel or family reasons) was not included in the experience counted as

part of the employee's current and continuous service. There was no ambiguity or special meaning that made the phrase and application of the clause meaningless or illogical.

(iv) Did the interpretation given offend business common sense?

[29] A useful cross check to the plain reading given to the clauses was whether the outcome was so contrary to business common sense that it could not have been an intended or agreed outcome.

[30] As TDHB's submissions noted the MECA provided for a range of circumstances where individual DHB employees were deemed to have different anniversary or service dates for the purposes of different entitlements or elements of their pay. Long service leave (clause 19) was an example of where different anniversary dates might apply depending on an employer's prior service with another DHB. DHB pay systems were adapted to account for and operate with such differences that had arisen from varying terms and arrangements agreed with employees and their unions over the years. Whatever complexities of administration resulted – however arcane they might seem to an external observer – were within the common sense of how DHB business, in fact, operated in respect of employee entitlements.

(v) Did the parties' subsequent conduct indicate some other intended meaning?

[31] Three elements of subsequent conduct were suggested as indicating one or other of the parties had some different understanding of how the relevant clauses were meant to work from what they contended in this interpretation dispute. These elements comprised:

- (a) what Mr McFadgen had written in an Implementation Plan and slides for a 'Roadshow' explaining the MECA to DHB managers and NZNO members in 2007 and some notes taken by Steve Aburn, a DHB representative, during those sessions in various centres; and
- (b) records of the parties' MECA Implementation Sub-Committee (MISC) discussions in 2010; and,

- (c) what some DHBs were said by Mr Lennox and Ms Harry to actually do about placement on salary scales when making appointments of employees transferring from other DHBs.

[32] None of that information was sufficiently persuasive, as a cross check, to conclude an interpretation based on what I considered to be a natural and ordinary reading of the words should be substituted for some other outcome.

[33] Mr McFadgen acknowledged that the 2007 Implementation Plan and Roadshow referred to “salary” in notes about service-related benefits that would transfer to a new DHB employer so “staff transferring are not penalised”. He now suggested that the reference to salary should not “strictly speaking” have been included and was “in retrospect ... confusing”. He did not recall the question of the applicable date for the transfer of service being discussed during the Roadshow meetings around the country. However Mr Aburn notes indicated that the issue was, at the least, raised at a meeting in Christchurch.

[34] TDHB submitted NZNO had agreed in 2010, as recorded in notes of MISC discussions, that an employee’s anniversary date for the purpose of salary increases would be the date that she commenced employment with the current DHB employer. MISC deliberations and conclusions were said to have been incorporated as agreed interpretations under terms of settlement signed for the 2012 MECA. While TDHB accepted parties still had reserved rights to seek an Authority determination of a dispute on interpretation of a MECA clause, it argued the MISC records showed a mutual intention on the meaning of the disputed clauses which NZNO should not now be entitled to deny. It was not a conclusion I considered could be so firmly drawn from the MISC notes that themselves remained somewhat ambiguous on the particular point in issue. A note dated 13 December 2010 recorded this question: “what is the employees anniversary date if they are employed by a new DHB or re-employed by a prior DHB – in terms of salaries”? A note headed Recommendation read: “Start date is date of appointment with DHB for salaries – anniversaries annually thereafter”. A further note headed “DHB” read:

Different anniversaries possible for different entitlements e.g. Leave and salary increments – each employer is a new entity. Relevant prior service is evaluated for determining starting salary – however new anniversary applies. Generally for leave and gratuity redundancy actual date of start of qualifying service will apply.

[35] While such notes cannot be scrutinised as closely as the agreed terms of the MECA, they do not squarely address how the evaluation of relevant prior service referred to was understood to affect *when* the automatic annual increment for movement on the salary scale should be applied.

[36] The evidence of Mr Lennox and Ms Harry offered competing anecdotes on what they said was varying actual practice at some DHBs in appointing employees to the relevant salary scales. There was insufficient detail or supporting evidence to rely on the content of those anecdotes.

Application to Ms Marshall's circumstances

[37] For the reasons given Ms Marshall was entitled to move to the next step of the scale without having to wait one full year from the date she began work at TDHB. She was entitled to have the benefit of the service she had rendered to BoPDHB for the part of the year since her anniversary date there credited in TDHB's calculation of when she was entitled to the automatic annual increment.

[38] As TDHB had appointed Ms Marshall to Step 2 of the salary scale, which she had reached in her service at BoPDHB, it was not necessary to say anything further, in her case, about the notion that TDHB could have exercised a discretion to appoint her to a lower salary step.

Costs

[39] Costs in a dispute on the interpretation of the terms of a collective agreement would generally lie where they fell but NZNO sought reservation of costs. If there is an issue as to costs to be addressed that the parties are not able to resolve and require an Authority determination, NZNO and Ms Marshall should lodge and serve a memorandum within 28 days of the date of this determination. TDHB would then have 14 days from the date of service of costs memorandum to lodge any reply memorandum.

[40] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual ‘daily tariff’ basis unless particular circumstances or factors required an adjustment upwards or downwards.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].