IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 18
5420515

BETWEEN	NEW ZEALAND NURSES ORGANISATION First Applicant
AND	MARISSA PANETTIERE Second Applicant
AND	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority:	Robin Arthur
Representatives:	Jock Lawrie, Counsel for the Applicants Greg Peploe, Advocate for the Respondent
Investigation Meeting:	15 April 2014 in Hamilton
Determination:	27 January 2015

DETERMINATION OF THE AUTHORITY

A. Marie Panettiere did not qualify for payment of a retirement gratuity at the end of her employment with Waikato District Health Board because she was continuing to work elsewhere as a professional midwife.

Employment relationship problem

[1] The New Zealand Nurses Organisation (NZNO) and Marissa Panettiere pursued a dispute with Waikato District Health Board (WDHB) over the interpretation, application and operation of some clauses in the 2012-5 Nursing and Midwifery Multi-Employer Collective Agreement (the MECA) between District Health Boards and NZNO.

[2] NZNO and Ms Panettiere said WDHB wrongly interpreted and applied clauses on service and a retirement gratuity when it refused to pay her the gratuity. They said she was entitled to be paid a further 153 days' pay as an employee retiring after 35 years, under a scale set out in the MECA. In Ms Panettiere's case this payment would have amounted to around $53,317 (gross). They sought a determination that Ms Panettiere was entitled to a payment of that amount, with interest, from WDHB.

[3] In response WDHB denied Ms Panettiere's employment history met the requirements of the definition of service in the Agreement and said she had resigned rather than retired from its employment so did not qualify for the gratuity in any event. It said Ms Panettiere had not, in fact, retired because she continued to work as a professional midwife elsewhere.

The investigation and the issues

[4] Copies of correspondence lodged by NZNO confirmed that it had met its obligation under s129(2) of the Employment Relations Act 2000 (the Act) to notify the other employer parties to the MECA of the existence of the dispute.

[5] Through the Authority's investigation I received written and oral evidence from Ms Panettiere; NZNO's industrial advisor Lesley Harry and organiser Rob George; WDHB's employee relations and remuneration consultant Julie Gledhill, human resources consultant Paula Fitzgerald, nurse manager of Women's and Children's health Janet Bland, and nursing director Suzanne Lawes; and District Health Boards Shared Services employment relations specialist Kevin McFadgen. The parties' representatives provided written and oral closing submissions on the issues.

[6] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has set out findings of fact and law and expressed conclusions on the issues I considered required determination. This determination has done so under the following headings:

(i) What are the relevant clauses in the MECA and the relevant principles of interpretation?

(ii) How did Ms Panettiere's employment with WDHB end?

(iii) What does 'retiring' mean in this MECA and how did it apply to Ms Panettiere's circumstances?

(iv) What was Ms Panettiere's employment history?

(v) What does 'service' mean in this MECA and how did it apply to Ms Panettiere's circumstances?

(vi) Should either party contribute to the reasonably incurred costs of the other party?

(i) What are the relevant clauses in the MECA and the relevant principles of interpretation?

[7] The MECA provides for retiring gratuities to be paid to some employees, with the provision for each DHB being set out in an appendix:

> ***40.0 Retiring gratuities***
>
> *Retiring gratuities are available to employees who are retiring from DHBs where those provisions existed in Collective Agreements which were in place prior to 1 July 2004. Those DHB-specific provisions are attached as Appendix 1(b)* (sic) *to this MECA. All cut off and implementation dates expressed in those DHB-specific provisions will continue to apply in each DHB.*

[8] The parties agreed the Appendix reference in clause 40 of the MECA should be to Appendix 2(b). The Appendix included the following provision for WDHB:

> *Waikato DHB*
>
> *RETIRING GRATUITIES*
>
> *NOTE: This clause shall not apply to employees employed after 30 June 1992.*
>
> *1. The employer may pay a retiring gratuity to staff retiring from the organisation who have had not less than 10 years' service with the employer, with the employer and or one or more other District Health Board or its predecessors and with one or more of the following services: the Public Service, the Post Office, New Zealand Railways or any university in New Zealand.*
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> *2. For the purposes of establishing eligibility for a gratuity, total organisational service may be aggregated, whether this be part-time or whole-time, or a combination of both at different periods. Part-time service is not to be converted to its whole-time equivalent for the purpose of establishing eligibility.*
>
> *...*

[9] It was not necessary for this determination to set out the other paragraphs of that provision or the scale of maximum gratuities given in it for total service between 10 and 40 years.

[10] The definitions clause of the MECA defined "*service*" as:

> *"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 whilst 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] The second two sentences of the 'service' definition (underlined above) were added in the 2007 collective agreement negotiations. The parties' arguments took different views of how the definition applied to the calculation of Ms Panettiere's service prior to 2007. Also at issue was whether this general definition applied to references to service in the retirement gratuities clause or whether those references amounted to an "*otherwise defined*" use of the word applicable just for the clause.

[12] The parties' respective arguments on the interpretation and relationship of relevant clauses of the MECA were considered in light of the relevant principles established by case law for the interpretation of employment agreements. The primary focus is 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] A further guide to interpreting the WDHB-specific provision was the context provided by the wording used (in respect of service) in other clauses of the same

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[1] *Silver Fern Farms v New Zealand Meat Workers Union* [2010] NZCZ 317 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].

MECA that set the terms on which retirement gratuities were available to employees of other district health boards.

(ii) How did Ms Panettiere's employment with WDHB end?

[13] Ms Panettiere resigned from her position at a charge midwife manager (CMM) at Waikato Hospital in a letter dated 16 November 2012.

[14] The circumstances of how Ms Panettiere came to hand in her resignation were relevant to the issue of whether the end of her employment with WDHB amounted to "*retiring*" for the purposes of the application of the retirement gratuity clauses in the MECA.

[15] In August 2012 Ms Lawes had raised an allegation of serious misconduct by Ms Panettiere. After having met with her on 1 October 2012 and having heard her explanation about the matter of concern, Ms Lawes advised Ms Panettiere by letter on 12 October 2012 that no further action would be taken about the allegation. Instead Ms Lawes proposed changes to Ms Panettiere's work arrangements.

[16] Ms Lawes' concern was that Ms Panettiere had not attended two work meetings on 7 August 2012 because she was involved elsewhere assisting a private client giving birth. Ms Panettiere had a private practice as a Lead Maternity Carer (LMC) – a role that co-ordinates maternity care for pregnant women and is mostly done by midwives. The Ministry of Health pays a fee to LMCs for their work with each woman. The work usually includes attending the birth to assist the woman. Ms Panettiere's work as a LMC was separate from her employment as a CMM for WDHB. The CMM role, to which Ms Panettiere was appointed in August 2010, was a full-time salaried position, usually working Monday to Friday.

[17] Prior to Ms Panettiere's appointment as a CMM, a previous manager had permitted her to work both as a caseload midwife for WDHB and to maintain her own independent LMC business. In light of the concern raised about Ms Panettiere's attendance at work in early August 2012 Ms Lawes decided it was not a satisfactory arrangement for Ms Panettiere to be both a full-time CMM and to conduct an "*out-of-hours private practice*" as an LMC. Ms Lawes was concerned that carrying out both

roles caused unacceptable risks to Ms Panettiere's attendance and performance, including circumstances where she might have to leave usual Monday to Friday CMM duties to attend to a private client giving birth.

[18] Ms Lawes then offered Ms Panettiere the options of retaining her full-time CMM role but ceasing her LMC work or of giving up the CMM role and working in a 0.7 FTE senior midwife role while retaining her LMC clients.

[19] Ms Lawes declined a request from Ms Panettiere for either a six-month transition period or a 12-month period of 'career break leave' in order to make arrangements for management of her LMC clients. Ms Panettiere then rejected both options proposed by Ms Lawes and resigned from her CMM position. In her resignation letter Ms Panettiere said she wished to "*apply for gratuities due to my resignation from the [WDHB]*" as she had "*given unbroken service since January 1982 to the public health service*".

[20] NZNO formally raised Ms Panettiere's claim for a retirement gratuity on 12 December 2012. In a letter in reply dated 30 January 2013 Ms Fitzgerald, for WDHB, said the Board had no information suggesting Ms Panettiere had retired. Instead WDHB understood Ms Panettiere would be in regular paid work as a LMC in her own midwifery practice. Ms Fitzgerald also wrote that WDHB doubted Ms Panettiere could legitimately sign the statutory declaration form WDHB required before any such retirement gratuity was paid out.

[21] Ms Panettiere wrote to WDHB's CEO on 1 February 2013 "*applying in retrospect for my retirement gratuity*". She referred in her letter to her son having died during the stressful time when she decided to leave WDHB. Her son had died on 7 September 2012 following a car accident.

[22] Included with her gratuity application was a signed statutory declaration – in a standard form of wording WDHB had for the purpose – confirming she had notified its CEO that she had left the employment of the organisation and she "*will not be, and have no intention of, taking up on a permanent basis further regular paid employment*". The form also included paragraphs committing her to advising the CEO if she subsequently sought regular paid employment on a permanent basis and

acknowledging she could be required to pay back some or all of such a gratuity in those circumstances. The form also referred to attached "*Conditions for Payment of a Retiring Gratuity*".

[23] Those conditions – set out in a WDHB document dated November 2007 – described "*retiring*" as "*the permanent cessation of regular paid employment*" and stated that this description did not just apply to employment at WDHB or its successors. However it noted the condition about further employment did not apply to situations where an employee had taken enhanced early retirement or had their employment ended by redundancy.

[24] On leaving WDHB's employment Ms Panettiere continued with her LMC commitments to seven women who delivered babies under her care during January and February 2013. In the months from March to June 2013 she worked as a midwife on a casual basis at two private birth care centres. Her evidence was that she had, since July 2013, started to "*build up*" her LMC caseload as an independent midwife.

[25] Data compiled from WDHB records and provided by Ms Bland indicated that from 1 December 2012 to 4 March 2014 Ms Panettiere was involved as the registered LMC for 55 women, had been the responsible midwife at 29 deliveries of babies and had assisted at 41 births. While Ms Panettiere questioned the accuracy of some of the tallies given she said she regarded her independent midwifery business as part-time because she took on a maximum of four women a month as an LMC rather than the eight or more which would amount to a full-time role.

(iii) What does 'retiring' mean in this MECA and how did it apply to Ms Panettiere's circumstances?

[26] NZNO and Ms Panettiere submitted that, as the MECA did not expressly define the phrase "*retiring from the organisation*", its meaning should be taken by construction of the terms providing for the retirement gratuity. On that basis they submitted Ms Panettiere's resignation amounted to 'retiring from the organisation' if she met the criteria of being employed at the cut off or implementation date and had ten years of service. I have addressed the cut off and service criteria later in this determination. The initial question was whether a resignation by an employee (who

met the cut-off date and service criteria) was, in leaving the organisation, therefore "*retiring*" or whether the word meant something more than that?

[27] I have concluded the use of the phrase "*from the organisation*" in conjunction with the word "*retiring*" in the WDHB term did not give any special, limited or particular meaning to the word "*retiring*" so that it could be met or satisfied by the simple act of resigning. On a plain reading the phrase indicates the retirement is occurring while the employee is employed by WDHB, not any other employer. Its purpose, objectively read, prevents an employee who leaves WDHB to work elsewhere and then 'retires' from that subsequent job from seeking (at that later point in time) to claim a retirement gratuity from WDHB. Its meaning, then, is simply that the employee must be a present employee of WDHB at the time of retiring – so is doing so from that organisation, not some other one.

[28] NZNO and Ms Panettiere also submitted that WDHB could not rely, for the purposes of the interpretation dispute, on the terms of a clause that had previously allowed for payment of a gratuity on resignation. The resignation gratuity clause was removed from an earlier iteration of the present MECA in 1995. It had allowed the employer to pay to an employee – who met the cut off and service criteria for the retirement gratuity but was resigning from her or his position to "*take up other employment*" – an amount equal to half of what that employee could have received if they were retiring and entitled to a retirement gratuity. At that time the two clauses – one about a retirement gratuity and one about a resignation gratuity – drew a clear distinction between the act of resignation and the event of retirement.

[29] I considered the previous resignation clause was an essential contextual element to interpretation of the word "*retiring*" as it remained and continued to be used in the collective agreement in subsequent years, including in the present MECA. In that context the word "*retiring*" must mean more, objectively, than leaving a position with WDHB to "*take up other employment*" with another employer.

[30] NZNO and Ms Panettiere submitted that if 'taking up other employment' amounted to resigning rather than retiring, the description did not apply to her in any event. That was said to be so because Ms Panettiere had no plans to take up other employment at the time she ended her employment relationship with WDHB and she

had not, in fact, done so except for occasional casual employment. That argument required further analysis of the meaning of the word "retiring" (and the context in which it was used in the MECA) before a conclusion could be reached on its application to Ms Panettiere's circumstances.

[31] NZNO and Ms Panettiere relied on the Shorter Oxford Dictionary definition of retire as to "*withdraw, esp[ecially] to or from a specified place, position or occupation ... leave office or employment esp[ecially] on reaching normal age for leaving service".* They submitted Ms Panettiere's circumstances were within the scope of that definition because no age-related criteria properly applied, and she had 'withdrawn' from her employment position with WDHB.

[32] However I reached a different conclusion on the basis of both that definition, and this similar one in the Concise Oxford Dictionary about the word 'retire': "*leave one's job and* <u>*cease to work*</u>*, typically on reaching the normal age for leaving service*" (my underlining for emphasis).[3]

[33] The age of an employee became irrelevant when the 1999 amendments to the Human Rights Act 1993 abolished compulsory retirement ages (in most cases).[4] The following extract from a Human Rights Commission paper, issued in December 1998, identified consequential issues likely to arise in the definition of retirement:[5]

> ***Is the concept of retirement still valid? Will people in future just resign?***
>
> *The term 'retirement' is not given a statutory meaning in the Human Rights Act. The legal definition of retirement depends on the context. If it is defined in the contract then it will have the meaning that the contract gives it. If the contract is silent, the court is able to discern the parties' intentions.*
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> *Clearly, like the term 'employment' which can also present legal difficulties, there can be an interaction of related issues like income, paid or unpaid work, part or full time work, contractual and statutory obligations. Sometimes that interaction will lead to difficult questions – is there retirement when the employee wants to work part time afterwards? Or take another job? Does it matter if the employee says they are going to retire but then take up other employment?*

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[3] Concise Oxford Dictionary (11th ed, 2004).
[4] See Human Rights Act 1993 ss 22(1)(d), 30, 30A and 149.
[5] *Age and Retirement in the Public Service: Legal and human resource implications of the abolition of compulsory retirement:* Human Rights Commission (December 1998, State Services Commission ISBN 0-478-08951-1) at 32.

> *The Human Rights Commission has adopted (for the moment) the pragmatic view that retirement is essentially a question of fact – has there been a withdrawal from the fulltime workforce? The concept is not necessarily invalidated by someone returning to work the next day in a part time capacity, although there may be an issue with the 'retirement' of someone who returns the next day to the same or a similar job.*
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> ***Example**: After 21 years employment, an employee aged 38 years gave notice to his employer, advising that he was taking up further full-time employment elsewhere. The employee complained that he was entitled to retiring leave as the collective employment contract provided for retiring leave for employees leaving after having completed 10 years' service. The Proceedings Commissioner determined that the employee was not 'retiring' **within the meaning of the contract**, so the retiring allowance clause did not apply to him.*
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> *However, it may be that "retiring allowances" will be replaced by a different method of acknowledging or recognising the withdrawal from full-time work. Also, the concept of retirement from the full-time workforce may become increasingly irrelevant as workforce participation patterns change (e.g. the shift to part-time or portfolio work).*
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> *(Emphasis as in original)*

[34] There has subsequently been relatively little case law directly relevant to the interpretation issues in this dispute. In *Brooker v State Insurance Limited* the Employment Court ordered the employer to pay out on a contractual retiring leave provision to an insurance claims supervisor with 36 years' service who left his job after his position was made redundant and he had declined relocation to a position at another office in the region.[6] The Court rejected the employer's defence that the worker could not be said to have 'retired' from the workforce because he had taken on work at a local service station. It said:[7]

> *That is irrelevant because the contract does not prohibit post-retirement work, nor could it, and the [employer] did not know what the [worker] would do after 12 May 2000 (his last day at work) and so the latest date at which his entitlement was to be ascertained.*

[35] In *South Canterbury District Health Board v Milner* the Court found Ms Milner, a sole-charge dietician, was entitled to payment of the retirement gratuity when she had left her employment with the board on the grounds of stress-related ill-health although she had (unknown to the South Canterbury board) already secured another job with another health board elsewhere as a managing dietician.[8] There was conflicting evidence on whether she had told the board's representative that she was permanently ceasing any employment due to her health problems, with the Court

[6] [2000] 2 ERNZ 274.
[7] *Brooker,* above, at [22].
[8] (unreported, EC, CC 9/02, 12 April 2002, Palmer J).

concluding the board representative had made a mistaken assumption about Mrs Milner's intentions. The judge made the following observation about the interpretation of the particular clause providing for payment of a retiring gratuity (which had the same relevant wording as the present case):[9]

> *There is nothing, in my view, in the sub-clauses in this context, which specifies that the qualifying criteria for a retiring gratuity necessarily includes permanently ceasing to be a member of the work force generally.*

[36] However the judge concluded that the circumstances of Ms Milner's departure from South Canterbury were an "*enforced*" resignation for reasons of ill-health, qualifying her employer to exercise its discretion to pay her the retirement gratuity and long service leave. In reaching that conclusion the judge also stated that "*a truly voluntary resignation, would not, I hold, qualify Mrs Milner for payment of either a retirement gratuity or payment of her untaken long service leave*".[10]

[37] Two Authority determinations provided some general assistance. In *Rawiri v A-G* the Authority found the former employee, who had left IRD after 22 years' service to take up a private sector role, was not 'retiring' as he "*had another job to go to*".[11] It relied on what it called a 'narrow' definition of retirement drawn from two Arbitration Court decisions, one of which included the following description of the word or concept:[12]

> *In general terms, one understands retirement to mean ceasing to work at the end of one's working life (whatever that period may be). It is also common for people to retire from their long-term occupations and then seek or accept other employment as a means of occupying oneself in retirement or supplementing a pension.*

[38] In *NZNO v Whangaroa Health Service Trust* the Authority determined a dispute about entitlement to a retirement gratuity for former district health board employees.[13] The relevant 'grandparented' relevant clauses were essentially the same as those in the present matter. The Authority concluded that, although the provision of a gratuity was said to be discretionary, payment should be made unless fair and reasonable grounds existed for declining to do so.

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[9] *Milner,* above, at 63.
[10] *Milner,* above, at 93.
[11] (ERA, WA 129/09, 9 September 2009, Member Stapp).
[12] *Auckland Local Authorities' Officers IUOW v Glen Eden Borough Council* [1983] ACJ 476, at 482, and *Auckland Local Authorities' Officers IUOW v Takapuna City Council* [1978] ACJ 153.
[13] (ERA, AA 326/10, 19 July 2010, Member Oldfield).

[39] Applying the guidance of the dictionary definitions and the interpretation given in case law, I concluded a reasonable person with the necessary contextual information would understand the word 'retiring' as used in the MECA, to mean an end to (and, that is, a withdrawal from) the occupation that the employee was engaged in during their service to WDHB. In this case the event of Ms Panettiere submitting her resignation from her position with WDHB but continuing her work as a midwife through her LMC role did not constitute 'retiring' because it was:

(i) a voluntary resignation (per *Milner*); and

(ii) not an end to her 'long-term occupation' (per *Glen Eden*); and

(iii) not 'withdrawing from' her occupation (per Shorter Oxford definition); and

(iv) not ceasing to work (per Concise Oxford definition).

[40] NZNO and Ms Panettiere submitted that the wording of the statutory declaration WDHB required applicants for a retirement gratuity to sign – and the 'conditions for payment of a retiring gratuity' that accompanied it – imposed requirements as to future behaviour that were at variance with the terms of the MECA. In essence their argument was that phrases WDHB used in those documents describing 'retiring' as "*permanent cessation*" from any further "*regular paid employment*" were too prescriptive and beyond the intended meaning of the word. They noted that other DHBs had included express references in their relevant retirement gratuity clauses to "*permanent cessation of regular paid employment*" (as in the Lower North Island MECA) or "*permanently retiring from the workforce*" (Otago DHB). WDHB had not negotiated any such express phrase in its retirement gratuity clause and was not entitled to act as if it had, they submitted.

[41] Ms Gledhill's evidence about the actual operation by WDHB of its policy and procedure in assessing retirement gratuity entitlements confirmed the use of a very restrictive definition that I was not satisfied accorded with a reasonable interpretation of the word 'retiring'. She confirmed, in answer to questions, that a nurse who otherwise met the criteria (of having been employed at the time of the 'cut off' date and with the necessary service) would not be regarded as 'retiring' if that former WDHB nurse then took on a part-time job as, say, a reading assistant for a few hours a week at a local school or a caregiver at a private rest home for one shift a week.

[42] Her witness statement suggested that WDHB's reference to permanent and regular further employment did not apply to former staff members who had retired but then sought "*to undertake some casual work or irregular employment either for the DHB, themselves or other parties*". However WDHB's operation of its policy in determining gratuities – based on its own requirement for 'permanent cessation' of <u>any</u> regular paid employment – clearly went beyond a reasonable and objective interpretation of the word 'retiring' by including any part-time job, particularly extending to those outside the area of training and service of the former employee. It was inconsistent with – for example – the conclusion in *Brooker* that a part-time job at a local garage taken by a former insurance claims supervisor was not a relevant consideration in deciding whether or not he was 'retired'. Similarly the Court in the *Glen Eden* case had accepted someone could still be regarded as retired from their 'long-term occupation' if they took some other employment to supplement their pension or as an interest to occupy themselves. A clear line remains from the circumstance where someone is continuing to work in their area of training and experience – as seen in the *Rawiri* case. Similarly, if in the *Milner* case, there was a voluntary resignation to move to another similar or better position in the same occupation at another board, the worker would not (absent some other qualifying criteria such as redundancy or ill-health) have been entitled to the retirement gratuity.

[43] An alternative argument from Ms Panettiere about the nature of her ongoing employment also had to be rejected. She sought to draw a distinction between someone going on to work as a paid employee and someone who – as she argued she was in her LMC role – going on to work as an independent contractor. It was a technical argument relying on a narrow definition of 'employment'. As an LMC she continued to be 'employed' in the practice of her profession in providing services for which she had to maintain her professional certification and for which she received reward (the Ministry-paid fees). Given the particular nature of public health services and the registration requirements for many occupations within it, that was a useful indication (in the context of this particular MECA) as to whether a person's actual or intended activities amount to 'retiring' for the purposes of interpreting and applying the retirement gratuity clause. Mere retention of a practising certificate does not, of course and in itself, mean that a person is working and not 'retired' but if the person is

working in an area that requires that registration, it may be a relevant factor in the necessary assessment.

[44] The facts of Ms Panettiere's case were not appropriate to determine the legitimacy or enforceability of the provisions in WDHB's required statutory declaration purporting to allow recovery of some or all of a retirement gratuity if the employee decided in future to seek regular paid employment on a permanent basis. It was an issue that could only properly be addressed in a case where the facts were directly on point.

[45] There was, however, nothing inherently wrong in an arrangement for an employee to provide a statutory declaration confirming they were 'retiring' at the time of applying for a retirement gratuity – provided the word was described in a way that was consistent with the MECA. At the time of providing such a statement, the employee would also be subject to her or his good faith obligations.

[46] In Ms Panettiere's case she remained registered to practice as a midwife and was doing so through her work as an LMC. Her evidence established that she worked shifts at a midwife at private birthing units and expanded her practice as an LMC in the following months. She simply had not 'withdrawn' from her occupation and profession so could not reasonably be said to have 'retired' in any way meaningful for the interpretation and application of WDHB's retirement gratuity clause.

(iv) What was Ms Panettiere's employment history?

[47] Having reached the view that Ms Panettiere's resignation in November 2012 and her subsequent work did not amount to retiring, it was not strictly necessary to consider the element of the dispute regarding interpretation of service requirements. I have done so in the remainder of this determination in case it may be of assistance to the parties (including for the purpose of challenge to the determination as a whole).

[48] Although there were complex submissions from the representatives on the service issues and the history of the relevant provisions, I considered the issues boiled down to these two questions:

(i) Was continuous service required from the cut-off date?

(ii) Did the 2007 change to the MECA definition of service have any effect on how relevant service was assessed?

[49] The parties had different views on what parts of Ms Panettiere's employment history and service as a nurse and midwife could be taken into account in calculating whether she may have been entitled to a retirement gratuity.

[50] WDHB said the relevant period of Ms Panettiere's service with it started in September 1997, when she returned to the employment of WDHB after working for around 11 months (from November 1996) at Huntly Birthcare, which was not part of the Board's service. It contended Ms Panettiere was, therefore, someone employed after 30 June 1992 and someone to whom the retiring gratuity clause did not apply.

[51] However Ms Panettiere's account of her relevant service, summarised from her witness statement, was as follows:

1977-1980	Inland Revenue Department (as a clerk).
1980-1981	Thames Hospital Board (as a trainee enrolled nurse).
1982-1986	Waikato Hospital Board (as an enrolled nurse and then staff nurse).
1986-1987	Department of Health (as a public health nurse).
1987-1996	Waikato Hospital (as a staff nurse from August 1987 to July 1990 and then from August 1992 as a part-time staff nurse until starting work as a midwife in December 1993). During this period Ms Panettiere took parental leave from June 1990 and (from August 1990) had worked as a nurse on a casual basis at Tauranga Hospital and as a practice nurse for a GP in Tauranga. She began training as a midwife in February 1992 and completed the training by December 1993.
1996-1997	Birthcare Huntly (as a midwife).
1997-2012	Waikato District Health Board (as a caseload midwife and then as a CMM).

[52] At particular issue was whether Ms Panettiere's relevant service history was broken by two events – firstly, not returning to work at Waikato Hospital on the expiry of her parental leave in August 1991 (with the result that – in October 1991 –

the Board treated her employment as abandoned) and, secondly, her year working at Birthcare Huntly, a private maternity care provider. Resolution of that issue depended on when and how the MECA definition of service applied in assessing Ms Panettiere's employment history.

(v) What does 'service' mean in this MECA and how did it apply to Ms Panettiere's circumstances?

(a) Was current and continuous service required from the 'cut off' date of 30 June 1992?

[53] The evidence and submissions provided for the Authority investigation led to questions about whether, properly interpreted, the WDHB retirement gratuity clause required an employee to:

(a) have been a current employee of WDHB on 30 June 1992; and

(b) have been continuously employed by WDHB from that date to the date of her or his retirement.

[54] Ms Gledhill's evidence, on behalf of WDHB, referred to the 1992 collective contract negotiations having agreed that the retirement gratuity clause would apply only to staff who were "*currently employed*" with WDHB as of 30 June 1992. The clause does not, in fact, refer to current employment. Rather it excludes employees employed *after* that date. It does not require that the employee was in employment on the date of 30 June 1992. It theoretically includes an employee who was employed on, say, 30 May 1992 but had left before 30 June 1992. It was a point that only became relevant if the clause – properly interpreted – does not also require continuous service to WDHB from that date.

[55] The WDHB gratuity clause does not expressly refer to continuous employment. In that respect it differs from the wording of the equivalent clauses negotiated by some other boards, as recorded elsewhere in the same MECA. The Northern Districts retiring gratuity clause refers to employees "*whose current employment*" started from after a particular date. The Bay of Plenty clause refers to "*those staff with current continuous service who commenced before 23 November*

1992". The Otago clause refers to employees who "*have remained continuously employed*" from a particular date.

[56] Objectively the WDHB gratuity clause does not appear to require continuous service by the employee. However, arguably, an express reference is not necessary as the MECA's clause 5 definition of 'service' describes it as meaning "*current continuous service with the employer*". On that basis references to service in the WDHB retirement gratuity clause must then mean current continuous service.

[57] The general clause 5 definition does, however, include an exception to that definition – that is where the "*applicable clause*" otherwise defines service.

[58] The question of interpretation then becomes whether the WDHB retirement gratuity clause has some other definition of service?

[59] One factor in favour of that view is the express reference to continuous service in at least some of the gratuity clauses of other boards. Those other boards have not relied on the general definition as being sufficient.

[60] A second factor is the difference between the scope of service referred to in clause 5 and the WDHB-specific gratuity clause.

[61] The clause 5 definition of 'service' refers to "*the employer*" and predecessor organisations. Clause 5 also gives this definition of the phrase 'the employer': "*the relevant District Health Board employing the particular employee*". The reference to the specific board is also clear from the subsequent reference (in the second sentence of the clause 5 definition of 'service') to transfer of service "*between DHBs*" from the commencement of the multi-employer collective agreement operative from 2007.

[62] The scope of service that may be taken into account is different, however, in the WDHB gratuity clause. As well as service with "*the employer*" (meaning, as also defined in clause 5, the relevant DHB employing the particular employee), it includes time spent working for other district health boards and their predecessors as well as the public service, the Post Office, New Zealand Railways or any university in New Zealand.

[63] The effect of that wider scope is that 'service' for the purpose of the WDHB-specific clause cannot be read as limited as the clause 5 definition of service as being only "*current continuous service with the* [present] *employer*" (my emphasis). Accordingly, 'service' for the purposes of the WDHB Appendix terms appears to fall into the second part of the clause 5 definition of service, as being something "*otherwise defined in the applicable clause*". In reaching that view I have taken an ordinary meaning of the word 'defined' as being something stated or described exactly in respect of its nature, scope or meaning.[14]

[64] In application to Ms Panettiere's circumstances, the effect of this interpretation was that – provided she was in the employment of WDHB at some time on or before 30 June 1992 – she was within the closed category of people who could later be considered for a retirement gratuity. It was not relevant, for that purpose (and only that purpose), if she had left the employment of WDHB and later returned to it – or, put another way, she did not have current, continuous service with WDHB during all the intervening period. The three necessary factors were to:

(a) have been employed by WDHB on 30 June 1992 or some time sooner; and
(b) be employed by WDHB (and not some other entity) at the time of retiring; and
(c) in her total employment history, prior to retiring from her WDHB position, to have completed at least ten years' service with WDHB, other health boards or their predecessors, the Public Service, the Post Office, New Zealand Railways or a New Zealand university.

[65] If she had met those criteria, the relevant service and length of service would be calculated by aggregating her service with each of the identified employing entities, as contemplated by the reference in the second paragraph of the WDHB clause to "*total organisational service*".

(b) Did the 2007 change to the MECA definition of service have any effect on how relevant service was assessed?

[66] If the view reached on non-continuous but aggregated service reached in the previous section of this determination were wrong, NZNO and Ms Panettiere made an

[14] Concise Oxford English Dictionary (11th edition, 2004).

alternative submission that, if accepted, would result in her service being assessed as current and continuous under the clause 5 definition anyway.

[67] Their submission – in a form much simplified by my description of it – was that the definition of service adopted by the parties to the MECA from 2007 onwards should be applied to her earlier employment history (from at least 1982). If that were done, they submitted, her service should be deemed (for the purposes of that definition) continuous throughout.

[68] WDHB resisted that submission on the basis – again in a form much simplified by my description of it – that the 2007 definition was intended to apply to service from then onwards and did not require any reassessment or reclassification of an employee's service before the 2007 agreement came into effect. For example – in my reading of the clause, on an objective basis – an employee who left one DHB prior to 2007 and began work for another board (say) two months later was deemed to have broken service. Such an employee's previous service for his or her earlier board employer was not taken into account for service-related entitlements (such as when they qualified for a higher level of annual leave). However, after the 2007 addition to the definition came into effect, such an employee would be 'credited' for their previous service.

[69] If the 2007 addition to the service definition applied retrospectively to Ms Panettiere's service history, as she and NZNO submitted it logically should, two apparent breaks in the continuity of her service with WDHB would be "*deemed*" not to have any effect. During her absence on parental leave in 1990-91 she had worked as a hospital nurse and a practice nurse in Tauranga so she was 'actively engaged' in nursing, for which, under the 2007 definition, there was an extended 12-month period before her service could be regarded as broken. Similarly when she worked for Huntly Birthcare over an 11-month period in 1996-97 she was 'actively engaged' in midwifery related work which, under the 2007 definition, was deemed not to amount to a break in service.

[70] However I have accepted, as a plain and ordinary interpretation of the words and consistent with a business common sense reading, WDHB's submission that the clause does not have the meaning or retrospective application ascribed to it by Ms

Panettiere and NZNO. The changes adopted in the 2007 agreement include a clear operative date for the effect of any changes to what is deemed to be service.

(vi) Should either party contribute to the reasonably incurred costs of the other party?

[71] Costs in a dispute on the interpretation of the terms of a collective employment agreement would generally lie where they fell and I expect this approach would apply in respect of the matters dealt with in this determination. However if there is any issue as to costs to be addressed, WDHB may lodge and serve a memorandum as to costs within 28 days of the date of this determination and NZNO would then have 14 days to lodge any reply memorandum on behalf of the applicants. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Robin Arthur
Member of the Employment Relations Authority