**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

**[2015] NZERA Auckland 5**
**5454288**

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| | BETWEEN | ASSOCIATION OF SALARIED MEDICAL SPECIALISTS<br>Applicant |
| | AND | COUNTIES MANUKAU DISTRICT HEALTH BOARD<br>Respondents |

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| Member of Authority: | Eleanor Robinson |
| Representatives: | Daniel Vincent, Counsel for the Applicant |
| | Richard Upton, Counsel for Respondent |
| Investigation Meeting: | On the papers |
| Determination: | 8 January 2015 |

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**DETERMINATION OF THE AUTHORITY**

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## Employment Relationship Problem

[1] The Applicant, Association of Salaried Medical Specialists (ASMS), is claiming back pay for the claimants who are members of ASMS and senior medical officers employed by the Respondent, Counties Manukau District Health Board (CMDHB), as gastroenterologists (the Gastroenterologists) within the Department of Medicine at Middlemore Hospital, Auckland.

[2] CMDHB denies that the Gastroenterologists have any valid claim for back pay and claims that it has fulfilled all of its legal obligations towards ASMS.

[3] Mr Upton for CMDHB seeks an order for removal to the Employment Court pursuant to s 178(2) of the Employment Relations Act 2000 (the Act), on the grounds that:

> *a. an important question of law is likely to arise in the matter other than incidentally;*
>
> *b. the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court;*

*d. ….in all the circumstances the court should determine the matter.*

[4] Mr Vincent for ASMS does not seek formally to remove the matter now before the Authority to the Employment Court, but submits that ASMS recognises that there are issues of law between the parties that do justify the removal of this matter to the Employment Court pursuant to s 178(2)(a) of the Act.

**Brief Background Facts**

[5] ASMS and CMDHB are parties to a Multi-Employer Collective Employment Agreement (MECA). The claimants named in the Statement of Problem are:

(a) Members of the Applicant;

(b) Employed pursuant to the MECA in question;

(c) Senior Medical Officers (SMOs); and

(d) Gastroenterologists employed by CMDHB.

[6] Gastroenterology is one of a number of services within CMDHB's division of medicine. The size of the service more or less determines the number of SMOs required to fulfil patient demand within that service. The size of the service has a bearing upon the individual job sizes within it, and individual job size impacts upon (but is not determinative of) the individual SMO's remuneration.

[7] On or about 23 December 2004, the Applicant and New Zealand's various district health boards including CMDHB, entered into a MECA. The term of that MECA was from 1 July 2003 until 30 June 2006 (the first MECA).

[8] On 19 November 2004, the chief executives and chief medical officers of the Waitemata District Health Board, the Auckland District Health Board and CMDHB (the DHBs) jointly wrote to all senior medical and dental officers employed by them, including the claimants.

[9] That letter followed a decision by the DHBs to jointly undertake a regional project to give effect to changes in the recently negotiated National MECA for ASMS members employed by the New Zealand District Health Boards.

[10] The DHB's letter advised that a project team had been asked to produce an agreed process by February 2005, after which implementation would proceed throughout the rest of

that year. Timing and implementation was important from the outset. The letter of 19 November 2004 followed a protracted but eventually successful negotiation between ASMS and all District Health Boards which resulted in the first MECA and which contained the Gastroenterologists' core terms and conditions for employment.

[11] The Gastroenterologists' terms and conditions of employment that were carried over and are relevant were contained in successive MECAs including:

(a) The New Zealand District Health Boards Senior Medical and Dental Officers' Collective Agreement, 1 July 2007 to 30 April 2010 (the second MECA);

(b) The New Zealand District Health Boards Senior Medical and Dental Officers' Collective Agreement, 20 December 2011 to 28 February 2013 (the third MECA);

(c) The New Zealand District Health Boards Senior Medical and Dental Officers' Collective Agreement, 1 July 2013 to 30 June 2016 (the fourth MECA).

[12] Clauses 12.1 and 12.2 of the first and second MECAs stated:

> *12.* ***Hours of work and job size***
>
> *12.1 An employee's hours of work and job size shall be mutually agreed and shall objectively reflect the requirements of the service and the time reasonably required for the employee to complete their agreed duties and responsibilities, as set out in their job description.*
>
> *12.2 An employee's job size is the average weekly number of hours the employee is required to undertake their:*
>
> *(a) Routine duties and responsibilities, including such scheduled activities as outpatient clinics, theatre lists and departmental meetings;*
>
> *(b) Non-clinical duties and responsibilities* [refer to clause 49.2(d)]*;*
>
> *(c) Duties at locations other than the usual workplace; and*
>
> *(d) Rostered after-hours on-call duties, including telephone consultations and other relevant discussions.*

[13] Clauses 12.1 and 12.2 of the first and second MECAs established a process whereby SMOs' workloads would be objectively measured and sized with a view to then ensuring that the SMOs were paid fairly, consistently and transparently.

[14] The parties to the first MECA did not agree on any timeframe for the completion of the job sizing process. Since the first MECA expired, the parties have attended bargaining for MECAs from 1 July 2007 to 30 April 2010, 20 December 2011 to 28 February 2013 and 1 July 2013 to 30 June 2016. The parties are not agreed on a timeframe for the completion of the job sizing process in the MECAs.

[15] CMDHB submits that it agreed that an SMO would qualify for back pay where an individual's job size had materially increased and it was clear that they had been working without remuneration for those hours. CMDHB also submits that it was made clear that back pay would be for a period of three months from the date of implementation or six months in extenuating circumstances. There was never an agreement that the job sizing process would address historical discrepancies between the hours worked and the hours paid.

[16] In April 2010 following the successful ratification of the first MECA and the commencement on the job sizing for all SMOs in April 2007, CMDHB wrote to the Gastroenterologists (and other SMOs) and released regional principles relating to the SMO job sizing. Among other things, CMDHB advised the SMOs (including the Gastroenterologists) that the particular service in which they were employed would have to be sized before individual SMO sizing could occur.

[17] ASMS submits that the Gastroenterologists had completed all the work required of them for the job sizing process by February 2008. Throughout the time of the job sizing exercise, the Gastroenterologists continued to discharge all the duties and responsibilities set out in their agreed job descriptions in the belief that the unpaid clinical and non-clinical work they were doing would eventually be reimbursed through the job sizing process and backdated in accordance with assurances given by their employer and in accordance with the regional protocols drawn up and agreed by the three DHBs.

[18] CMDHB submits that on 15 June 2009, it wrote to its SMOs clarifying any increases to remuneration would be backdated for six months and would be conditional upon:

(a) The individual SMO's agreed job size having materially increased; and

(b) The claimant having been working without remuneration for additional hours.

[19] For approximately 12 months from June 2009 onwards, CMDHB negotiated with individual SMOs within the Gastroenterology service to agree on individual job sizes. It submits that agreement on the individual job sizes was reached and the implementation date for the new service size and individuals' job sizes were agreed to be effective from 1 July 2010, which meant that back pay was applicable back to January 2013.

[20] ASMS submits that each of the named Gastroenterologists rejected the 8 February 2011 offers of back pay received from CMDHB because the offers had not been properly calculated and did not correctly compensate them for the additional unpaid work that had been identified and confirmed by the job size project and review.

[21] The Gastroenterologists sought advice from ASMS which raised the matter with senior management in a letter dated 9 April 2013. However, despite a number of discussions with management, ASMS submits that CMDHB refused to accept either that it had incorrectly calculated each Gastroenterologist's back pay entitlement or to increase the period of back pay beyond its initial offer of six months.

[22] The Gastroenterologists now claim remuneration at the rate determined by the service size and job sizing processes as ultimately applied to each of them as from 1 May 2008 until August 2010 when their new individual job sizes were eventually implemented.

[23] CMDHB submits that there is no obligation on it to do this and that any specific decision that other DHBs have made about extending such timeframes are not binding upon it.

**Submissions on behalf of CMDHB**

[24] Mr Upton for CMDHB submits that there are four important questions of law involved, namely:

(a) In circumstances where Schedule 1B of the Employment Relations Act 2000 (the Act) applies, what are the implications if a party has failed to comply with the requirements of para. 22 of that Schedule (and among other things does such a failure prevent that party from pursuing a claim for a breach of good faith under s.4 against the alleged offending party?);

(b) Do parties who agree to a process being conducted under an employment agreement have an implied contractual obligation to fulfil that process within a particular period of time and, if so, how long is that period of time?;

(c) Do parties who agree to a process being conducted under an employment agreement have an obligation pursuant to good faith to fulfil that process within a particular period of time and, if so, how long is that period of time?;

(d) In circumstances where an agreed process is conducted and concluded, but one party is dissatisfied with the outcome, can that constitute a breach of good faith?

[25] Case law establishes that a question: *"will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about the decision of that case or a material part of it"*[1].

[26] Mr Upton submits that all the questions of law as set out above are decisive and important aspects of the case if not determinative of the outcome of the entire proceedings. Further, the questions are important because they will affect large numbers of employers and employees involved in collective bargaining, both within those employers specified in Schedule 1B of the Act, and more broadly. They also have potential implications for bargaining for individual employment agreements.

[27] Furthermore, it is submitted that the questions of law are likely to impact on bargaining for employment agreements generally. They will have implications to good faith obligations, which underpin all employment relationships. They also have implications for all parties to bargaining who agree on processes to be carried out (for example, by the formation of working groups, salary reviews etc). There are significant implications associated with these costs. As such these considerations demonstrate the importance of the questions of law.

[28] It is submitted by CMDHB that the questions of law, in particular the first question, have not been considered by the Employment Relations Authority or the Employment Court previously. The questions as such are novel. If the application is granted, it is submitted that this may necessitate a full bench of the Employment Court being convened and that the Court's decision will then have a potential impact on all bargaining in the health industry as well as beyond that. It is submitted that its importance is wide ranging and significant to employment law in general. The questions may impact on a large number of different parties throughout New Zealand. Consequently it is important that the matter be referred to the Employment Court for judgment.

[29] A further factor, it is submitted, in determining whether the questions of law are important is the issue of the question measured against the case in which it arises. In this case, the various questions of law are entirely central to the entire case. There is little in the way of material factual dispute in that the key issues are more likely to focus on the legal implications of those facts. They are therefore largely legal questions requiring extensive argument. The question or questions of law will be decisive of the case in question or, failing that, certainly of great importance to it.

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1 *McAlister v. Air New Zealand Ltd* AC22/05, 11 May 2005

[30] It is further submitted that the questions arise *"other than incidentally"*. It is submitted that the questions go well beyond being *"incidental"*. The answers to the questions will be largely decisive of the current matter; they cannot therefore be viewed as incidental.

[31] It is submitted that the Authority need only be satisfied that there is one important question of law arising other than incidentally and it is submitted that there are four such questions. Each and every question is important and arises other than incidentally, therefore the requirements of s.178(2)(a) of the Act are met. As a result, the Authority can and should order that the matter be removed.

**Submissions on behalf of ASMS**

[32] ASMS does not agree that the first question properly reflects a legal point in issue between the parties. It is a disputed fact, it submits, as to whether the Gastroenterologists breached para. 22 of Schedule 1B of the Act which concerns notification of breach. That issue only becomes relevant if there is a finding of breach which ASMS considers unlikely.

[33] ASMS does, however, agree that the relevance of Schedule 1B of the Act to the good faith obligations between the parties ought to be considered by the Employment Court.

[34] Schedule 1B of the Act places unique obligations on the health sector which recognise the importance of the work done in that sector. The Gastroenterologists in the case were working significant hours and continued to do so in order to meet the need of the South Auckland population.

[35] It is submitted by ASMS that the Gastroenterologists worked in excessive of their contracted hours in the expectation of having their jobs sized within a reasonable period of time and being awarded back pay for the additional hours they were working. It is submitted, therefore, that the first question could be redrafted to read:

> *Did Schedule 1B of the Employment Relations Act 2000, which requires the parties to provide health services even when in dispute, obligate the DHB to implement job sizing (and back payment for the work undertaken) as soon as it knew the gastroenterologists were meeting the ongoing health needs of its patients whilst under staffed?*

[36] ASMS has little difficulty with the second and third questions as set out by CMDHB, however, it submits that there is a legal issue to be determined as to whether there is a contractual obligation, or a good faith obligation, which required CMDHB to conclude job sizing within a reasonable period of time. It submits that the questions of law posited have general importance because:

(a) Those obligations remain in the subsequent versions of the MECA;

(b) Job sizing is likely to occur again in the future;

(c) The MECA, by its very nature, is applicable to a number of different DHBs and employees and therefore the interpretation of the relevant provisions and the job sizing process will have ramifications for the industry generally; and

(d) There is a significant amount of public money at stake.

[37] The Employment Court's findings in respect of this matter will not impact on the job sizing undertaken for other services in the DHB. Its relevance will be to the conduct of future job sizing under future MECAs, including the current one. It is submitted there is an ongoing need to ensure that sufficient resources are being applied to particular services, and the timeliness of the job sizing process is of material significance to future job sizing projects undertaken.

[38] It is submitted that the fourth question mis-states a grievance and therefore the focus of the case in the Statement of Problem focuses on the length of time it took for job sizing to be completed and the amount of back pay paid. ASMS would support this question being removed to the Employment Court for consideration if it was redrafted as follows:

> *Is it a breach of good faith for an employer not to remedy a staffing shortfall for a particular service when it is aware that service is significantly short staffed, its employees are working beyond their contractual obligations to meet that shortfall, and the work undertaken is of public importance in that it addresses a significant public health need?*

[39] ASMS submits that CMDHB knew of the shortfall in June 2008 but did not remedy it until August 2010. The staff in the Gastroenterology service continued to work servicing the shortfall in the expectation that change was imminent and that they would be paid for the additional work.

[40] It is submitted that that legal issue, including the employer's duty of good faith particularly in the public health service, is of public importance and does leave itself to resolution at the Employment Court level.

[41] ASMS submits that whilst there are few disputed facts, there are significant issues of facts that need to be explored, and submits that CMDHB's failure to implement agreed job sizes within an expected and reasonable timeframe needs to be explored and will be the subject of disclosure requests and factual inquiry. For that reason, it is not accepted that it is simply a legal case which will turn on an interpretation of the contractual and legal framework around it but that, whilst there are issues of law that need to be considered by the Employment Court, that will need to be done following determination of disputed facts.

**Removal Application and discussion**

*General Principles of Removal*

[42] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[43] In the event that the party or parties applying for removal satisfy the tests set out in s.178(2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Court. In so doing the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Court[2].

**Determination**

[44] I am satisfied that important questions of law are likely to arise other than incidentally in this matter, which will be decisive of important aspects of the case and will affect large numbers of employees and employers involved in collective bargaining.

[45] The important questions of law will also have implications for all parties engaged in collective bargaining who agree on the processes to be carried out.

[46] Given the fact that such questions as those set out above have the potential to impact on a number of employees, employers and unions, not just within the health sector but more widely, I consider it is important to have direction from the Employment Court.

[47] Finally, I am satisfied that it is appropriate for the Authority to exercise its discretion to remove in accordance with s. 178(2) (a), (b) and (d) of the Act.

[48] In all the circumstances the Employment Court should determine these matters, including the precise formulation of questions 1 and 4.

**Costs**

[49] Costs are reserved.

**Eleanor Robinson**
**Member of the Employment Relations Authority**

[2] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83]