

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 380
3046753

BETWEEN BAY OF PLENTY DISTRICT
 HEALTH BOARD
 Applicant

AND MIDWIFERY EMPLOYEE
 REPRESENTATION AND
 ADVISORY SERVICE
 INCORPORATED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Susan Hornsby-Geluk/Alastair Espie, Counsel for the
 Applicant
 Helen White, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further Applicant 28 & 29 November 2018
information received: Respondent 28 & 29 November 2018

Date of Determination: 29 November 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 27 November 2018 the Bay of Plenty District Health Board (the BOP DHB) filed an application for urgency and for, amongst other things, compliance orders. The compliance orders sought relate to alleged breaches by the Midwifery Employee Representation and Advisory Service Incorporated (MERAS) of its duty of good faith under Part 1 of the Employment Relations Act (the Act) and various Agreements for the provision of Life preserving services (the LPS Agreements) entered into under Clause 12(5) of Schedule 1B to the Act.

[2] Specifically, the BOP DHB alleges that MERAS has failed to comply with its obligation under the LPS Agreements to advise the BOP DHB of the names and contact details of union members responsible for providing life preserving services

support to the BOP DHB within the agreed timeframe, and to ensure that those members are available to provide those services.

[3] During a telephone directions conference held later that day I granted the DHB's application for urgency. By agreement the filing of all supporting affidavits and submissions were filed on a staggered basis up to 10 am on 29 November 2018. Bearing in mind the urgency, and with the consent of the parties, this application has been heard on the papers and on the basis of untested evidence.

[4] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- a) Having entered into agreements for the provision of Life preserving services under clause 12 of the Code, is MERAS bound in good faith to comply with those agreements?
- b) If so, should a compliance order be made?

[6] Before I turn to these issues, it is necessary to review the facts in more detail and to provide an overview of the legislative scheme behind which these issues must be determined.

Background against which issues are to be determined

[7] MERAS is the union that represents the majority of midwives in public hospitals including those at Tauranga and Whakatane Hospital.

[8] MERAS and all of the DHBs across New Zealand are currently bargaining for the renewal of a multi-employer collective agreement that will cover midwives employed by the District Health Boards including the BOP DHB.

[9] Between 7 and 20 November 2018, the BOP DHB received multiple strike notices from MERAS. The notices each advised of a total withdrawal of labour for a

two hour period, twice a day, from 22 November to 5 December 2018. The strike notice scheduled for 29 November 2018 was subsequently withdrawn.

[10] Upon receipt of the strike notices the BOP DHB took steps to assess the minimum staffing levels it needed in order to maintain life preserving services. In doing so, it took into account a number of factors:

- a. Neither Tauranga nor Whakatane Hospitals currently operate on call rosters. Instead, when additional staff are required, they ring around staff to ascertain availability.
- b. The normal process of “ringing around” to find somebody to cover is not feasible during the strike period. Firstly, because a very high percentage of the midwives employed by the BOP DHB are union members and therefore would be on strike. Secondly, those who were not members of the Union may not respond positively.
- c. The BOP DHB are entering into a period where it is expecting an extremely high number of women who are expected to present for labour, or with acute issues, and who have no Lead Maternity Carers. A contingency plan was already in place prior to notification of strike action to increase the Birthing Suite staffing and a new on call system was to be commenced on 1 December 2018.

[11] The LPS Agreements relating to each strike were thereafter prepared and sent to MERAS. The material terms of the agreements were these:

In accordance with clause 12 of the Code of Good Faith for the Public Health Sector (Schedule 1B of the Employment Relations Act 2000, "the Code") the DHB and Midwifery Employee Representation and Advisory Service Incorporated (MERAS) have reached an agreement on LPS and its members' assistance to maintain, or assist in maintaining, life preserving services during the period of industrial action. This is the written record of the parties' agreement.

...

1. Extent of the life preserving services (clause 12(5)(a) of the Code)

The extent of the life preserving services necessary to provide for patient safety during the period of industrial action is as follows:

1.1 The attached table (Document One) represents those MERAS members requested under the nationally agreed principles document and covers the named Tauranga and Whakatane Hospital Antenatal/Birthing Suites, Postnatal Wards, Tauranga Hospital Women's Acute Assessment Unit, Tauranga Hospital Antenatal Services for women without an LMC, Tauranga Outpatient Antenatal Obstetric Clinic, Whakatane Hospital Outpatient Antenatal Obstetric Clinic, and retrieval services for both Tauranga and Whakatane Hospital

2. The number of staff necessary (clause 12(5)(b) of the Code)
Tauranga Hospital: 27, Whakatane Hospital: 7

The number of staff necessary to enable the DHB to provide life preserving services during the period of industrial action is as follows:

2.1 As contained in the attached LPS Requirements tables, document one.

2.2 As contained in the attached tables Tauranga Hospital: 8 midwives on duty, 8 on call on site, 11 midwives on call off site. Whakatane Hospital: 1 midwives on duty, 3 midwives on call on site, 3 midwives on call off site.

3. Protocol for the management of emergencies (clause 12(5)(c) of the Code)

...

4. Contingency planning

4.1 The DHB confirms that it has taken, and throughout the period of industrial action will continue to take, all reasonable and practical steps to reduce services, reduce demand for services, minimise risk for patients, and utilise available resources including other DHBs and other service providers where it is reasonable and practicable to do so.

4.2 The DHB recognises that life preserving services are services to patients that cannot be deferred until after the period of industrial action.

5. Process for recourse to the union

5.1 Where it is necessary for the DHB to make a request to the union for the assistance of a union member or members during the period of industrial action, the following process will be followed:

5.1.1 The DHB will make its request to the union through the DHB's contingency planning team. The DHB will advise the union at least 48 hours or two working days, whichever is the earlier, prior to any period of industrial action of the roster of DHB contacts who will be involved in this process and may contact the union to request LPS be provided.

- 5.1.2 The DHB's request will specify the number of the union's members whose assistance is required, the nature of the assistance required, any particular qualifications needed (where relevant or applicable), and the likely duration of the union members' commitment.
- 5.1.3 The union will accept each request as being made in good faith and for a bona fide reason. The union will not challenge the DNB's request at the time it is made, and will provide the services of its members sought by the DHB.
- 5.1.4 The union will respond to the DHB's request within 20 minutes (except where otherwise specifically agreed) where the LPS cover being provided is on-call in nature. In all other circumstances, the union will respond to the DHB's LPS request immediately.
- 5.1.5 The DHB shall confirm with the union any requests that have been made and the basis of each request, in accordance with the audit form attached as an addendum to this agreement, for each day of any period of industrial action on the next working day.
- 5.1.5 The union will advise the DHB of the names and contact details of union members responsible for providing LPS support to the DHB at 72 hours or (3 working days) prior to any period of industrial action.
- 5.2 The parties agree that any disputes between them as to the nature of requests will be addressed after the life preserving services have been provided. It is expressly recorded that the purpose of this is to ensure that patients do not suffer as a result of any dispute between the parties about particular requests.
- 5.3 In the event of a dispute between the parties as to the nature of a request for which LPS has been provided, the union may request non patient identifiable clinical information from the DHB in order that the union can form a view of whether it considers the request for LPS was within the definition of LPS set out in clause 3 of the Code. The DHB shall make this information available to the union by the close of the working day after the union's request is made of the DHB.

[12] The LPS Agreements for each strike occurring from 22 November 2018 to 3 December 2018 were subsequently executed by MERAS. Those relating to the strikes on 4 and 5 December 2018 are currently awaiting adjudication outcomes.

[13] By 15 November 2018, the BOP DHB had not received any information from MERAS as to who would be providing Life preserving services cover during the periods of strike action for which the LPS Agreements were in place. Meetings were convened that resulted in some names being provided by MERAS but these were insufficient to meet the requirements in the LPS Agreements.

[14] Concerned that MERAS was not meeting its obligations, and in accordance with its obligations under Clause 4 of the LPS Agreements, the BOP DHB commenced efforts to try and fill the rosters themselves. While their efforts had some success in filling gaps in the Life preserving services rosters, they were unable to cover all of the shortfalls.

[15] As a result, Kirsten Rance, the BOP DHB Midwife Leader, emailed the MERAS representatives pointing out that they were endeavouring to find cover to fill the Life preserving services rosters for 22-26 November but had been unable to do so. The email sought to discuss this with MERAS. It also recorded that they had not received the names of the midwives who would be performing the Life preserving services beyond 26 November and requested that these be provided.

[16] MERAS' co-leader (midwifery), Caroline Conroy, responded advising "*Sorry I can't agree to this request as the LPS request exceeds the midwives rostered on the shift.*"

[17] On 22, 23 and 24 November 2018 the planned strikes went ahead. Only some of the life preserving cover agreed in the LPS Agreements was provided by MERAS. The BOP DHB was unable to secure the cover otherwise. Although no adverse outcomes followed, the lack of offsite on-call Life preserving services cover meant the BOP DHB was unable to take steps to mitigate the risk to the women and babies that required its services to an acceptable level.

[18] In light of its safety concerns, and the significant gaps in the life preserving services rosters for the strikes scheduled for 25-27 November 2018, the BOP DHB instructed its solicitors to write to MERAS.

[19] By letter dated 24 November 2018 the BOP DHB's solicitor sent a letter to MERAS which:

- a. Advised that MERAS' unwillingness or inability to confirm the staffing it agreed to provide under the LPS Agreements had resulted in a situation at Whakatane Hospital that morning.
- b. Identified the gaps in the life preserving services rosters for 25, 26 and 27 November 2018 that needed to be filled;

- c. Sought urgent undertakings that MERAS would meet the commitments it had entered into in respect of life preserving services,
- d. Requested a response by 6 pm that day.

[20] Ms Conroy responded later that evening. The contents of that letter were marked without prejudice but a copy was provided to me by the BOP DHB and referred to by Ms Conroy in the affidavit that she has filed. No objection to the production of this letter has been raised.

[21] Within this letter MERAS responded to the allegations made about the events that took place on 24 November, denying any risk to safety and maintaining that the events reflected a “normal busy day”. Materially, the letter also rescinded its support for the LPS agreements for Bay of Plenty stating:

I need to advise that I rescind my support for the LPS agreements for Bay of Plenty as they currently stand because they are so far outside of the normal staffing arrangements. I signed these agreements in good faith that they reflected the normal staffing levels since MERAS only ever agreed to provide LPS up to the staffing levels on any given shift (and which has occurred very amicably at other DHBs).

Given the DHB is showing no attempt to provide on-call provisions anywhere near the levels they are asking of MERAS during the hours outside of the 2 hour strike periods then it seems completely unreasonable for us to provide that level of on-call for the 2 hour period of the strikes. For your information the DHB normally has no midwives on-call and instead thinks it is okay to call them regularly during their off-duty time and not even pay them call-back rates when they suddenly change all their personal plans to assist in supporting their colleagues already on duty.

I would be happy to receive any LPS requests on Monday that better reflect the normal staffing levels. In the interim I do make a commitment to ensure that MERAS does provide the LPS levels that replace the MERAS members on duty for any shift over the weekend and also advise members on duty that they can phone midwives in the normal way during the strike periods for this weekend to cover an emergency situation should they need to do so. This then meets the usual arrangements that the DHB has in place.

[22] On 25-27 November 2018 the planned strikes went ahead. Again, the LPS cover agreed by MERAS in the LPS Agreement was not provided:

- a. During the strike action on 25 November, both Whakatane Hospital and Tauranga Hospital were short two off-site on-call midwives for both strike periods.

- b. During the strike on 26 November, Tauranga Hospital was short one off-site on-call midwife during the morning strike and four during the afternoon strike. Whakatane Hospital was short two off-site on-call midwives during both strikes.
- c. During the strike on 27 November, Tauranga Hospital was short five off-site on-call midwives during the morning strike and four short of what was required for the afternoon strike. Whakatane Hospital were short two off-site on-call midwives during both strikes.

Issue One: Breach of Good Faith

[23] To determine this issue it is necessary to consider the Code of Good Faith for the Public Health Sector that is set out in Schedule 1B to the Act. The purpose of the Code is set out in Clause 2:

2. Purpose —

The purpose of this code is—

- (a) to promote productive employment relationships in the public health sector:
- (b) to require the parties to make or continue a commitment—
 - (i) to develop, maintain, and provide high quality public health services; and
 - (ii) to the safety of patients; and
 - (iii) to engage constructively and participate fully and effectively in all aspects of their employment relationships:
- (c) to recognise the importance of—
 - (i) collective arrangements; and
 - (ii) the role of unions in the public health sector.

[24] Clause 3 provides definitions including:

Life preserving services means —

- (a) crisis intervention for the preservation of life:
- (b) care required for therapeutic services without which life would be jeopardised:

- (c) urgent diagnostic procedures required to obtain information on potentially life-threatening conditions:
- (d) crisis intervention for the prevention of permanent disability:
- (e) care required for therapeutic services without which permanent disability would occur:
- (f) urgent diagnostic procedures required to obtain information on conditions that could potentially lead to permanent disability

[25] Clause 4 addresses further general requirements which include the requirement for the parties to “engage constructively” and “participate fully and effectively” in the employment relationship. Parties must also “create and maintain open, effective, and clear lines of communication”. Importantly, the parties must “use their best endeavours to resolve, in a constructive manner, any differences between them”.

[26] Clauses 11–12 of the Code are at the heart of this case and deal with patient safety. They provide:

11 General obligation for employers to provide for patient safety during industrial action —

During industrial action, employers must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability.

12 Contingency plans —

- (1) As soon as notice of industrial action is received or given, an employer must develop (if it has not already done so) a contingency plan and take all reasonable and practicable steps to ensure that it can provide life preserving services if industrial action occurs.
- (2) If an employer believes that it cannot arrange to deliver any life preserving service during industrial action without the assistance of members of the union, the employer must make a request to the union seeking the union’s and its members’ agreement to maintain or to assist in maintaining life preserving services.
- (3) The request must include specific details about—
 - (a) the life preserving service the employer seeks assistance to maintain; and
 - (b) the employer’s contingency plan relating to that life preserving service; and
 - (c) the support it requires from union members.
- (4) A request must be made by the close of the day after the date of the notice of industrial action.

- (5) As soon as practicable after the employer has made a request but not later than 4 days after the date of the notice of industrial action, the parties must meet and negotiate in good faith and make every reasonable effort to agree on —
- (a) the extent of the life preserving service necessary to provide for patient safety during the industrial action; and
 - (b) the number of staff necessary to enable the employer to provide that life preserving service; and
 - (c) a protocol for the management of emergencies which require additional life preserving services.
- (6) An agreement reached between the parties must be recorded in writing.

[27] Section 100D(4) of the Act provides that a failure by any party to comply with the Code is actionable as a breach of the duty of good faith in s 4 of the Act.

Analysis

[28] The purpose of Clauses 11 and 12 of the Code is to maintain patient safety during industrial action in the public health sector. For that reason the Code establishes a structured and prescriptive set of rules relating to the timeframe and processes for agreeing life preserving services.

[29] The parties complied with those rules and reached agreement. Their agreement was recorded in multiple written LPS Agreements. These set out their agreement as to the extent of the life preserving services necessary to provide for patient safety during the industrial action (Clause 1), the number of staff necessary to enable the employer to provide that life preserving service (Clause 2) and a protocol for the management of emergencies which require additional preserving services (Clause 3).

[30] Upon execution, the LPS Agreements became binding and enforceable. MERAS was bound to provide the staff it had agreed to provide unless the BOP DHB reduced its requirements in accordance with Clause 4 of the LPS Agreements.

[31] It was not open to MERAS to unilaterally resile from the agreed terms. If it had a dispute about the terms then the appropriate course to follow was that set out in the LPS Agreements. Namely, to address the dispute after the provision of the life preserving services so as to ensure patients do not suffer.

[32] To allow otherwise would create unacceptable uncertainty. It would undermine the purpose of the Code, and an employer's ability, to provide for patient safety during industrial action. As stated by the Court in *Association of Professional and Executive Employees Inc v New Zealand District Health Boards*:

By its very nature, patient safety is of critical importance and cannot be compromised to meet other objectives. It follows that the provisions of the Code designed to assist employers in providing life preserving services during industrial action should be interpreted in a manner which allows patient safety to be maintained. That requires an effective contingency plan. It is the employer's responsibility to produce and implement that plan but, to the extent that the employer needs the assistance of potentially striking employees, the Code must be interpreted in a manner which enables a fully effective contingency plan to be put in place.¹

[33] For completeness, I did consider but do not accept MERAS evidence that it was misled into entering into the LPS Agreements by misrepresentations made by the BOP DHB as to the staff numbers required. While I empathise with the situation the midwives have now found themselves in, I am not satisfied on the balance of probabilities, and the limited untested material before me, that any misrepresentations were made by the BOP DHB. The LPS Agreements are clear and unambiguous as to the number of staff required to be provided during the strike periods. If these numbers reflect more staff than are normally rostered then that was a matter that could have been ascertained by MERAS prior to signing the LPS Agreements. The parties could then have followed the adjudication process set out in Clause 13 if agreement was not reached as they are now doing in relation to the strikes scheduled for 4 and 5 December 2018.

Finding on Issue One

[34] MERAS made a commitment through the LPS Agreements to provide the BOP DHB with a particular number of midwives and the names and contact details of those midwives. I find its failure to meet this commitment, and to comply with the Code, is a breach of its duty of good faith under s 4 of the Act.

¹ [2013] NZEmpC 3 at [27].

Issue Two: Compliance Order

[35] MERAS' breaches cannot be permitted to continue. They have caused significant uncertainty, stress to staff, and an unacceptable risk to the mothers and babies who require care.

[36] A compliance order under s 137 of the Act is necessary.

[37] I order MERAS to comply with its good faith obligations in Part 1 of the Act by:

- a. Providing to the BOP DHB the names of the union members responsible for providing LPS support for all future strike periods by **8 am on 30 November 2018**; and
- b. Ensuring that the members it has named to provide life preserving services present for work in accordance with the applicable rosters, during the strike periods where LPS agreements have been executed.

[38] The issue of penalties for MERAS' breaches of good faith is reserved. A telephone conference is to be convened to address timetabling for the hearing of this aspect of the BOP DHB's claim.

[39] Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority