IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 297
3061281

BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION (NZRDA) Applicant
A N D	AUCKLAND DISTRICT HEALTH BOARD First Respondent
A N D	WAITEMATA DISTRICT HEALTH BOARD Second Respondent
A N D	COUNTIES MANUKAU DISTRICT HEALTH BOARD Third Respondent

Member of Authority:	Rachel Larmer
Representatives:	Bill Manning, Counsel for Applicant Susan Hornsby-Geluk, Counsel for Respondents
Investigation Meeting:	20 May 2019 at Auckland, by telephone conference
Oral Determination:	20 May 2019
Record of Oral Determination:	21 May 2019

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] New Zealand Resident Doctors Association (NZRDA) has filed a Statement of Problem seeking a declaration from the Authority that Resident Medical Officers (RMOs) who accepted an offer of employment, made by the Northern Regional Alliance (NRA) on behalf of the three respondent District Health Boards (DHBs), on or about 6 August 2018 are not covered by s 62 of the Employment Relations Act 2000 (the Act) when rotating from one DHB to another within the Auckland region over the course of their 2019 training year.

[2] Alternatively, should s 62 of the Act be held to apply to the RMOs, then the NZRDA seeks a declaration that the DHB to which the RMO is rotated must comply with the terms and conditions of the RMOs' employment that applied immediately before the rotation, to the extent that such terms and conditions are more favourable than the Speciality Trainees of New Zealand MECA with all 20 DHBs (the SToNZ MECA).

[3] The parties were party to a MECA that commenced on 13 February 2017 and expired on 28 February 2018 (the NZRDA MECA).

[4] Under s 53 of the Act the NZRDA MECA continued in force until 28 February 2019, but it has now lapsed.

[5] NZRDA initiated bargaining for a new collective agreement to replace the previous MECA but bargaining has not been able to be concluded yet. The parties are currently in facilitation with the Authority (involving a different Member) over bargaining for a new collective agreement.

[6] Since 28 February 2019 NZRDA's union members who are RMOs have continued to be employed under individual employment agreements (IEAs) based on the expired NZDRA MECA.

[7] In February 2018 a new union SToNZ was incorporated and registered. Membership of SToNZ is open to all RMOs.

[8] SToNZ settled a MECA with all 20 DHBs in November 2018. The SToNZ MECA has a coverage clause that is essentially the same as the coverage clause in the expired NZRDA MECA.

[9] NZRDA claims that the RMOs who are working under IEAs based on the expired NZRDA MECA have materially more favourable terms and conditions of employment than the employees who are employed under the SToNZ MECA.

[10] The respondent DHBs do not agree with that position.

[11] Part of the RMOs' training requires them to rotate from one hospital to another. That often, but not always, involves them transferring their employment from one DHB to another.

[12] The NRA is an agency established by the Northern DHBs (the three respondents plus the Northland DHB).

[13] The NRA provides administrative support to the respondents in their recruitment, retention and administration of the training of the RMO workforce in the Auckland region. This support includes managing the RMOs' training rotations from DHB to DHB within the Auckland region.

[14] There is a disputed issue as to whether or not the offers of employment the NRA made to rotating RMOs on or about 6 August 2018 for the 2018/2019 training year means that any RMO who accepted the NRA's 'Offer of Appointment' is a "new employee" covered by s 62 of the Act - each time the RMO rotates to a different DHB within the Auckland region during their 2019 training year.

[15] Approximately 120 RMOs are affected by this dispute. There are also approximately 17 or 18 Wellington based RMOs who are also affected by NZRDA's belief that s 62 does not apply to RMOs who received a letter of offer on behalf of Capital and Coast DHB and Wairarapa DHB.

[16] NZRDA has advised its RMO members that s 62 does not apply to them because they are not "*new employees*" as required by that section, meaning they are

entitled to remain on their existing terms and conditions as per their IEAs that are based on the expired NZRDA MECA.

[17] The respondent DHBs believe that NZRDA acknowledges that the DHBs must offer the SToNZ MECA as an IEA to all new employees but they don't agree with NZRDA's position that its RMO members are outside the application of s 62 of the Act.

[18] The new RMO rotations start next Monday 27 May 2019. The parties have not agreed on what if any interim arrangements should apply pending resolution of the dispute by the employment institutions.

[19] Last week the DHBs wrote to all RMOs based in the Auckland and Wellington regions, who are rotating to another DHB within that same region, offering them the opportunity to nominate whether or not they consider themselves to be "new employees" in terms of s 62 of the Act.

[20] Those that elected to regard themselves as "new employees" would be employed on a new IEA based on the SToNZ MECA, meaning the expired NZRDA MECA terms would no longer apply, unless agreed otherwise by the parties.

[21] The RMOs who do not elect to regard themselves as "new employees" from the time the next training rotation starts on 27 May 2019, would remain employed on an IEA based on the expired NZRDA MECA and any other additional terms that already applied to them, including those stated in the NRA 'Offer of Appointment' letter issued to RMOs at the beginning of their training year.

[22] The DHBs provided the RMOs with a summary of what it considered the key differences between the IEA based on the current SToNZ MECA and the IEA based on the expired NZRDA MECA were. This comparison occurred without NZRDA's input.

[23] The DHBs gave rotating RMOs until 23 May 2019 to advise the employing DHBs of their election.

[24] The NZRDA claims that the DHBs' 'election strategy/initiative' as communicated to the RMOs was unilateral and unacceptable to it, even as a temporary strategy pending resolution of the substantive dispute.

[25] NZRDA also claims that the table comparing the provisions of the two MECAs the DHBs sent to RMOs was not a fair and balanced comparison, so was a breach of good faith.

[26] The parties have been directed to urgent mediation but as yet have been unable to agree on a temporary solution pending determination of the substantive claims.

[27] It is agreed that the start of the new RMO rotation on Monday next week (27 May) makes the resolution of this dispute an urgent matter.

[28] The Authority raised possible removal under s 178(2) (a), (b) and/or (d) of the Act with the parties last week.

[29] This removal suggestion was discussed in detail by the parties with the Authority during an investigation meeting that took place by way of a telephone conference today.

[30] Both parties and the Authority agreed during today's telephone investigation meeting that:

a. This was an appropriate matter for removal to the Employment Court;

b. The test in s 178(2)(a) of the Act was met because this matter involved an important question of law that arose other than incidentally. It involved interpretation of how the new s 62 requirements in the Act that came into effect on 6 May 2019 apply to RMOs who are required to rotate between different DHBs as part of their training. This is a unique situation that has arisen due to the new SToNZ MECA so there is no previous case law on how s 62 is to be applied to the parties' situation;

c. The test in s 178(2)(b) of the Act was met because the case was of such a nature and urgency that it was in the public interest that it be removed immediately to the Court. Almost 140 employees employed by DHBs were directly affected as from Monday next week. These employees, their employing DHBs, the NRA and the unions involved need to know what terms and conditions applied to employees as a matter of urgency;

d. The test in s 178(2)(d) of the Act was met because the Authority was of the opinion that in all the circumstances the Court should determine this matter in the first instance because:

i. This claim involves new law that potentially affects others in employment relationships, not just these parties;

ii. The importance of the matters in dispute makes a challenge highly likely;

iii. It is preferable that the parties to focused their time and resources on the current facilitated bargaining and on pursuing this matter before the Court rather than involving the Authority as a first step;

iv. Certainty regarding the s 62 obligations will be obtained more quickly if this matter is removed than if the Authority's determination was challenged;

v. The Court is potentially able to hear this matter a couple of months before the Authority would be able to, so it is more expedient to remove it in all the circumstances.

[31] Having determined that the grounds for removal under s 178(2) exist the Authority further considers that there are no reasons that would weigh against removal.

[32] Accordingly, with the consent of both parties, the Authority orders that this matter should be removed in its entirety to the Employment Court to determine in the first instance.

[33] The questions of law (or mixed questions of fact and law, as the case may be) are:

a. Are the RMOs employed by DHBs in the Auckland region for the 2019 training year "new" employees to whom s 62 of the Act applies when they are required, as part of their training, to rotate from the employ of one DHB in the Auckland region to another DHB?

b. If s 62 applies to these rotating RMOs, then are the DHBs to whom they are rotated to obliged to comply with the RMOs' terms and conditions which applied immediately before the rotation, to the extent such terms and conditions are more favourable to the RMOs than the collective agreement that applies to them under s 62 of the Act?

c. What if any terms and conditions of the expired NZRDA MECA are more favourable to RMOs than the current SToNZ MECA terms and conditions?

[34] Finally, the Authority considers that it is appropriate for costs on this removal application to lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority