

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 339
3005931

BETWEEN	THE NEW ZEALAND NURSES ORGANISATION INCORPORATED Applicant
A N D	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Respondent

Member of Authority:	Peter van Keulen
Representatives:	Philip Cheyne, counsel for the Applicant Alastair Espie, counsel for the Respondent
Investigation Meeting:	19 and 20 November 2018
Submissions and further information received:	20 November 2018 and up to 18 February 2019 from the Applicant 20 November 2018 and up to 20 February 2019 from the Respondent
Date of Determination:	7 June 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem concerns the coverage of a Multi-employer Collective Agreement, between the New Zealand Nurses Organisation Incorporated (NZNO) and the District Health Boards dated 24 August 2015 (the MECA).

[2] The Nelson Marlborough District Health Board (NMDHB) employs a group of Registered Nurses as Clinical Needs Assessors or Specialist Needs Assessor Service Co-ordinators (collectively known as NASCs). These Registered Nurses are members of NZNO

and say they are covered by the MECA. NMDHB says the Registered Nurses who are employed as NASCs are not covered by the MECA.

[3] The coverage clause in the MECA states:

This is a multiple employer collective agreement (MECA) that is made pursuant to the Employment Relations Act 2000.

This MECA shall apply to all employees who are members of NZNO and who are employed by the DHBs party to this MECA in the roles listed below or hold a nursing and midwifery position and is required by the employer to be a qualified health professional:

Registered Nurses
Registered Midwives
Enrolled Nurses
Registered Obstetric Nurses
Karitane Nurses
Health Care Assistants/ Hospital Aides

[4] Breaking this down, this clause provides that in order to be covered by the MECA an employee must be:

- (a) A member of NZNO; and
- (b) Employed by a District Health Board; and
- (c) In a role that is listed; or
- (d) Holding a nursing position in which the employee is required to be a qualified health professional.

[5] In this matter, the Registered Nurses who are NASCs and who claim to be covered by the MECA are all members of NZNO, are employed by a DHB and are required to be qualified health professional by NMDHB. The NZNO also accepts that the only possible role listed that might be applicable is “Registered Nurses”.

[6] So after these accepted parameters are applied to the coverage clause, the issue for me to determine is whether the Registered Nurses working as NASCs:

- (a) Are in a role that is a Registered Nurse role; or
- (b) Hold a nursing position.

[7] In order to resolve this issue I must interpret and apply those parts of the coverage clause to determine if Registered Nurses employed by NMDHB as NASCs are covered by the MECA. More specifically, I need to interpret what “in a role that is listed” as “Registered Nurses” and “hold a nursing position” mean and then apply this to the NASCs situation.

[8] When looking at interpreting and applying a coverage clause in a collective agreement a number of factors are relevant :

- (a) The principles of contractual interpretation;
- (b) Section 56 of the Employment Relations Act 2000 (the Act) and definition of coverage clause in the Act; and
- (c) Case law pertaining to the interpretation and application of coverage clauses.

[9] Turning to the relevant parts of the Act, section 56 of the Act states:

- (1) A collective agreement that is in force binds and is enforceable by–
 - (a) the union and the employer that are parties to the agreement; and
 - (b) employees-
 - (i) who are employed by an employer that is a party to the agreement; and
 - (ii) ...
 - (iii) whose work comes within the coverage clause in the agreement.

[10] And then, in section 5 of the Act, coverage clause is defined as:

- (a) In relation to a collective agreement,-
 - (i) Means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or type of employees; and
 - (ii)

[11] So from the Act the focus on the application of coverage clauses is to assess the work undertaken. The Employment Court has confirmed this. In *Aviation and Marine Engineers Association Inc v Air New Zealand Limited*¹ the Employment Court said at [140] and [141]:

¹ [2013] NZEmpC 172

[140] Coverage of work (and therefore of the employees who perform that work) under collective agreements is a matter of negotiation and settlement of their terms by unions and employers. Coverage is not determined by job descriptions issued to individual employees covered by those agreements so that, in effect coverage may be determined, or affected significantly, unilaterally by the employer. A job description of work affected by the coverage clause of a collective agreement must conform to, the collective agreement's coverage clause.

[141] Where an Employer has multiple collective agreements affecting the employment of employees (including in the same part of the business), the provisions of the collective agreement governing any particular situation will be determined, first, by which collective agreement (if any) covers the issue. This will be done by considering the coverage of the affected employees by reference to the work performed by them.

[12] Putting the relevant parts of the Act and case law together what this means is, when I interpret and apply the coverage clause I must consider whether the work that the Registered Nurses do as NASCs comes within the work or type of work covered by a Registered Nurses role or a nursing position.

[13] In order to do this I will start by interpreting what is meant by Registered Nurses role and a nursing position in order to establish the work or type of work covered. Then I will consider whether the work undertaken by Registered Nurses as NASCs is covered by this work or type of work.

[14] There are many decisions dealing with contractual interpretation from the Supreme Court through to the Employment Court.

[15] In *Vector Gas v Bay of Plenty Energy*² Justice Tipping stated at [19]:

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

² [2010] NZSC 5

[16] Then, in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*³, Judge Ford summarised the principles from *Vector Gas* saying:

[17] In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business common-sense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[17] I have referred to these passages in other determinations to set out my summary of the contractual interpretation principles. That summary is worth repeating here to outline my approach.

[18] In a contractual interpretation exercise, the aim is to establish, objectively, the meaning the parties intended their words to bear. However, this is not about what the parties say they intended the words to mean; I establish the objective meaning by assessing what a reasonable and properly informed third party would consider the words to mean. Being properly informed means the third party will have knowledge of the context in which the parties agreed the terms, so knowledge of the facts and circumstances that would be operating in the parties’ minds. But, evidence of this contractual context is not relevant if it simply establishes what the parties subjectively intended their words to mean.

[19] I should take the natural and ordinary meaning of the words and accept this as being what the third party would take them to mean if they are not ambiguous in light of the contractual context and ensuring the interpretation accords with business common sense.

[20] If there is either an ambiguity based upon the words used or some illogical formulation evidenced by the crosscheck or application of business common sense then

³ [2011] NZEmpC 149

further analysis of extrinsic evidence will assist, such as the conduct of the parties after the contract was agreed. However, if the words are clear and have only one possible meaning then I should be very careful before I apply business common sense to achieve an interpretation that does not accord with those words⁴.

[21] These principles are important because there is an ambiguity in or illogical construction of the two phrases in the context of the coverage clause. This arises because of the use of the words “position” and “role”. It is not clear from the coverage clause if one is a reference to a specific type of job undertaken and the other is a reference to a more general type of work undertaken or whether perhaps the two words have been used interchangeably.

[22] To explain further, applying the natural and ordinary meaning to the word position, in my view this is commonly used to describe a particular type of job in an organisation. It is quite common to refer to position descriptions when describing a particular job. In contrast, applying the natural and ordinary meaning to the word role, this often refers to a more generic description of responsibilities, expected behaviours or the type of work undertaken within an organisation.

[23] If I apply these meanings to the coverage clause, what I get is that I must establish the work undertaken in a nursing position, being a specific type of job within NMDHB and the type of work undertaken in a Registered Nurses role, being a wider classification of various jobs for Registered Nurses within NMDHB.

[24] When I do a cross check to ensure this interpretation accords with business common sense I find this approach to be illogical, because a reasonably and properly informed party, would, in my view, come to a different conclusion on what is intended by the use of these two words.

[25] The relevant extrinsic evidence, that a reasonable and properly informed party would have includes:

- (a) The MECA coverage clause changed in 2007. Prior to 2007, the coverage clause referred simply to members of NZNO being employed in *positions* listed which included Registered Nurses position.

⁴ *Chief Executive of the Department of Corrections v Corrections Association of New Zealand Inc* [2005] ERNZ 984 (EmpC)

- (b) NMDHB uses position descriptions to refer to particular types of jobs. In particular, it has a Registered Nurse position description but not a nurse position description.
- (c) NMDHB also has a NASC position description, which has parts that replicate the Registered Nurse position description.
- (d) The NMDHB Scope of Practice for Nursing differentiates between different scopes of practice – one of which includes Registered Nurses – and the work undertaken by Registered Nurses as NASCs is covered by the scope of practice.
- (e) In a NASC position, a Registered Nurse is able to meet the required Nursing Council Competencies to maintain registration as a Registered Nurse.

[26] Based on this extrinsic evidence I think a reasonable and properly informed party would understand the reference to a Registered Nurses role as being a reference to the specific Registered Nurses jobs for which there is a position description. And, I believe that party would understand that the additional language added to the coverage clause was done to extend the coverage of the MECA to include the type of work done by nurses across the NMDHB regardless of specific job titles or position descriptions. That is, the reference to nurse position is generic and covers all work of a nursing nature done by a nurse whether in a specific Registered Nurse position or not.

[27] This approach is consistent with the fact that the coverage clause clearly contemplates that the NMDHB can have nursing positions that are not Registered Nurse roles and so therefore, it must be a wider reference.

[28] Having reached this conclusion the application of the coverage clause, using the extrinsic evidence and the evidence I established in my investigation of the work undertaken by Registered Nurses working as NASCs, is straight forward.

[29] I do not accept that the Registered Nurses role covers the work done by Registered Nurses working as NASCs. This is a reference to specific clinical work within a scope of practice and is too narrow to cover the type of work done by NASCs (described below).

[30] However, I do believe the type of work undertaken by Registered Nurses working as NASCs is the type of work covered by a nursing position.

[31] The type of work undertaken in a nursing position can be described in general terms as utilising nursing knowledge and nursing judgement to assess health needs and provide care and to advise and support people to manage their health.⁵

[32] NASCs undertake needs assessments, make recommendations for care for people living in the community who require support and then co-ordinate this service. More specifically:

- (a) A client will be referred to a Needs Assessment Service, normally through their GP. A referral co-ordinator assesses the response time frame and then allocates the patient to a NASC.
- (b) The NASC will review the client's existing health information, which will include input from the medical practice where the client is registered. This is done so that a NASC can understand the client's health needs.
- (c) The NASC will arrange an appointment and then attend at the client's home, retirement home or private hospital (depending on where the client is residing) to assess their needs.
- (d) The assessment involves a NASC asking questions of the client and any family member or support person who assists them. There is also a practical element to the assessment undertaken in which the NASC assesses the environment and the client's mobility or functioning within that environment.
- (e) A NASC uses a DHB assessment programme, InterRai, to log the information and assist with the assessment producing various measures and caps, which in turn inform the type and extent of publically funded support that client will receive.
- (f) Ultimately this assessment and the InterRai outputs are the basis for formulating a care plan for the client.

⁵ See the Nursing Council website.

- (g) As part of the assessment, a NASC will assess if there is any immediate care or intervention required and may, if required, assess the client's health, considering any current health or injury concerns.
- (h) And a NASC will provide information or practical advice to the client and/or any care giver on day to day care, so for example advise on or give information about existing medication, or give practical advice on mobility issues.

[33] Registered Nurses who are carrying out the NASC job use their nursing skills and knowledge. This includes:

- (a) Knowledge of medication and potential of side effects, including an ability to explain to clients and family what their medications are and what they do.
- (b) Knowledge of and experience working with mental health conditions, with the ability to assess suicide risks, abusive or suspected elder abuse or abuse in a client with a disability.
- (c) Managing clients with dementia, including some treatment and providing support and education for carers and families.
- (d) Managing complex cases in community of clients with life-threatening conditions.
- (e) Wound assessment skills, clients may show a NASC a wound or skin condition they have, as they can be reluctant to visit their GP.
- (f) Ability to recognise life-threatening situations e.g. delirium.
- (g) Knowledge of and experience with nutritional deficiencies, for example recognising signs and symptoms of anaemia/dehydration.
- (h) Experience with mobility issues – recognising clients' various mobility issues and falls risk and giving advice, assistance or making appropriate referrals.
- (i) Knowledge in clinical screening including ability to read and understand blood results, x-ray results and testing performed for clients eg. MRI and CT scans.

- (j) Educating clients and families about bowel and bladder care, including providing product information.
- (k) Providing information to families about caring for a client who is a family member. This information and advice includes areas of good oral hygiene, skin care/pressure area care, signs and symptoms of pain if client is unable to verbalise their needs, and the use of equipment provided when caring for someone at home.
- (l) NASCs have a close working relationship with hospice nurses and doctors.
- (m) Knowledge and expertise in the assessment and production of a health care plan including research, goal setting, planning, implementation, co-ordination and evaluation and expertise with ensuring an holistic approach underpinned by best practice and broad based competencies.
- (n) Understanding the need for informed consent and the ability to evaluate that the client understands the information that has been provided.

[34] So, on my assessment Registered Nurses who are NASCs are utilising their nursing knowledge and nursing judgement to assess health needs and provide care and to advise and support people to manage their health – i.e. they are undertaking the type of work done in a nursing position and they are therefore covered by the MECA.

[35] There are two additional aspects of this matter that support my conclusion on coverage:

- (a) In Appendix 2(b) of the MECA there is provision for Registered Nurses working as ambulance officers in the Accident and Emergency Department at Wairau to be paid an additional allowance. If the parties accept that the coverage of the MECA extends Registered Nursing carrying out an ambulance officer role, then this supports a wide interpretation and application of a nursing position.
- (b) The NASC role at NMDHB is multidisciplinary i.e. it is also carried out by other qualified medical practitioners such as physiotherapists. Therefore, it is arguable that a wide definition of nurse position would mean that a

physiotherapist in a NASC role would be covered by the MECA and this is illogical.

I accept that this is the case but do not accept that it is illogical or because this consequence may arise a more narrow interpretation of the coverage clause is required. First, it is unlikely that a physiotherapist would be a member of NZNO – the starting point for coverage in most cases will be that the employee being a member of NZNO is a nurse. Second, the coverage clause allows this. If the parties did not intend the MECA to cover multi-disciplinary roles then the requirement for an employee holding a nursing position to be a qualified health professional should have been for the employee holding a nursing position to be a Registered Nurse.

[36] In all of the circumstances I am satisfied that Registered Nurses who are members of NZNO and working as NASCs at NMDHB are covered by the MECA.

Orders

[37] This determination, reserved at the conclusion of a one day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief Delegate of the Authority that this would likely occur she decided, as she was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[38] Registered Nurses who are members of NZNO and are employed by NMDHB as NASCs are covered by the MECA.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[40] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority