

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 313
3098772

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| BETWEEN | THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM NEW ZEALAND Applicant |
| AND | FIRST UNION INC Respondent |

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| Member of Authority: | Marija Urlich |
| Representatives: | Susan Hornsby-Geluk, counsel for the applicant Peter Cranney, counsel for the respondent |
| Investigation Meeting: | 16 June 2020 by telephone |
| Submissions received: | 16 June, 15 July 2020 from the applicant 16 July 2020 from the respondent |
| Further information received: | 17 June and 10 July 2020 |
| Determination: | 11 August 2020 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] St Johns and FIRST Union are bargaining for a collective agreement. St Johns is concerned about the potential impact on ambulance and related services of any industrial action which may be taken during bargaining.

[2] St Johns seeks the following declarations:

- (i) that the Code of Good Faith for the Public Health Sector, Schedule 1B of the Employment Relations Act 2000, applies to St Johns as the employer in terms of its ambulance services including but not limited to emergency services, patient transfer services, and functions which support those services, on the basis that they amount to “services provided to district health boards” pursuant to clause (1)(1)(d) of the Code;
- (ii) that employees working within its ambulance services, including but not limited to emergency services, patient transfer services, and functions which support those services, fall within the scope of the clause (1)(1)(e) of the Code in that they are “are engaged in providing services to district health boards”;
- (iii) that the Life Preserving Services arrangements set out at clauses 11-13 of the Code apply to St Johns as the employer and the employees of St Johns in terms of its ambulance services, including but not limited to emergency services, patient transfer services, and functions which support those services.

[3] FIRST Union opposes the declarations sought and says broadly, any declaration made by the Authority must be in line with and reflect the language of the statute. More specifically FIRST Union says:

[FIRST Union] accepts that the Code applies to [St Johns] to the extent it provides the services to DHBs, and that it applies to [FIRST Union’s] members to the extent they are engaged in providing such services (so long as, in both cases, the services are provided by [St Johns] to the DHBs in its role as provider of those services).

In answer to the question as to which of the services listed do not fall within the Code, [FIRST Union] points out that the Code applies to natural or legal persons, not services. However, subject to the qualifying criteria being met in each case, none of the services mentioned is excluded from the Code.

[4] The services provided by St Johns relevant to this determination are ambulance services, including but not limited to emergency services, patient transfer services, and functions which support those services.

The Authority's investigation

[5] On 14 April 2020 the Authority held a case management conference call with the representatives. It was agreed the investigation meeting would be held by AVL as was a timetable for filing evidence and submissions.

[6] The investigation meeting was unable to be held by AVL and, rather than adjourn the investigation meeting, the parties agreed to proceed by telephone. The Authority heard evidence from witnesses for St Johns, Peter Tranter and Tony Smith, and received submissions from the representatives. Subsequent to the investigation meeting St Johns filed further relevant information on which the parties filed submissions.

[7] As permitted by s 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. It has not recorded all evidence and submissions received.

Jurisdiction

[8] FIRST Union raises a jurisdictional issue as to whether the Authority can issue “declaratory judgments”, as the declaration sought have been characterised in the application. The Authority does not have jurisdiction to issue declaratory judgments.

[9] The Authority does have exclusive jurisdiction to determine:

any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of the Act (other than an action founded on tort).¹

[10] This employment relationship problem is determined under jurisdiction conferred on the Authority by s 161(r) of the Act generally and specifically under

¹ Section 161(r) Employment Relations Act 2000.

schedule 2(1)(1)(b) of the Act which confers jurisdiction on the Authority to make findings about the meaning of a statutory provision as sought here.

Schedule 1B - Code of good faith for public health sector

Background

[11] Schedule 1B of the Act provides a code of good faith for the public health sector (the Code) which applies to specified parties in employment relationships in the public health sector. The purpose of the 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.”

[12] The Code requires parties bound by it to commit to patient safety and recognise the importance of collective arrangements and the role of unions.

[13] In *Service & Food Workers Union Nga Ringa Tota v Auckland District Health Board* the Court considered the interpretation of the Code had to take account of the actual and potential legislative status as a code of good faith now and in the future and that it should be careful to interpret any ambiguous provision consistent with recognised statutory objectives.²

[14] In *Assoc of Professionals & Executive Employees Inc v Capital & Coast District Health Board* the Authority considered a claim of breach of good faith under the Code

² [2007] ERNZ 553 at [29]-[34].

as it applied to the parties' life preserving services agreement (LPSA).³ The Authority considered the claim within the context of the dispute resolution provisions of the relevant collective employment agreement and the wider statutory scheme noting at [51]:

The Life Preserving Services Agreement did not provide for any mechanism for dispute resolution. Any dispute therefore is an employment relationship problem, which is to be dealt with by direct discussion, mediation and adjudication before the Authority.

To whom does the Code apply?

[15] The Code applies to the following parties:

1 Application

(1) This code applies to the following parties to an employment relationship in the public health sector:

...

(d) other employers to the extent that they provide services to district health boards or the New Zealand Blood Service;

(e) employees of the employers referred to in paragraph (d) to the extent that they are engaged in providing services to district health boards or the New Zealand Blood Service;

(f) unions whose members are employees referred to in paragraph

(2) However, to avoid doubt, subclause (1)(d) and (e) applies in relation to the provision of services only if the services are provided to a district health board or the New Zealand Blood Service in its role as a provider of services

(3) Before a district health board or the New Zealand Blood Service enters into an agreement or arrangement with another employer for the provision of services to the district health board of New Zealand Blood Service, the district health board or the New Zealand Blood service must notify the employer that this code will apply to the employer in relation to the provision of those services.

³ ERA Wellington WA98/07, 17 July 2007.

[16] There is no dispute the Code applies to St Johns and FIRST Union because they are parties to an employment relationship in the health sector:

- St Johns provides services to DHBs (cl 1(1)(d)); and
- FIRST Union's members are employed in services St Johns provides to DHBs (cl 1(1)(e) and (f)).

[17] The question before the Authority is, given the breadth of services offered by St Johns, what services provided to DHBs in which FIRST Union members are employed by St Johns fall within the ambit of the Code. Or, to adopt the language used by the respondent in its opposition to the declarations sought, are the services for which the applicant seeks declarations qualifying services under the Code because they meet the criteria for such services.

The parties' collective employment agreements

[18] The relevant collective employment agreements include⁴:

The parties acknowledge the provision of ambulance services and their related activities are integral components of the public health sector. As such the parties will engage with each other in accordance with the principles and processes outlined in Schedule 1B – Code of good faith for the public health sector of the Employment Relations Act 2000.

[19] It is apparent to the Authority the parties have considered the relevance and application of the Code during bargaining and agreed the Code applies to the parties within the ambit of ambulance services and their related activities provided to DHBs.

Discussion

Is St Johns a provider of services to DHBs?

[20] The extent of services provided by St Johns to DBHs requires an assessment first, of whether St Johns is, under the terms of the Code, a provider of services to DHBs. The evidence before the Authority is that DHBs do not contract directly with

⁴ Clause 8.1.1 of the Clinical Operations Management & Support Collective Agreement 1 July 2018 – 30 June 2020 and clause 11 of the Clinical Operations Collective Agreement 1 July 2018 – 30 June 2020.

St Johns to provide the qualifying services and that the Crown contracts with St Johns to provide qualifying services to DHBs.

[21] The Code does not include a definition of “provision of services”. Clause 1(3) of the Code describes the provision of services as involving “an agreement or arrangement”. Similarly, the Code does not contain a definition of that phrase. An agreement, in a legal context, is ordinarily understood to refer to a binding and enforceable agreement such as a contract. The meaning of “arrangement” is not defined.

[22] The following commentary on the meaning of arrangement assists:

“Arrangements” and “understandings” are terms which describe something less than a legally enforceable contract. In attempting to identify the essential elements of an arrangement, courts in the United Kingdom, Australia and New Zealand have generally given the concept of an “arrangement” a broad interpretation.

In general, they have endorsed the observation of Diplock LJ in *British Basic Slag Ltd* (below) that the word “arrangement” is not a term of art, and that it should be construed in its ordinary or popular sense.

Applying accepted statutory interpretation principles, the ordinary meaning of arrangement is broad and is commonly understood to involve something less than a legally enforceable contract.⁵

[23] The Authority is satisfied the meaning of “provision of services” in the Code includes both contractual agreements and arrangements which involve something less than a legally enforceable contract.

[24] The Authority is satisfied, St Johns provides services to DHBs within the meaning of “provision of services” the Code.

What qualifying services does St Johns provide DHBs?

[25] FIRST Union says this question is misconceived because the Code applies to natural or legal persons, not services, but subject to each such service meeting the qualifying criteria, none of the mentioned services are excluded from the Code. It is

⁵ *Gault on Commercial Law* CA27.04 Contracts, arrangements, and understandings – introduction (2) Arrangement.

accepted the Code applies to natural and legal persons, the issue is what are qualifying services under the Code that St Johns provides DBHs.

[26] The starting point is what the parties have agreed. The relevant clauses of the employment agreements include “ambulance services and their related activities”. This is the context in which the parties have agreed to engage with each other guided by the Code. It follows these are qualifying services.

Outcome

[27] The Authority is satisfied St John’s provides to DHBs, within the meaning of the Code, ambulance services, including but not limited to emergency services, patient transfer services, and functions which support those services within the meaning of the Code.

[28] The Authority is satisfied the Code applies to FIRST Union to the extent its members employed by St Johns are employed to provide to DHBs, within the meaning of the Code, ambulance services, including but not limited to emergency services, patient transfer services, and functions which support those services within the meaning of the Code.

[29] The declarations are granted as sought.

Costs

[30] Costs are reserved. If St Johns intends to seek costs against FIRST Union any costs memorandum is to be filed and served within fourteen days of the date of determination and any reply memorandum filed and served within a further seven days.

Marija Urlich
Member of the Employment Relations Authority