IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 71
3083693

BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Applicant
AND	THE 20 DISTRICT HEALTH BOARDS OF NEW ZEALAND First – Twentieth Respondents
AND	SPECIALITY TRAINESS OF NEW ZEALAND Twenty-First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	William Mannering, Counsel for the Applicant Susan Hornsby-Geluk, Counsel for First – Twentieth Respondents Amy Keir, Counsel for Twenty-First Respondent
Investigation Meeting:	On the papers
Determination:	18 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, New Zealand Resident Doctors Association (NZRDA), seeks to be advised, in relation to Resident Medical Officers (RMOs) who commence employment with a respondent District Health Board (DHB):

(A) for the purpose of determining which collective agreement binds the greatest number of the employer's employees in accordance with s 62(4) of the Employment Relations Act 2000 (the Act), what does the phrase "in relation to the work the employee will be performing mean?

(B) Where RMOs commence employment in either the Auckland region (consisting of the Auckland, Waitemata, and Counties Manukau DHBs) or in the Wellington region (consisting of the Capital & Coast, and Hutt Valley DHBs) for the purpose of determining which collective agreement binds the greatest number of the employer's employees in accordance with s 62(4) of the Act, is the employer the DHB with whom the RMO will be starting work, or all of the DHBs within the region jointly?

[2] Mr Manning for NZRDA seeks an order for removal to the Employment Court pursuant to s 178(2) of the Act, on the grounds that:

a. an important question of law is likely to arise in the matter other than incidentally;

b. …

c. the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; 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. the Authority is of the opinion that in all the circumstances the court should determine the matter.

[3] The First – Twentieth Respondents consent to the removal of this matter to the court.

[4] The Twenty First Respondent submits that, in respect of the application for removal, it will abide by the decision of the Authority.

Brief Background Facts

[5] RMOs are registered medical practitioners who are employed by DHBs as they progress through their post-graduate training to become vocationally registered Senior Medical Officers or General Practitioners.

[6] NZRDA is a registered union and is the duly authorised representative of the RMOs who belong to it.

[7] The Twenty-First Respondent, Speciality Trainees of New Zealand (SToNZ), is a registered union and the duly authorised representative of those RMOs who belong to it.

[8] Each of the First to Twentieth Respondents is a DHB which employs RMOs, some of whom belong to NZRDA, some belong to SToNZ, and some of whom do not belong to either union.

[9] In or about November 2018 SToNZ settled a MECA with all 20 DHB (the SToNZ MECA). The term of the SToNZ MECA is from 10 December 2018 to 9 December 2020.

[10] In August 2019 NZRDA settled a MECA with all 20 DHBs, (the NZRDA MECA). The term of the NZRDA MECA is from 1 April 2019 to 31 March 2021.

[11] In all material respects the coverage of the NZRDA and the SToNZ MECAs are identical; they cover RMOs in the employment of the DHBs.

[12] An element of the employment and training of RMOs entails their rotation from one hospital to another, which often (although not always) entails transferring their employment from one DHB to another.

[13] As a term of their employment, RMOs who are employed in the Auckland region (consisting of the Auckland, Waitemata, and Counties Manukau DHBs), or in the Wellington region (consisting of Capital & Coast, and Hutt Valley DHBs) are required to rotate from time to time from one DHB within the region to another DHB within the region.

[14] Following settlement of the NZRDA MECA, Central Region Advisory Services Ltd (a centralised agency providing industrial advice and advocacy services to all 20 DHBs, which is known as TAS), issued a memorandum to the DHBs (the TAS memorandum) advising how they should apply s 62 of the Act to RMOs who would be commencing employment with them and who did not belong to a union. In substance, the TAS memorandum advised DHBs that for the purpose of s 62(4) of the Act, the work of such RMOs: "should be categorised by the work classifications set out in the table in the memorandum".

[15] After learning of the existence of the TAS memorandum and that Southern DHB intended to implement the advice contained in the memorandum, by letter dated 27 November 2019 NZRDA (through its counsel) advised Southern DHB that it objected to the advice contained in the TAS memorandum, and advised that in its opinion the phrase in s 62(4): "… in relation to the work the employee will be performing" means the work of RMOs generally, in the employ of the relevant RMOs.

[16] In subsequent correspondence and communications between NZDRA and the DHBs or their legal advisors:

i. NZDRA confirmed its objection to the advice contained in the TAS memorandum;

ii. The DHBS confirmed that they intended to apply the advice contained in the TAS memorandum;

iii. A further issue was identified, namely whether, in the case of the Auckland region and the Wellington region, for the purpose of s 62(4) of the Act, the 'employer' is the DHB with whom an RMO starts work, or all of the DHBs within the region jointly.

iv. The parties agreed that the issues which have arisen between them are novel and require judicial determination.

Submissions of the First-Twentieth Respondents

[17] Ms Hornsby-Geluk for the First – Twentieth Respondents submits that this case involves important questions of law which have not been subject to judicial scrutiny, namely the correct interpretation of s 62(4) of the Act which provides:

> If the work to be done by the new employee is covered by more than 1 collective agreement, subsection (3)(a) applied to the collective agreement that binds the greatest number of the employer's employees in relation to the work the employee will be performing.

[18] It is submitted that the parties to these proceedings have a different view as to the correct interpretation of the reference in s 62(4) of the Act to: "in relation to the work the employee will be performing". In this respect, it is the view of the First to Twentieth Respondents that the correct interpretation of s 62(4) requires coverage to be determined by applying the MECA which covers the greater number of RMOs who are performing the same type of work that the new RMO will be performing.

[19] However the Applicant is claiming that the reference in s 62(4) to: "in relation to the work the employee will be performing" means the work of RMOs generally.

[20] Counsel on behalf of the First to Twentieth Respondents submits that they are unaware of any case law which provides judicial guidance on how s 62(4) of the Act should be interpreted. Further, this is an important question of law that will have broad application to a wide range of employers.

[21] It is also submitted by counsel for the First to Twentieth Respondents that the Authority should order that the matter be removed to the Employment Court as there are already proceedings before the Court between the same parties and which involve related issues, namely proceedings EmpC 155/2019.

[22] In those proceedings, the Applicant is seeking a declaration in relation to the application and s 62 of the Act in relation to RMOs who are not union members and are required to rotate from one DHB to another within the same region.

[23] The First to Twentieth Respondents therefore submit that these issues, namely the correct interpretation of s 62 should be heard together.

Removal Application and discussion

General Principles of Removal

[24] 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.

[25] 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[1].

Outcome

[26] 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 have a broad application to a wide range of employers and employees.

[27] Given the fact that such questions as those set out above have the potential to impact on a number of employees, employers and unions, I consider it is important to have direction from the Employment Court.

[28] I am also satisfied that given the Employment Court already has proceedings before it involving the same parties involving related issues, it is appropriate to remove the matter.

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

[30] In all the circumstances the Employment Court should determine these matters.

Costs

[31] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority

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