

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 346  
3147442

BETWEEN	THE 20 DISTRICT HEALTH BOARDS (listed in appendix A) Applicant
A N D	NEW ZEALAND NURSES ORGANISATION Respondent

Member of Authority:	Peter van Keulen
Representatives:	Susan Hornsby-Geluk counsel for the Applicant Dr Rodney Harrison QC, counsel for the Respondent
Investigation Meeting:	On the papers and oral submissions in a case management conference on 4 August 2021
Submissions Received:	2 August 2021 and 4 August 2021 from the Applicant 3 August 2021 and 4 August 2021 from the Respondent
Date of Determination:	5 August 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Code of Good Faith for Public Health Sector (the Code) imposes obligations on the 20 District Health Boards (the DHBs), employees of the DHBs, unions whose members

are employees of the DHBs and other parties in relation to developing, maintaining and providing a high quality public health service, ensuring safety of patients, and engaging constructively and participating fully in all aspects of their employment relationships.

[2] As part of those obligations the Code provides that during industrial action the DHBs must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability. If the DHBs believe they cannot arrange to deliver life preserving services without the assistance of members of the union who are undertaking industrial action then the Code sets out a mechanism, at clause 12, for the DHBs and the union to reach an agreement in respect of the provision of life preserving services (LPS Agreements).

[3] It is the provision of life preserving services pursuant to LPS Agreements that has become a contentious issue between the DHBs and the New Zealand Nurses Organisation (NZNO).

[4] In May and June 2021, issues between the parties as to LPS Agreements arose in relation to strike action being undertaken by NZNO on 9 June 2021. At that time each DHB had negotiated and entered into LPS Agreements with NZNO in accordance with clause 12 of the Code. However, notwithstanding the LPS Agreements, by early June 2021 there were gaps in many of the DHBs rosters for life preserving services. The DHBs raised this with NZNO and requested undertakings from it that it would comply with its obligations under the LPS Agreements. NZNO responded, refusing to provide the undertakings, claiming that the LPS Agreements were not legally binding contracts and a breach of an LPS Agreement would not amount to a breach of good faith.

[5] Ultimately the issue between the DHBs and NZNO, as to the enforceability of LPS Agreements, was not resolved as a few days after this exchange it became clear that there were sufficient NZNO members to fill the DHB rosters. This meant, from the DHBs' perspective, the LPS Agreements had been met satisfactorily with life preserving services arrangements in place to provide for patient safety during the strike action.

[6] However, the issue as to the effect and enforceability of LPS Agreements remained unresolved between the DHBs and NZNO.

[7] The NZNO position in respect of LPS Agreements is:

- (a) LPS Agreements are not legally binding contracts and are therefore not enforceable.
- (b) Non-compliance with an LPS Agreement cannot be regarded as a breach of the Code nor would it give rise to a breach of good faith.<sup>1</sup>
- (c) NZNO cannot direct individual members to give up their lawful right to strike and an LPS Agreement cannot lawfully fetter an individual's right to strike. It follows that any responsibilities undertaken by NZNO under LPS Agreements are no more than "best endeavours" obligations, which corresponds with the obligations NZNO would have under a binding determination pursuant to clause 13 of the Code if an LPS Agreement was not agreed. And therefore NZNO's negotiating stance for any future LPS Agreements is that the current form for LPS Agreements is to be amended to reference "best endeavours" qualifications.

[8] The DHBs' current position in respect of LPS Agreements is:

- (a) An LPS Agreement is legally binding and enforceable by way of a compliance order, as was determined in *Bay of Plenty DHB v MERAS*.<sup>2</sup>
- (b) A refusal by NZNO to comply with an LPS Agreement may amount to a breach of the Code and to a breach of the duty of good faith.

<sup>1</sup> Section 4 of the Employment Relations Act 2000.

<sup>2</sup> *Bay of Plenty DHB v MERAS* [2018] NZERA Auckland 380.

(c) A refusal to enter into an LPS Agreement unless it is subject to a best endeavours qualification would be in breach of clause 12(5) of the Code.

[9] It is against these stated positions that on 2 August 2021 the NZNO issued notices of strike action for 8 hours on 19 August 2021 and 24 hours on 9 September 2021.

[10] Concerned that they will be unable to agree appropriate LPS Agreements with the NZNO or if they do, the NZNO may not meet their obligations under any LPS Agreements, the DHBs lodged a statement of problem in the Authority seeking the following declarations:

(a) An LPS Agreement is legally binding and/or able to be enforced by way of a compliance order.

(b) A refusal to comply with an LPS Agreement may amount to a breach of the Code and of the duty of good faith under section 4 of the Employment Relations Act 2000 (the Act).

(c) A refusal by a party to enter into an LPS Agreement unless it is subject to a “best endeavours” qualification, would be in breach of clause 12(5) of the Code.

[11] The DHBs also applied to have the matter removed to the Employment Court pursuant to s 178 of the Act on the basis that there are important questions of law likely to arise in the matter, the 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, and it is proper in all of the circumstances that the Court should determine the matter.

[12] The NZNO responded to the DHBs’ statement of problem and application for removal with a protest to the jurisdiction of the Employment Relations Authority, asserting that the Authority does not have jurisdiction to grant relief by way of declaration as sought. Notwithstanding the protest to jurisdiction of the Authority, which NZNO says applies to the

Employment Court also, NZNO accepts this matter is an appropriate case for transfer to the Employment Court.

[13] In a case management conference on 4 August 2021 counsel for both parties requested that I deal with the application for removal of this matter to the Employment Court on the papers and urgently. I agreed to do that and this determination deals with the application for removal.

### **Analysis of application for removal**

#### *The Code*

[14] The Code is set out in Schedule 1B to the Act. So, first I must consider the object of Act set out a s 3:

#### **3 Object of this Act**

The object of this Act is—

- (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
  - (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
  - ( ) by acknowledging and addressing the inherent inequality of power in employment relationships; and
  - (i) by promoting collective bargaining; and
  - (ii) by protecting the integrity of individual choice; and
  - (iii) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
  - (iv) by reducing the need for judicial intervention; and
- (ab) ....

[15] The key part of the object that informs this application is the focus on building effective employment relationships through the promotion of good faith by recognising that employment relationships must be built on good faith behaviour and by reducing the need for judicial intervention, i.e. in applying the Code (as a schedule to the Act) I must promote good faith behaviour and look to reduce the need for judicial intervention.

[16] 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.

[17] Clause 4 addresses general requirements including 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”. And, the parties must “use their best endeavours to resolve, in a constructive manner, any differences between them”.

[18] So in applying the Code I must keep in mind the parties must commit to the safety of patients and with regard to their employment relationships, the parties must engage constructively, participating fully and effectively and using their best endeavours to resolve differences between them.

[19] Clauses 11 – 13 of the Code 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.

### **13 Adjudication**

(1) If the parties cannot reach agreement under clause 12(5) they must, within 5 days after the date of the notice of industrial action, refer the matter for adjudication by a clinical expert or other suitable person as agreed under clause 8.

(2) The adjudicator must conduct the adjudication in a manner he or she considers appropriate and must –

(a) receive and consider representations from the parties; and

(b) in consultation with the parties, seek expert advice if the adjudicator considers that it is necessary to do so; and

(c) attempt to resolve any differences between the parties to enable them to reach agreement and, if not possible, make a determination binding on the parties; and

(d) provide a determination to the parties as soon as possible but not later than 7 days after the notice of industrial action.

(3) The parties must use their best endeavours to give effect to the determination.

(4) The parties must bear their own costs in relation to an adjudication.

[20] So the Code sets out a process for either agreeing LPS Agreements or having a determination made by an adjudicator about life preserving services.

[21] It is against these relevant parts of the Code that I consider the grounds for the application for removal.

#### *Power to remove a matter to the Employment Court*

[22] The power to remove a matter to the Court, as set out in s 178 of the Act, is:

(2) The Authority may order the removal of a matter, or any part of it, to the Court if -

- (a) An important question of law is likely to arise in the matter other than incidentally; or
- (b) The 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; or
- (c) The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- (d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[23] The application for removal has been advanced on the basis of ss 178(2) (a) (b) and (d) of the Act.

[24] Counsel for the DHBs says the important questions of law are:

- (a) Whether an LPS Agreement is legally binding and/or able to be enforced by way of a compliance order.
- (b) Whether the refusal to comply with an LPS Agreement may amount to a breach of the Code and of the duty of good faith under s 4 of the Act.
- (c) Whether a refusal by a party to enter into an LPS Agreement unless it is subject to a “best endeavours” qualification, would be in breach of clause 12(5) of the Code.

[25] Counsel for NZNO agrees that these are important questions of law and adds that the jurisdictional issue raised by NZNO is also an important question of law.

[26] Counsel for the DHBs says the nature and urgency of its claim means it is in the public interest that the matter be removed to the Court to determine. The nature and urgency includes that there is ongoing bargaining, strike notices have been issued, the parties have been unable to agree how to resolve their difference over PPS Agreements, if agreement cannot be reached then the lack of clarity will impact on patient safety, the questions of law

are complex and of significant implication and there is likely to be a de novo challenge to Any determination of the Authority.

[27] Counsel for the DHBs says that in all of the circumstances it is proper that this matter be removed to the Court. In particular counsel says NZNO's stated position that prior enforcement ordered by the Authority in *MERAS* was incorrectly determined indicates it will not likely consider itself to be bound by any determination of the Authority, that this matter is legally complex and has significant interpretation issues, that urgent clarification is required and that a challenge to any Authority determination is likely, are all relevant factors.

*Applying the Code to the grounds for removal*

[28] The issue that arises out of clauses 11 – 13 of the Code in respect of the application for removal to the Court is that the parties have not completed the process set out. This is evident from the DHBs' affidavit evidence and the submissions received. The problem this creates is that the claim articulated by the DHBs is anticipatory; it is based on a belief that the NZNO's stated position in respect of LPS Agreements means the parties will either be unable to conclude LPS Agreements, based on what the DHBs say will be a negotiating stance that is in breach of NZNOs obligations under the Code, or if LPS Agreements are agreed the NZNO will not meet its obligations under them based on its view that the LPS Agreements are not legally binding and enforceable and that the key obligations from the LPS Agreements will only extend to "best endeavours" obligations.

[29] This consequence of this is that until the process in clause 12 and, if required, clause 13 of the Code is completed then I cannot say that grounds for removal have been met:

- (a) I cannot say the important questions of law set out are likely to arise. For example, if the parties do not agree LPS Agreements then the first two questions as to enforceability and breach will not be engaged, and then the third question may not arise if the basis on which the LPS Agreements are not

concluded is not because of the alleged negotiating stance of NZNO in relation to best endeavours – noting here that counsel for NZNO states refusing to enter into LPS Agreements unless the best endeavours conditions are included has not been advanced as a negotiating stance. And it follows in this circumstance that the jurisdictional issue will not arise.

(b) I cannot say at this stage that the nature and urgency of the case is such that it is in the public interest that the case be removed. For example, if LPS Agreements are concluded and despite ongoing differences of opinion about the enforceability and extent of the obligations, the requirements for life preserving services are met then there is no urgency and/or significant nature to the case – noting here that this is what happened in June 2021 when despite differences of opinion about the LPS Agreements the rosters for providing life preserving services were met and any pending action for compliance by the DHBs was abandoned.

(c) Considering both of the points above it follows that I cannot say that I am of the opinion that it is proper in all of the circumstances for the Court to determine this matter.

[30] Also, if I allow the DHBs' claim to be removed without clauses 12 and 13 of the Code being properly and fully engaged and completed then I am not encouraging the parties to focus on what they can do now to secure patient safety during the strikes, I am not promoting good faith behaviour and I am not reducing judicial intervention, where I can appropriately do that.

[31] The application for removal is declined.

[32] The parties are directed to update the Authority after the process in clause 12 and if required clause 13 of the Code has been completed. After that update is received a further

case management conference can be held so directions can be made for the progression of this matter if required.

## **Costs**

[33] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority

## **APPENDIX A**

### **District Health Boards of New Zealand**

Auckland District Health Board

Northland District Health Board

Waitemata District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Tairāwhiti District Health Board

Taranaki District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Hutt Valley District Health Board

Capital and Coast District Health Board

Wairarapa District Health Board

Nelson Marlborough District Health Board

West Coast District Health Board

Canterbury District Health Board

South Canterbury District Health Board

Southern District Health Board