IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 359
3137861

	BETWEEN	AUCKLAND DISTRICT HEALTH BOARD & 19 OTHER DHBS Applicants
	AND	NEW ZEALAND PUBLIC SERVICE ASSOCIATION First Respondent
	AND	ASSOCIATION OF PROFESSIONAL AND EXCEUTIVE EMPLOYEES Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Susan Hornsby-Geluk, counsel for the Applicants Peter Cranney, counsel for the First Respondent William Manning, counsel for the Second Respondent
Investigation Meeting:	On the papers
Submissions received:	10 June 2021 from the Applicant 24 June 2021 from the First Respondent 10 June 2021 from the Second Respondent
Determination:	12 August 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The problem before the Authority arises from a pay equity settlement process and a dispute between the parties about employee information sharing obligations in s 13Z of the Equal Pay Act 1972 (the EPA).[1]

[2] Section 13Z sits within Part 4 of the EPA which includes at s 13A the purpose of the pay equity claim process and at s 13C that the s 4 duty of good faith as set out in the Employment Relations Act 2000 applies to parties to such a process:

> **13A Purpose**
>
> The purpose of this Part is to facilitate resolution of pay equity claims, by—
>
> (a) setting a low threshold to raise a claim (while recognising that entry into the pay equity claim process does not predetermine an outcome); and
> (b) providing a simple and accessible process to progress a pay equity claim.
>
> **13C Good faith in pay equity claim process**
>
> (1) The duty of good faith in section 4 of the Employment Relations Act 2000 applies to the parties to a pay equity claim, as if references in that section to a collective agreement were references to a pay equity claim settlement.
> (2) The duty of good faith in section 4 of the Employment Relations Act 2000 requires the parties to, at least,—
> (a) follow the process set out in this Part to resolve the pay equity claim; and
> (b) in the case of multiple employer parties required by section 13K to enter into a multi-employer pay equity process agreement, use their best endeavours to enter into that agreement in an effective and efficient manner; and
> (c) in the case of multiple union parties required by section 13M to consolidate their claims, use their best endeavours to agree on how they will progress the consolidated claim; and
> (d) use their best endeavours to enter into an arrangement, as soon as possible after the start of pay equity bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and
> (e) use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner; and
> (f) recognise the role and authority of any person chosen by each of the parties to be that person's representative or advocate, and not (directly or indirectly) bargain about matters relating to the pay equity claim with the person for whom a representative or advocate acts (unless the parties agree otherwise); and
> (g) not undermine, or do anything that is likely to undermine, the bargaining or the authority of another party in the bargaining.
> (3) The duty of good faith in section 4 of the Employment Relations Act 2000, which applies to the relationship between a union and a member

[1] Authority file number 3136444.

> of the union, also applies to the relationship between a union and an employee who is not a member of the union if the employee is covered by the union-raised claim.

[3] How the equal pay statutory scheme would support dispute resolution in pay equity claims was emphasised by the Minister of Workplace Relations and Safety at the second reading of the Equal Pay Amendment Bill:

> A number of submitters raised concerns about the dispute resolution process in the bill. In particular, submitters were concerned about the many steps in dispute resolution and the potential for disputes to become long and drawn out, placing a burden on the resources of both parties.
>
> …
>
> We introduced this bill to make it easier for workers to make a pay equity claim, using a more simple and accessible process aligned to New Zealand's existing bargaining framework. Following the select committee report back, our social partners, the Council of Trade Unions, and Business New Zealand approached us with the view that the pay equity bargaining framework should align more closely with the framework for collective and individual bargaining under the Employment Relations Act. I agree that closer alignment with existing employment bargaining practises will make the pay equity process better for all parties involved. Good-faith bargaining offers the best opportunity to build productive employment relationships through a collaborative process. The bargaining framework provides opportunities for parties to agree to address wider workforce issues alongside pay equity claims if they wish.
>
> Through a Supplementary Order Paper, I plan to make additional changes to the bill to further align pay equity bargaining with existing bargaining processes while maintaining distinctions where necessary. Working through these changes took time, but we wanted to get it right. Such changes include enabling unions to raise pay equity claims and allowing union and individual pay equity claims to progress separately. This will enable parties to negotiate claims more easily, similar to the way they've been doing claims in the State sector. The bill will continue to allow employees to bargain individually for pay equity where there is no union or where employees choose not to be represented by a union.[2]

[4] Section 13Z imposes a duty on the applicants (the DHBs) to share contact information of affected employees "with the union or unions". The dispute concerns to whom the DHBs are obliged to share this information – the first respondent (the PSA) and/or the second respondent (APEX). The parties have attempted to progress this issue themselves by, it is understood discussion between the PSA and APEX and exchange of correspondence with the DHBs setting out respective positions. On the information before the Authority the parties have not yet attended mediation concerning this dispute.

---

[2] Hon Iain Lees-Galloway (Minister of Workplace Relations and Safety) 24 June 2020, Hansard Reports.

[5] The PSA says the DHBs are obliged to share the information only with the union who first raised the claim. APEX says the DHBs are obliged to share the contact information of each of the affected employees with both unions. The DHBs do not agree s 13Z obliges it to provide employee contact information only to the PSA being the union who first raised the claim.

[6] The context of the dispute begins in July 2018 when the PSA raised two pay equity claims for employees employed by the DHBs. The claim was duly progressed including the DHBs and the PSA agreeing a bargaining process agreement in December 2019. In November 2020 APEX initiated a pay equity claim with the DHBs for portions of the same employees. The claims were consolidated as required by the EPA.[3]

[7] On 9 April 2021 the PSA wrote to Technical Advisory Services Limited (TAS), the DHBs' representative in the pay equity claims, seeking an assurance the names and contact details of any affected employee, as defined by the Act, including PSA members would not be provided to APEX. By letter dated 12 April 2021 TAS wrote to the PSA that section 13Z was, in its view, open to interpretation in circumstances where there is a multi-union claim, that the legislation was novel and untested and they could not provide an assurance contact details of employees would not be provided to APEX. The letter continued that the DHBs were taking a cautious approach to the provision of information issue and encouraged the parties to try to find a consensus approach so as to allow the claim to progress.[4]

[8] Following that correspondence the PSA lodged the dispute under Authority file number 3136444. The DHBs then applied to the Authority for removal of the dispute to the Employment Court for hearing and determination, which is the application under the file number 3137861.

[9] The removal application is supported by an affidavit of Peter Brown affirmed on 3 May 2021. Mr Brown is the director of employment relations for TAS. In his affidavit Mr Brown avers, amongst other matters, that:

---

[3] Equal Pay Act 1972, s 13M.
[4] Correspondence DHBs to PSA 12 April 2021.

- he instructed his staff to work with the PSA and APEX to attempt to come to some arrangement as to sharing of employee contact details and these attempts were unsuccessful;
- the issue of provision of information is important because it involves disclosure of personal information and may put one union in a position of competitive advantage over the other;
- the issue is important to the unions involved because under the EPA they owe a duty of good faith to all affected employees;
- the consolidated claim involves two unions, 20 employers and 16,000 employees;
- the DHBs have not provided the information to either party;
- until this matter is resolved the pay equity claim cannot progress to settlement; and
- there are other pay equity claims which will be assisted by the final resolution of this question.

The Authority's investigation

[10] On 29 April 2021 the PSA lodged the dispute. On 3 and 6 May the DHBs and the second respondent, APEX, respectively lodged statements in reply. On 3 May the DHBs lodged an application for removal. By correspondence dated 6 May the PSA advised the Authority they did not oppose removal. By correspondence dated that day APEX advised the Authority it supports the application for removal.

[11] On 14 May, by agreement a timetable for filing submissions and supporting evidence in respect of the removal application was set.

[12] The parties have complied with the timetable. The DHBs have filed submissions which will be referred to below. The PSA and APEX have not filed substantive submissions other than to confirm their positions in respect of the removal application.

How can removal be sought?

[13] Implicit in any application for removal is that the application is properly before the Authority because the Authority has jurisdiction to determine the dispute between

the parties. This is true for this application. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including all matters arising under the Equal Pay Act 1972.[5]

[14] In addition the Authority has the ability to deal with any question related to the employment relationship including any question connected with the construction of any other Act which arises during the course of any investigation.[6]

[15] As stated by the Court of Appeal in *Gill v Pizza*:

> …removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.[7]

[16] This appears to be the situation here – an issue for which the Authority has jurisdiction to deal with has arisen during the course of the investigation of this employment relationship problem albeit at the outset. How then can removal be sought?

[17] The Authority is constrained in its ability to remove proceedings before it to the court by s 178(2) of the Act. Four grounds of removal are set out in s 178(2) of the Employment Relations Act. The DHBs seek to rely on two of those grounds:

- An important question of law is likely to arise other than incidentally; and
- 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.[8]

[18] In the event a party or parties applying for removal satisfy the tests set out in s 178(2) the Authority has residual discretion to determine whether or not the matter should be removed to the court.[9] Any relevant factors against removal must be considered.[10] In *Carter Holt Harvey* the Court considered a range of factors in favour of declining removal. Two of the factors in the exercise of the residual discretion may be of some relevance to this matter:

---

[5] Employment Relations Act 2000, s 161(1)(qd) and Equal Pay Act 1972, s 13ZY.
[6] Employment Relations Act 2000, schedule 2, clause 1.
[7] *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd and Ors* [2020] NZCA 192.
[8] Employment Relations Act 2000, s 178(2)(a) and (b).
[9] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561- 562.
[10] *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at 83.

- It is not inevitable that there will be a challenge by any party to the Authority's determination. Outcomes in that forum are not necessarily stark wins or losses of everything at stake. The Authority's methodology and remedial powers enable it to craft solutions that parties can, by modifying their behaviours towards each other, live with. That is the scheme of the legislation Parliament intended to apply now and henceforth in employment relations.
- Further opportunities for mediation will occur if the Employment Relations Authority stage of dispute resolution is not excluded.[11]

What is the test for an important question of law?

[19] In *Hanlon v International Educational Foundation (NZ) Inc* Chief Judge Goddard said in respect of the predecessor provision to s 178:

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of [s 178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.[12]

[20] *Hanlon* confirms that the context of the case is a relevant factor in assessing the importance of a question of law.

[21] Questions of law do not need to be complex, tricky or novel to be important.[13] The s 178(2)(a) test is met if the issue arises other than incidentally so that the outcome turns on the answer.[14]

---

[11] Ibid at 83 – 84.
[12] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at [7].
[13] *Johnson v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].
[14] *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].

What is the test for public interest?

[22] The test is conjunctive – the case is of such a nature and of such urgency that it is in the public interest for the matter to be removed. Both elements (nature and urgency) must be satisfied for the test to be met.

Discussion

[23] The DHBs submit this case involves an important question of law which has not been subject to judicial scrutiny namely, the correct interpretation and application of section 13Z of the Equal Pay Act 1972. They also submit the s 178(2)(b) test is met because the question of law involves a new statutory provision that has not been considered by the Authority or court before, is complex and determinative of the dispute and that until this question is resolved the claim cannot proceed.

[24] Section 13Z appears to provide an employer (in this case the DHBs) must send the names and contact details of any non-union member employees, affected by the PSA claim and who have not opted out, to "the union or unions" within 20 days of the s 13V notice being given that a pay equity claim is arguable. The question is whether information sharing needs to occur subsequent to the APEX claim. This will turn on the meaning and effect of the consolidation of the claims and whether as a consequence of that consolidation APEX's claim becomes folded into that of the PSA's or runs parallel to that of the PSA.

[25] The DHBs say there are other important questions that must also be considered namely whether s 13Z allows the parties to agree their own process for the provision of employee contact details and if a union does not have access to the contact details how the duty of good faith may be satisfied. Those questions are likely to be answered by analysis of the relevant statutory provisions though I accept that they are questions which have arisen as the DHBs have attempted to broker a resolution of this dispute.

[26] Section 13Z is a new provision. How it is applied after a consolidation (or otherwise) is also new and is not a question which arises incidentally to the dispute as the parties have chosen to characterise it. Within that narrow frame it is accepted determination will resolve that dispute.

[27] While there is a clear public interest in progress and resolution of pay equity claims it does not meet the requirements of urgency as expressed in s 178(2)(b). Progress of the claim has been delayed by the respective applications about the dispute and removal.

[28] Having considered whether the s 178(2) tests have been met I must now consider whether the residual discretion not to remove this particular case should be exercised. The principles for the Authority's exercise of that residual discretion were described in *Auckland District Health Board v X (No 2)* in this way:

> …the inquiry must not be on the desirability or undesirability of removing cases, generally, because Parliament has decided some should be removed. Rather, it should be on whether it may be undesirable to remove a particular case.
>
> The legislative scheme makes paramount, satisfaction of one or more of the express statutory tests for removal. The discretion then remaining is residual and should not be employed to re-litigate, avoid or defeat the statutory test or tests established. Rather, it should be applied to determine whether there may be a good and sufficient reason not to remove a particular case in spite of the establishment of one or more of the tests.
>
> That is reinforced by the addition of the new fourth test for removal (subs (2)(d)) in the 2000 legislation. It cannot have been Parliament's intention to provide both for new broad discretionary grounds for removal and then the exercise of a second independent but otherwise identical discretion. The addition of the new subs (2)(d) reinforces the conclusion that the Authority's discretion under s 178 is both residual and intended to determine whether there are factors against removal.[15]

[29] In this particular case a factor against removal concerns the context of a pay equity case proceeding under an express statutory purpose of "providing a simple and accessible process to progress a pay equity claim". [16] A further factor is the overarching good faith obligations on the parties to progress that claim. Central to such a process must be a focus on the parties endeavoring to use all possible avenues of resolution between themselves.

[30] To remove one feature of many nested within the EPA statutory mechanism foreshadows the possibility of multiple such claims and undermines the purpose of the

---

[15] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at 561- 562.
[16] Equal Pay Act 1972, s 13A(b).

EPA where all parties are under a duty of good faith which includes "us[ing] their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner".[17]

[31] Given this context, though questions are raised, they do not meet the removal test of an important question. Similarly, given the nature of the case, removal would not be in the public interest. However, even if one or two arms of the s 178 test are accepted as established, I consider the objects of the Employment Relations Act and the purpose of the EPA are good and sufficient reasons for exercise of the residual discretion not to remove this particular case.[18]

[32] Whatever technical or practical concerns the parties may have about the operation of the requirements of s 13Z can be resolved by the Authority if they are unable to resolve them first by attendance at mediation.

Should removal be granted?

[33] For the reasons set out above the application for removal is declined.

Costs

[34] Costs are reserved. It may be the parties agree costs are to lie where they fall which is likely to be an appropriate outcome.

Marija Urlich
Member of the Employment Relations Authority

[17] Equal Pay Act 1972, s 13C.
[18] Employment Relations Act 2000, s 3(a)(i), (iii), (v) and (vi) and Equal Pay Act 1972, s 13A, s 13C(2)(e).