

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 9
3095852

BETWEEN	ASSOCIATION OF SALARIED MEDICAL SPECIALISTS First Applicant
AND	DR GRAEME FRENCH Second Applicant
A N D	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Respondent

Member of Authority:	Peter van Keulen
Representatives:	Peter Cranney, counsel for the Applicants Brian Nathan, counsel for the Respondent
Investigation Meeting:	15 September 2020
Submissions Received:	15 September 2020 from the Applicant 15 September 2020 from the Respondent
Date of Determination:	14 January 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Nelson Marlborough District Health Board (NMDHB) employed Dr Graeme French as a part-time Ophthalmologist from 8 January 1996.

[2] In 2018 Dr French raised a personal grievance and on 14 November 2018 Dr French and NMDHB attended mediation, which resulted in them entering into a record of settlement dated 14 November 2018 (the Record of Settlement).

[3] The terms of the Record of Settlement included:

- (a) That Dr French agreed to resign from his employment with NMDHB, with his last day of employment being 4 May 2019.
- (b) Dr French was not required to attend work during his notice period (from 9 February 2019 until 4 May 2019).
- (c) Dr French was entitled to utilise his Continuing Medical Education allowances during his notice period.
- (d) Dr French would be paid his full salary and entitlements up until 4 May 2019, with this being paid within 7 days of 4 May 2019.
- (e) NMDHB would pay Dr French an ex-gratia payment, with this being paid within 7 days of 4 May 2019.
- (f) The Record of Settlement was in full and final settlement of all matters arising out of Dr French's employment relationship with NMDHB.

[4] On 4 May 2019 Dr French's employment with NMDHB came to an end and within 7 days NMDHB paid what it believed to be the amounts it owed to Dr French under the Record of Settlement.

[5] Subsequently, on 14 July 2019, Dr French wrote to NMDHB and asked when he would be paid his retiring gratuity. Then on 18 July 2019 the Association of Salaried Medical Specialists (the Association) wrote to the NMDHB on Dr French's behalf, seeking payment of a retiring gratuity for Dr French.

[6] NMDHB responded to the Association advising it that it would not pay Dr French a retiring gratuity as it had no obligation to do so.

[7] The parties exchanged correspondence over Dr French's claim to be paid a retiring gratuity but were unable to reach an agreement. In the end, the Association lodged a statement of problem with the Authority seeking a compliance order against NMDHB requiring it to pay Dr French the retiring gratuity.

[8] This determination resolves the application for compliance. I also record that this determination, reserved at the conclusion of my investigation, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. When I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Employment Relations Act 2000 (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.

My approach to analysing Dr French's claim

[9] I will assess Dr French's application for compliance, in respect of payment of a retiring gratuity, in three parts.

[10] First, what is the contractual entitlement? This involves considering the applicable collective agreement and NMDHB policy on retiring gratuities.

[11] Second, once I have established the contractual entitlement I will consider the effect of the Record of Settlement on that entitlement, i.e. whether the entitlement has been modified or extinguished by the Record of Settlement.

[12] Third, based on the first two steps I will determine what the obligation is on NMDHB in respect of any retiring gratuity for Dr French by applying whatever contractual entitlement Dr French has to the circumstances of his departure from NMDHB.

What is Dr French's contractual entitlement?

[13] Dr French was employed pursuant to a Collective Agreement covering members of the Association. The applicable collective agreement in 2018 and 2019 was the MECA for Association members employed by New Zealand District Health Boards covering the period 1 July 2017 – 31 March 2020 (the MECA).

[14] The MECA recognised at clause 20 that prior entitlements to retiring gratuities had been grandparented – in simple terms, any pre-existing rights to retiring gratuities were preserved and continued under the MECA.

[15] In this regard Dr French had previously been employed pursuant to the terms of a Collective Agreement between the Association and NMDHB covering the period

17 November 1999 – 28 February 2001. And under this Collective Agreement there was an entitlement to a retiring gratuity set out at clause 8. Clause 8.2 stated:

The employer may pay a retiring gratuity to staff retiring from the employer who have no less than 10 years' service as a salaried medical or dental practitioner in the public sector in New Zealand provided that for current employees (ie, employed by the employer at the commencement of this contract) service which previously qualified for retiring gratuity is recognised.

[16] So, Dr French says the entitlement to a retiring gratuity is based on an employee having the requisite length of service and retiring from NMDHB. Counsel for Dr French submits this is the position established by the Employment Court in *Mathews v Bay of Plenty District Health Board*,¹ where the Court held that a similarly worded retiring gratuity meant that an entitlement arose in circumstances where an employee ceased their work with the relevant DHB and did not replace it with substitute work although they might continue with other private work; the clause provides for a retiring gratuity in circumstances where an employee retires from the DHB.

[17] And Dr French says it is this entitlement that was grandparented in subsequent collective agreements including in the MECA as described above.

[18] Whilst NMDHB recognises the grandparenting of the retiring gratuity it says the entitlement is subject to the NMDHB policy on retiring gratuities. This policy provides amongst other things that a retiring gratuity will be paid in circumstances where the employee has informed NMDHB in writing of their intention to retire permanently from the general workforce and NMDHB agrees the employee is retiring.

[19] So, NMDHB says Dr French's entitlement to a retiring gratuity only arises in these circumstances, that is, where Dr French has advised NMDHB that he is retiring from the general workforce and where NMDHB accepts that he is retiring. And, NMDHB says that is not the case here.

[20] Whether a policy is incorporated as a binding part of an employment agreement or a collective agreement turns on whether there is a reference to that policy in the applicable agreement.² In this case clause 50 of the MECA provides that policies are not incorporated in

¹ *Mathews v Bay of Plenty District Health Board* [2019] NZEmpC 49.

² *Mathews v Bay of Plenty District Health Board*, above n1, at [69].

the agreement and to the extent any policy is inconsistent with the MECA, the provisions of the MECA will prevail.

[21] So, in my view the position is straight forward. First, the NMDHB policy on retiring gratuities does not form part of the MECA. Second, the policy is inconsistent with the grandparented entitlement to a retiring gratuity as it requires the employee to retire from the general workforce and not just a DHB; therefore, as the policy is inconsistent with the grandparented entitlement to a retiring gratuity, the grandparented entitlement prevails.

[22] Therefore I conclude that Dr French's contractual entitlement is as set out in clause 8.2 of the Collective Agreement between the Association and NMDHB for 17 November 1999 – 28 February 2001. And I conclude that the entitlement only requires Dr French to retire from NMDHB; retiring from NMDHB means ceasing work with NMDHB and not replacing it with other DHB work.

What is the effect of the Record of Settlement?

[23] When assessing the effect of the Record of Settlement I have been guided by the principles set out by the Court of Appeal in *J P Morgan Chase NA v Lewis*.³ Based on my assessment I make the following observations:

- (a) The Record of Settlement sets out the terms on which the employment relationship between Dr French and NMDHB was to terminate.
- (b) The terms of the Record of Settlement includes entitlements that arose under, and were defined in, the MECA. To this extent the relevant provisions of the MECA are incorporated by reference.
- (c) The terms of the Record of Settlement also include provisions intended to operate after the employment relationship was terminated – payments being made within 7 days of the termination.
- (d) The Record of Settlement is the agreement that is enforceable post termination – any order for compliance would be for NMDHB to comply with its obligations under the Record of Settlement.

³ *J P Morgan Chase NA v Lewis* [2015] NZCA 255.

[24] All of this means Dr French's entitlement to a retiring gratuity can only be enforced through the Record of Settlement and therefore any compliance order can only reflect an obligation to pay a retiring gratuity if that arises under the terms of the Record of Settlement i.e. is incorporated by reference.

[25] Assessing Dr French's entitlements under the Record of Settlement and whether this includes a retiring gratuity starts with two clauses:

2. [Dr French] agrees to resign from his employment with [NMDHB]. His last date of employment will be 4 May 2019 (the cessation date). He will be paid full salary and entitlements up until this date. This amount will be paid within 7 days of the cessation date by way of direct credit.
3.
4. [NMDHB] agrees that from 9 February 2019 [Dr French] will work out his notice period and will be paid his full pay and entitlements until the cessation date, however he will not be expected to be at work or perform his duties from 9 February 2019.

[26] So both clause 2 and clause 4 of the Record of Settlement provide for full salary or full pay and entitlements up until 4 May 2019 to be paid to Dr French. The question is do these clauses include any entitlement to a retiring gratuity?

[27] Interpreting the Record of Settlement, and in particular clauses 2 and 4 of the Record of Settlement, requires me to establish, objectively, the meaning the parties intended their words to bear. In order to establish this objective meaning I can have regard to the contractual context which includes the knowledge a properly informed third party would have in their mind when negotiating based on the facts and circumstances giving rise to the agreement.⁴

[28] The contractual context for the Record of Settlement is that the parties were negotiating and agreeing the terms by which Dr French's employment would terminate. That termination was referred to as Dr French resigning from his employment. This is significant because the MECA makes a distinction between employees resigning or retiring; clause 44 of the MECA states that an employee shall give three months' notice of resignation or retirement. So, objectively a party would have in mind that it was negotiating Dr French's

⁴ *Vector Gas v Bay of Plenty Energy* [2013] NZEmpC 172; and *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149.

resignation not retirement and therefore negotiating and agreeing Dr French's rights on resignation.

[29] The contractual context for clauses 2 and 4 of the Record of Settlement is that the clauses are dealing with payment of remuneration for Dr French working (or not) from the date of the Record of Settlement, through the notice period up until the cessation date. Objectively this indicates a party would have in its mind that it was negotiating and agreeing payments of remuneration for work performed; entitlements encompassing the remuneration package for Dr French's work and not additional extra ordinary payments.

[30] This assessment is reinforced by the parties setting out any additional extra ordinary entitlements separately in the Record of Settlement. Clause 3 provides for an ex gratia payment and clause 5 provides for Dr French to be entitled to utilise his Continuing Medical Education allowances.

[31] These two aspects of contractual context indicate that clauses 2 and 4 of the Record of Settlement are to be objectively interpreted as setting out the remuneration Dr French is to receive for work during his last few months of employment and this does not include any entitlement to a retiring gratuity. And any additional entitlements arising from Dr French's work up until the cessation date and on his resignation are recorded separately and this does not include any entitlement to a retiring gratuity.

What is NMDHB's obligation to Dr French in respect of the retiring gratuity?

[32] There NMDHB has no obligation to pay Dr French a retiring gratuity under either the MECA or the Record of Settlement:

- (a) Any additional rights or entitlements Dr French might have had under the MECA are not enforceable after the termination of Dr French's employment – based on *J P Morgan Chase NA*⁵ and the full and final settlement provision in the Record of Settlement.
- (b) The Record of Settlement does not include an obligation on NMDHB to pay Dr French a retiring gratuity.

⁵ *J P Morgan Chase NA v Lewis*, above n3.

Outcome

[33] The Association and Dr French's application for compliance is declined.

Costs

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

[35] 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 14 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