

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 6
3136444

BETWEEN NEW ZEALAND PUBLIC
SERVICE ASSOCIATION
Applicants

AND AUCKLAND DISTRICT
HEALTH BOARD & 19
OTHER DHBS
First Respondent

AND ASSOCIATION OF
PROFESSIONAL AND
EXECUTIVE EMPLOYEES
Second Respondent

Member of Authority: Marija Urlich

Representatives: Peter Cranney and Avalon Kent, counsel for the
Applicants
Megan Vant, counsel for the First Respondent
William Manning, counsel for the Second Respondent

Investigation Meeting: On the papers

Submissions received: 30 September and 4 October 2021 from the Applicant
30 September 2021 and 14 October 2021 from the First
Respondent
30 September and 14 October 2021 from the Second
Respondent

Determination: 14 January 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns a dispute between the parties regarding the operation and application of s 13Z of the Equal Pay Act 1972 (EPA).

Section 13Z imposes a duty on employers to share contact information of affected employees (employee information) ‘with the union or unions’ who have raised pay equity claims. The dispute concerns to whom the District Health Boards (DHBs) are obliged to share this information – the New Zealand Public Service Association (PSA) and/or Association of Professional and Executive Employees (APEX) both of whom have raised pay equity claims. The parties have attempted to progress this issue themselves by discussion between the PSA and APEX and exchange of correspondence with the DHBs setting out respective positions. The parties have also attended mediation in an attempt to resolve this employment relationship problem.

[2] In broad terms the PSA says the information should only be shared with it because it first raised a pay equity claim with the DHBs, the provision of employee information is a time bound and one off obligation by the s 13V ‘notice of first arguable claim’ to employees and the obligation is not re-set by the consolidation of APEX’s subsequently raised claim. In the alternative, the PSA says information limited to APEX’s claim and membership should be provided.

[3] APEX says the wording of the statutory provision is plain on its face, that it is one of two unions which have raised pay equity claims which have been consolidated and as joint claimants it is entitled to the employee information along with the PSA.

[4] The DHBs say the definition of union at s 13B of the EPA includes joint claimants whether the claims were jointly raised or subsequently consolidated claims, as it the case in this dispute.

The Authority’s investigation

[5] An application to remove this employment relationship problem to the Employment Court was declined by determination dated 12 August 2021.¹ On 24 August a case management conference was convened with the parties at which timetabling directions were made for the filing of an agreed statement of facts, affidavit evidence and submissions. The parties have complied with the directions including attending mediation by 17 September. On 22 September the PSA filed an amended statement of problem raising the alternative argument. Though amended statements in

¹ *Auckland District Health Board and 19 Ors DHBs v New Zealand Public Service Assoc & Assoc of Professional and Executive Employees* [2021] NZERA 359.

reply have not been filed the respondents' submissions address the alternative argument.

[6] For completeness an investigation meeting was scheduled for 28 October which was vacated on 27 October at the request of the parties. This matter is now determined on the papers.

[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. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

Issues

[8] The issue for investigation and determination is whether s 13Z of the Equal Pay Act 1972 obliges the DHB's to share affected employee information with APEX as well as the PSA.

Relevant law

Approach to interpretation

[9] Section 10 of the Legislation Act 2019 provides the approach to statutory interpretation:

10 How to ascertain meaning of legislation

(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

(2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.

(3) The text of legislation includes the indications provided in the legislation.

(4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.

Section 13Z

[10] The provision of the EPA at issue is s 13Z:

13Z Employer must notify union of employees covered by union-raised claim

- (1) This section applies if—
 - (a) 1 or more unions raise a pay equity claim with an employer; and
 - (b) 1 or more employees are covered by the union-raised claim and do not opt out under section 13Y within 20 working days after the date of the notice under section 13V(1).
- (2) The employer must provide the union or unions with the following information about each employee who is covered by the union-raised claim:
 - (a) the employee's name; and
 - (b) the employee's contact details for the provision of written information.
- (3) The employer must provide the information in subsection (2) to the union or unions as soon as is reasonably practicable after the date that is 20 working days after the date of the notice under section 13V(1).

[11] Relevant to the consideration of s 13Z are other sections of the EPA including ss 13A, 13B and 13C which set out the purpose of pay equity claims and good faith obligations which apply and 13M, 13V, 13ZA which deal with the mechanics of consolidation of such claims.

Background

[12] On 26 July 2018 the PSA raised two pay equity claims for allied, technical and scientific employees employed by the DHBs (the first claims). In December 2019 the PSA and the DHBs entered a bargaining process agreement setting out a process to progress the PSA claims. On 6 November 2020 the Equal Pay Amendment Act 2020 came into force, amending the EPA. On 17 November APEX raised a pay equity claim (the subsequent claim) for portions of the same workforce covered by the first claims.² On 19 and 20 November the DHBs gave notice to the PSA and APEX of the

² The APEX claims had been raised in June and July 2020 but was resubmitted subsequent to the amendment Act coming into force.

requirement to consolidate.³ For reasons set out below I am satisfied the claims were consolidated on 20 November.

[13] After 6 November and by 4 December the DHBs gave notice (the s 13V notice) of a number of pay equity claims which had been raised to each affected employee as required by s 13V of the EPA. This notice described the instant claim as:

DHBs and unions are working together to assess a number of pay equity claims. Current claims within the DHBs include:

...

- Allied, Scientific, and Technical (PSA/APEX)

[14] With respect to employee information the s 13V notice said:

In January the DHBs must provide the unions with the names and contact details of employees who have not opted out, so the unions can provide information about the pay equity process and ensure the employees can vote on the proposed pay equity settlement claim.

[15] Notwithstanding the reference to APEX in the s 13V notice there is no express requirement for employees to be notified of any subsequent claim because the s 13V obligation is to provide notice of the 'first arguable pay equity claim raised'.⁴ This issue is not in dispute between the parties, the PSA's claim was the first arguable claim for the purposes of the s 13V notice. What is disputed, and before the Authority for determination, is how the s 13Z information sharing obligation on the DHBs to provide the names and contact information of affected employees (the employee information) to 'the union or unions' is properly discharged. The PSA has written to the DHBs requesting the names and contact information of all affected employees be provided only to it and seeking confirmation that the DHBs would not disclose the contact information of PSA members to APEX.⁵ APEX has written to the DHBs asking for the contact information to be provided in full to both the PSA and APEX.⁶ The DHBs have declined to provide the requested information until the dispute is resolved.

³ Section 13M(3) Equal Pay Act 1972.

⁴ Section 13V(2).

⁵ Refer letter 9 April 2021 Oakley Moran to the DHBs representative. Note the letter is dated 9 April 2014, it is understood, in error.

⁶ Refer letter 6 April 2021 APEX to DHBs' representative.

The parties' positions

PSA

[16] The PSA's primary argument is the DHBs are obliged to share the contact information only with the union who first raised the claim ('the first claim') because the obligation is once-off and time bound. It submits the DHBs are not obliged to provide the employee information to APEX because APEX:

- can only satisfy one of the mandatory conditions of s 13Z(1)(a) and (b), namely (a), because it is a union which has raised a pay equity claim with the employer; and
- cannot meet the condition required under s 13Z(1)(b) because no notice under s 13V(1) is required to be issued in relation to the APEX claim.

[17] The PSA submits this analysis is consistent with s 13Z(3) which requires the employer to provide the employee information "as soon as reasonably practicable after the date that is 20 working days after the date of the notice under s13V(1)".

[18] In the alternative, the PSA says the DHBs' obligation to share information with APEX is limited to the contact information of employees employed by DHBs where APEX had a member or members at the time the claim was raised. It relies on s 13E(2) which prohibits a union raising a pay equity claim with an employer if no employee performing the relevant work is a member of the union.

APEX

[19] APEX's primary argument is the meaning of s 13Z is plain on its face that the information must be provided to 'the union or unions' which have raised claims and this interpretation is supported by the statutory scheme. The argument is developed as follows:

Meaning plain on its face

- in the case of consolidated union claims the word 'unions' in s 13Z cannot reasonably be read to mean only the union which raised the first claim;

- the wording of s 13Z(2) is unqualified – the employer must provide the same information about each affected employee to each union.

Statutory scheme

- the literal interpretation is consistent with the legislative scheme which allows multiple unions to raise sequential claims with the same employers covering the same or overlapping groups of employees and which provides such claims must be consolidated into one claim covering all affected employees;
- unions party to a consolidated claim are jointly responsible to progress the claim and without access to the employee information APEX cannot discharge its joint statutory duty;
- the distinction made in s 13M between ‘first claim’ and ‘subsequent claim’ is not repeated in s 13Z which must be deliberate legislative policy;
- any concern of potential misuse of the information is misconceived because in a consolidated claim the unions must act jointly to progress the claim and the information is necessary for them to do so;
- any risk of misuse of the information is mitigated because the duty of good faith applies to the parties which includes best endeavours to progress the consolidated claim and the requirement not to undermine or do anything likely to undermine the bargaining or the authority of another party to bargaining;
- the information can only be used for the purpose for which it is provided: Information Privacy Principle 10 of the Privacy Act 2020.

Alternative argument

- ‘union-raised claims’ in s 13Z must mean consolidated claims not the discrete union claims preceding consolidation;
- it follows employers are required to share with each union the information of all employees covered by the consolidated claim without reference to the scope or reach of the individual union claims.

The DHBs

[20] The DHBs do not have a particular position regarding the interpretation of 13Z but say the interpretation most consistent with the EPA requires the DHBs to provide the employee information to the PSA and APEX:

- where there is a consolidated claim that claim becomes ‘the union-raised claim’ for the purposes of s 13Z(2);
- this interpretation of s 13Z does not preclude the application of s13V(2) because the notification requirements to effected employees have already been fulfilled;
- ss 13ZA, 13M, 13Y and 13C support this interpretation;
- the purpose of the EPA is to facilitate resolution of pay equity claims by providing a simple and accessible process to progress claims;⁷
- treating consolidation claims as ‘the union-raised claim’ or ‘the claim’ is consistent with that purpose as does referring to multiple unions as ‘the union’ or ‘the claimant’ and reflects this is one process and claim.

Discussion

Are the DHBs obliged under s 13Z of the EPA to provide the employee information to APEX?

[21] Section 13Z applies if two conditions are satisfied. First, one or more unions raise a pay equity claim with an employer.⁸ Second, one or more employees are covered by the union-raised claim and do not opt out within 20 working days after the date of the relevant notice.⁹ The employer must then provide the union or unions with the names and contact details, for the provision of written information, for each employee who is covered by the union-raised claim. This information must be provided as soon as is reasonably practicable after the date that is 20 working days after the date of the notice that the claim is seen as being arguable.

[22] On a plain reading of s 13Z(1) the conditions for APEX to be provided the employee information have been met – it is a union which has raised an equal pay claim

⁷ Section 13A.

⁸ Section 13Z(1)(a).

⁹ Section 13Z(1)(b).

and the employees whose information must be shared are an identifiable group within the statutory context of the EPA. It is not accepted APEX is unable to meet the condition of s 13Z(1)(b) because the s 13V(1) notice limits the information sharing obligation only to the union which first raised a claim. Subsection 13Z(b) cannot be reasonably read down by s 13Z(a) because the purposes of the subsections are different - the first is to define the unions to whom the information must be shared and the second the employees. The employee category is defined as those employees affected by the pay equity claim using the provisions of the EPA rather than a limitation on the union parties who have raised claims.

[23] The stronger argument in support of the PSA's position arises from subsection 13Z(3). If s 13Z required the DHBs to share the employee information with subsequent claimant unions the effect would be to re-set the information sharing obligation as a consequence of consolidation. Such a re-set is arguably not within the timeframe requirements in s 13Z(3) which tie the information sharing to the s 13V(1) notice. However, the effect of consolidation of claims on employee information sharing to new union parties must have been in the contemplation of the legislator when it included the caveat "as soon as reasonably practicable" in s 13Z(3). Within the statutory context of the EPA "as soon as reasonably practical" must contemplate a timeframe for employee information sharing which includes a subsequent claim being raised. Consolidation may quickly follow the raising of the first claim, as is the case with this matter, or it may not. The EPA provides for consolidation in both scenarios. Given the five day time frame for notification of receipt of a pay equity claim to other unions, who may then bring a similar claim, is the same time frame as acknowledgement of receipt of the claim, the statutory drive is to encourage quick raising of subsequent claims.¹⁰ So, in practical terms, and as the case is here, there may be little delay between the raising of the first claim and subsequent claims, allowing all claims to have been received by or around the time the s 13V notice is issued to affected employees.

[24] Stepping back from the wording of s 13Z, I am satisfied the interpretation requiring employee information sharing with subsequent union claimants is consistent with the scheme of the Act which requires the consolidation of claims and does not give priority to any joint claimant progressing a consolidated claim.

¹⁰ Section 13J.

Do other EPA provisions support this interpretation?

(i) Section 13ZA – new employees

[25] This provision requires employers to notify new employees (ie employed after the s 13V notice has been issued) of the pay equity claim and if the employee does not opt out within 20 working days of receiving the notice, share the employee information with the ‘union or unions’. In such a situation the DBHs would be required to provide both the PSA and APEX with the same employee information because the obligation to do so is clear. The provision of new employee information to all union claimants is consistent with an interpretation of s 13Z which requires provision of employee information of affected employees following the s 13V(1) notice to all union claimant parties.

(ii) Section 13M – consolidation of substantially similar claims

[26] Section 13M is a deeming provision for consolidation the trigger for which is the notice of ‘the requirement to consolidate’ which the employer must provide within 5 working days of receiving a ‘subsequent claim’. As discussed above the effect of consolidation is to ‘re-set’ the information sharing obligation under s 13Z because that section provides for ‘the union or unions’ to be provided with the information and this must include all the unions involved in a consolidated claim.

(iii) Section 13Y – opt out

[27] Employees may opt out of ‘a union-raised claim’. The opt out mechanism is through the s 13V(1) notice or the s 13ZA(2) notice for new employees. Subsequent union claimants are not expressly required to be notified other than of new employees.¹¹ The effect of this is affected employees, who did not opt out and who are not new employees and who do not wish to have their information provided to a subsequent claimant union will not receive a further opt out opportunity. Though this seems less than ideal, any concern is mitigated somewhat by the fact the employee information is shared for a specific statutory process and the scheme of the EPA encourages joint claims and early subsequent claims. This supports stability of the consolidated claim.

¹¹ Section 13V(2) and Schedule 2, Part 2, clause 3.

(iv) *Sections 13ZY and 13ZF*

[28] These provisions require unions to notify employees covered by a pay equity claim before any application is made to the Authority (s 13ZY) and to ballot such employees about any proposed settlement (s 13ZF). It is accepted the joint claimants will need the employee information to fulfil these obligations under the EPA.

Should this issue be resolved by the joint claimants themselves?

[29] Consideration has been given to whether the DHB's information sharing obligation would be satisfied by providing employee information to the first claimant union only, because subsequent sharing between the joint union claimants would be consistent with the good faith requirement for multiple union parties to a consolidated claim to use best endeavours to agree on how they will progress the consolidated claim, which might be expected to include sharing of the employee information. However, such an interpretation would give a preference to the first claimant union after consolidation which strikes as inconsistent with the statutory definition of unions whose claims have been consolidated as 'joint claimants'.¹² It would also introduce a further potential ground for disputation between joint union claimants which seems inconsistent with 'a simple and accessible process'.¹³

Potential for misuse of the employee information

[30] It is acknowledged this may be a concern. The employee information is provided under a specific statutory provision (s 13Z) for the purposes of progressing pay equity claims including consolidated pay equity claims. The information should be used for a purpose for which it was provided and if this did not occur it may amount to non-compliance with the duty of good faith which binds claimant parties.¹⁴ A penalty application may be brought in the Authority for actions said to amount to non-compliance with the duty of good faith.¹⁵

¹² Section 13B.

¹³ Section 13A.

¹⁴ Section 13C.

¹⁵ Section 18(2)(d).

The alternative argument

[31] Consolidation creates joint claimants.¹⁶ The claims fold into one and are to be progressed jointly. The employer (or employers) providing all relevant information to all claimants is consistent with this and there is no express provision in the EPA otherwise.¹⁷

Outcome

[32] For the reasons set out above APEX is entitled to be provided with employee information under ss 13Z(2).

Costs

[33] Costs are reserved. It may be the parties agree costs are to lie where they fall which is likely an appropriate outcome. If that is not the case memorandum to be filed within 14 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority

¹⁶ Section 13B definition 'union'.

¹⁷ Refer in particular sections 13E(3) and 13Z.