IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 214
3155265

	BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES Applicant
	AND	TE WHATU ORA HEALTH NEW ZEALAND WAIKATO Respondent

Member of Authority:	Robin Arthur
Representatives:	Omar Hamed, advocate for the Applicant Susan Hornsby-Geluk, counsel for the Respondent
Investigation Meeting:	1 September 2022
Determination:	1 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns changes to the arrangements for the maintenance and testing of some specialised equipment in the Central Sterile Services Unit (CSSU) of Waikato Hospital. Tradespeople employed in the hospital's property and infrastructure department said their employer breached its obligation to consult them before contracting an external company to carry out some of the work they did for the CSSU. Through their union, the Association of Professionals and Executive Employees (APEX), they sought an order requiring their employer to comply with good faith obligations and a penalty for what they said were breaches of those obligations. They said the order should require the work done by the external contractor to be returned to their work schedules.

[2] Their employer, formerly Waikato District Health Board (the DHB), is now part of the national health services agency Te Whatu Ora or Health New Zealand (TWO).

In referring to actions and decisions taken in the past, this determination refers to the employer as the DHB. Any orders made, regarding future action, refer to the employer as TWO.[1]

[3] In responding to APEX's application, the DHB said it had made an urgent, safety-related change to get an external contractor to do some of maintenance checks of its CSSU equipment but the change was a temporary measure while it considered longer term options. The DHB said it would consult APEX and its members once a proposal for a long-term solution was developed. However it did not regard the temporary changes made as being of a kind that triggered the consultation obligations referred to in its collective agreement with its in-house trades workers or in the Employment Relations Act 2000 (the Act).

The Authority's investigation

[4] Two APEX members lodged witness statements for the Authority's investigation: David Hayes, a mechanical fitter with 35 years' service at the DHB, and Leoncio Dizon, an electrician with eight years' service. Two DHB representatives also lodged witness statements: Michael Fitzpatrick, its Director Asset Management and Peter Mathers, its Mechanical Maintenance Supervisor. Mr Mathers was unwell at the time of the investigation meeting so his evidence was given by way of affidavit only. The three other witnesses attended and answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions, speaking to written synopses.

[5] As permitted by s 174E of the Act this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. While the written and oral evidence of the witnesses, relevant background documents and the representatives' closing submissions have been closely considered in preparing this determination, it has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.[2]

Issues for determination

[6] This determination addresses the following issues:

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[1] See Pae Ora (Healthy Futures) Act 2022, Schedule 1, clause 10.
[2] Employment Relations Act 2000, s 174C(4).

(a) What decisions had the DHB made about maintenance work in the CSSU?

(b) Did the DHB meet its obligations under s 4 of the Act (including obligations arising under the Code of good faith for the public health sector in Schedule 1B of the Act) in making any such decisions and how they were made?

(c) If the DHB was found to have breached its obligations under s 4(4)(d) of the Act, should

  (i) a penalty be imposed and, if so, of what amount; and/or

  (ii) an order under s 137 of the Act be made requiring TWO to comply with s 4(4)(d) and/or clause 23 of Schedule 1 B of the Act and, if so, what should the terms of that order be?

(d) Should either party contribute to the costs of representation of the other party?

What decisions and changes were made?

[7] Waikato Hospital's property and infrastructure department includes a team of tradespeople employed to provide services to various departments and facilities on the hospital campus. Along with their duties elsewhere in the hospital, five fitters and eight electricians in the team carry out day-to-day repairs, planned maintenance and routine testing of the CSSU's specialised washing, decontaminating and sterilising machines. This specialised equipment cleans the surgical and medical equipment used in the hospital's theatres to the very high standards needed for patient safety.

[8] In late 2020 Mr Fitzpatrick arranged for Mr Mather to commission a condition survey of the CSSU equipment. He said this was prompted by CSSU managers putting forward a proposal to the DHB's capital planning round for replacement of three of its six sterilizers. The CSSU said the 10-year-old machines were near the end of their design life. Mr Fitzpatrick was surprised by that description as he understood the units generally had a 10-to-15 year life span and he wanted a "sanity check" on whether replacing that equipment should have priority in capital expenditure.

[9] Mr Mathers commissioned New Zealand Valuations Services Limited (NZVS) to undertake the survey. The owner and director of NZVS, James Henderson, was a former DHB electrician. After leaving the DHB's employment Mr Henderson had been trained in servicing the machines by Getinge, the company that supplied them to the

DHB. Mr Henderson then worked for Getinge as a service engineer, servicing CSSU equipment elsewhere in the country.

[10] Around the same time that the DHB commissioned a report from NZVS, Mr Henderson had also assisted the DHB by carrying out permitted essential service work during industrial action by the in-house trades staff.[3] During bargaining between APEX and the DHB over a new collective agreement, trades staff had refused to do some work on CSSU equipment.

[11] Mr Fitzpatrick said NZVS was chosen to conduct the survey he had requested because Mr Henderson "provided the independence we were after on this occasion". APEX and its members did not agree with that description.

[12] Mr Henderson visited the hospital site in December 2020 to carry out his survey.

[13] His report, delivered on 1 February 2021, answered the capital spending question by concluding washers and sterilisers were due for replacement in the next few years. It also identified "sizeable risks" in the maintenance programmes for the six sterilising machines when assessed against the Australian and New Zealand Standard for reprocessing of reusable medical devices in health services organisations, referred to as AS/NZS 4187:2014 (the AS/NZS standard). On a point at the core of subsequent debate about its contents and use, the report concluded the DHB had not established a properly documented "competency-based program" for the engineers who maintained and tested the units. It also said use of "non-factory parts" in some of the machines had, under the AS/NZS standard, thereby shifted the liability for sterile outcomes from the machine suppliers to the DHB. It said the DHB had to "find a way" that its current engineers could be deemed "competent" on the measure set in the standard.

[14] In the following weeks Mr Fitzpatrick, following discussion with Mr Mathers, decided to manage risks identified by the report by having NZVS carry out the six and 12-monthly checks scheduled in the maintenance programme for the three sterilising machines in use in the CSSU. The three other machines were out of commission and the CSSU was awaiting arrival of replacement machines.

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[3] Employment Relations Act 2000, s 97(4).

[15] Under Mr Fitzpatrick's plan the trades team were to continue to undertake any daily maintenance issues as well as monthly and three-monthly checks. In his later evidence to the Authority investigation Mr Fitzpatrick described these measures as "a half-way house" and only a temporary solution. He said at the time of making this decision – in the first half of 2021 – he was the sole manager in the hospital's property department, ongoing strike action was underway, management relationships with the trades team were strained and the impacts of the COVID-19 pandemic needed to be managed.

[16] Mr Fitzpatrick said the interim solution gave the DHB time to explore the practicability of its trades team being trained to the level that met the AS/NZS definition of competence so the work of carrying out the six and 12-monthly checks of the three sterilising units in operation could be returned to the trades team until those units were eventually decommissioned within the next few years.

[17] Mr Fitzpatrick expected that all the new replacement sterilising units would be maintained and monitored by the supplier or its representative under warranties in the purchase agreements for those units. Long-term, therefore, he expected the hospital's in-house team would not need to that work. However Mr Fitzpatrick expected the trades team would still be fully occupied, at the same staffing level, on continuing to provide services to other departments and facilities in the hospital.

[18] Mr Mathers and Mr Fitzpatrick did not talk with trades team members before making their decisions to commission the condition survey report from NZVS or, after receiving the report, to have Mr Henderson, through another company, then provide the six and 12-monthly maintenance checks.

[19] Mr Mathers, in his affidavit, said he told trades team members about the condition survey after Mr Henderson had already visited the site and members of the team asked what he was doing there.

[20] Mr Mathers also spoke with Mr Hayes, who was the union delegate for the trades team, about the decision to contract out some maintenance checks. His evidence was that he told Mr Hayes "what the issue was, and what we were going to do in terms of six and 12 monthly maintenance moving forward". On his account of that conversation, Mr Mathers was communicating a decision made rather than seeking comment about a proposal before it was finalised.

[21] Mr Hayes said Mr Mathers spoke to him in late June 2021 and told him "decisions had been made to turn some of the machines off and work was being given out, the department was in danger or something". He accepted Mr Mathers had asked his opinion of what was planned. Mr Hayes, in his oral evidence, said he had replied "go ahead and do what you want to do and I will contact the union". He said that discussion took place while wage negotiations and industrial action were underway and he did not want to get into an argument with Mr Mathers.

[22] The DHB did not provide APEX officials and Mr Hayes, as union delegate, with a copy of the NZVS report at that time. Rather, they got the report only on 17 August 2021, a month after APEX made an official information request for it.

[23] In September 2021 APEX trades staff provided a response to the report. This included discussing how shortcomings in documentation of maintenance and repairs could be addressed, commenting on reference to use of 'non-factory parts' for replacement parts in some equipment and questioning the criticism that the existing staff lacked sufficient training to meet the definition of competence in the AS/NZS standard referred to in the report. A covering letter from an APEX official also expressed concern at what it called "a significant conflict of interest" in Mr Henderson having prepared a report that led to the contracting out of regular maintenance checks and then him being involved in the business of providing those checks.

[24] At the heart of the ongoing disagreement about what had been done, and why, was whether the existing staff did or could meet the definition of competence used in the AS/NZS standard for servicing such equipment. The standard required servicing work to be carried out by a "competent person", defined as:

> A person who has, through a combination of training, education and experience, acquired knowledge and skills enabling that person to correctly perform a specific task.

[25] The trades staff considered their collective experience of servicing the machines, following manufacturer manuals for the various equipment, and the training some staff had done many years previous met the requirements of that definition. Mr Hayes, as one example, had attended a relevant training course 22 years earlier. He considered that training, and his subsequent experience in servicing the equipment over the intervening years, was shared with other staff so that those who did the maintenance

and testing of that equipment had sufficient training and knowledge. However he, and APEX generally, also criticised the DHB's managers for not having arranged for the trades staff to attend formal training courses with the equipment manufacturers or suppliers in more recent years.

[26] Mr Fitzpatrick, to the contrary, said he did not criticise the skill or experience of the trades staff but firmly believed that the DHB could not adequately document that their level of training, experience and knowledge met the definition of a competent person in the AS/NZS standard. The DHB could not locate adequate documentation of previous training and the manufacturers who had supplied the equipment to the DHB were not able or willing to provide training options for the DHB's staff now. The suppliers of the sterilising machines, for example, were committed to training their own staff who service their machines under the warranties given to customers when that equipment is purchased. Under that business model the suppliers have no interest in training the staff of their customers.

[27] The DHB also considered the emphasis placed on the contracting out of the six and 12-monthly equipment checks was out of proportion to the amount of time that work actually took in the context of the total work programme and duties of the trade staff across the needs of the many departments and facilities at the hospital. Mr Fitzpatrick said NZVS told him that the checks at six and 12-monthly intervals took four hours for each of the sterilising machines. Tallied for the three sterilisers in operation this amounted to 24 hours work a year. This was notionally 1.2 per cent of one full-time equivalent worker's total potential workload in a year.

[28] Mr Hayes, in his oral evidence, said that tally underestimated how much work was actually involved in those checks, which also included other equipment in the CSSU. His own tally of the time required each year to carry out that work properly was at least 54 hours, along with a further 30 hours for some electrical components. This amounted to around four per cent of the notional FTE annual workload of one team member. While still a relatively small amount when spread across the 12 or so team members capable of doing the CSSU work, Mr Hayes said it was important to those trades staff because the work was challenging and technical and part of their wider skill set. Losing that work as part of the mix of duties carried out was part of a gradual degradation in the range of tasks they did and enjoyed. The hourly cost for a contractor was also higher than for in-house staff. Their day-to-day maintenance of the equipment

also meant they were more familiar with its history when conducting the scheduled maintenance checks at monthly, three-monthly, six-monthly and annual intervals.

[29] At the time of the Authority investigation meeting the temporary measures for the six and 12-monthly checks to be carried out by the external contractor remained in place. No training had been able to be arranged for in-house staff to meet the DHB concern over whether they met the AS/NZS standard's definition of competence to maintain and check the equipment.

Did the DHB breach its good faith duty in making the change?

[30] APEX's claim that the DHB had breached its duty of good faith in changing how some of the work was done for the CSSU had to be assessed against the statutory requirements and the terms of the employment agreement between the workers and their employer.

The statutory and contractual framework

[31] There are three facets to the statutory duty of good faith:

(i) the general s 4(1) duty on parties to deal with one another in good faith, without being misleading or deceiving;

(ii) the wider s 4(1A) duty to be active and communicative with one another and for the employer to provide information and an opportunity to comment about decisions likely to have an adverse effect on the continuation of employment; and

(iii) the specific s 4(4) duty on employers to consult about the effect on employees of changes to the employer's business, including proposals that might impact on employees to contract out work otherwise done by the employees.

[32] These are the relevant sections:

> **4 Parties to employment relationship to deal with each other in good faith**
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> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

(2) …

(3) …

(4) The duty of good faith in subsection (1) applies to the following matters:

(a) …

(b) …

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:

(d) a proposal by an employer that **might impact on the employer's employees**, including a **proposal to contract out work otherwise done by the employees** or to sell or transfer all or part of the employer's business:

[33] In a case such as this the Authority is also guided by the provisions of the Act's specific code of good faith for the public health sector:[4]

Schedule 1B
Code of good faith for public health sector

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—

[4] Employment Relations Act 2000, s 100A, s 100C and s 100D.

(i) collective arrangements; and
(ii) the role of unions in the public health sector.

4 General requirements

(1) In all aspects of their employment relationships, the parties must –
(a) engage constructively; and
(b) participate fully and effectively.

(2) In their employment relationship, the parties must
(a) …
(b) …
(c) …
(d) …
(e) recognise the time and resource constraints that may affect their ability to participate fully, and make allowances for those constraints.

Continuity of employment

19 Outsourcing or direct provision of services

(1) This clause applies if—
(a) an employer is Health New Zealand …; and
(b) the employer obtains services from its employees; and
(c) the employer engages or arranges for another employer to provide some or all of those services—

(2) The employees referred to in subclause (1)(b) who are affected by the outsourcing or direct provision are entitled to be employed by the other employer on the same terms and conditions as applied to the employees immediately before the outsourcing or direct provision took effect.

20 Change in provider of outsourced services

(1) This clause applies if—
(a) Health New Zealand… has outsourced (within the meaning of clause 19(1)(c)(i)) the provision of services to it by another employer; and
(b) the agreement or arrangement under which the other employer provides those services comes to an end; and
(c) Health New Zealand … makes an agreement or arrangement with a new employer to provide some or all of those services to it.

(2) The employees of the employer referred to in subclause (1)(b) who are affected by the outsourcing are entitled to be employed by the other employer on the same terms and conditions as applied to the employees immediately before the agreement or arrangement referred to in subclause (1)(b) came to an end.

21 Obligation to notify provisions of clauses 19 and 20

(1) Before Health New Zealand … enters into an agreement or arrangement with a new employer to which clause 19 or clause 20 applies, it must notify the employer of the provisions of clause 19 or clause 20, whichever applies in the circumstances.

(2) However, failure to comply with subclause (1) does not affect the validity of an agreement or arrangement referred to in that subclause.

…

Remedying breaches of good faith

22 Notice of breach

If a party believes that another party has breached the duty of good faith in section 4, it must bring this to the attention of the party in breach at an early stage.

23 Obligation of party in breach

A party in breach must—
(a) if the breach can be made good, make good the breach by making every endeavour to restore the other party to the position the other party was in before the breach; or
(b) if the breach cannot be made good, provide an explanation to the other party.

[34] Looking at the terms agreed in any relevant employment agreement may assist in determining whether the parties have met their statutory good faith obligations because those terms may indicate how they will meet those obligations and because parties, acting in good faith, will comply with agreed terms. At the time the issues between the parties in this case arose, they were bound by the terms of the Waikato District Health Board Support Service Workers Collective Agreement (1 November 2017 – 31 October 2019). These included an "industrial democracy" clause which accepted change was necessary to ensure effective and efficient delivery of health services and said employee job delegates were "the recognised channel of communication between the union and the employer in the workplace".

[35] Clause 37, headed Management of Change, described the process for considering changes:

(1) Regular consultation between the employer, employees and the union is desirable on matters of mutual concern and interest.

(2) The aim of mechanisms established for this purpose will be to reach agreement and to make recommendations to management, who will endeavour to take the view of those groups into account as far as possible before making final decisions.

(3) In accordance with the principles contained in [the Industrial Democracy clause] the employer agrees that the union will be advised of any review (prior to the commencement) which may result in significant changes to either the structure, staffing or work practices affecting employees, and will provide the union with an opportunity to be involved in the review. When the implementation of decisions arising from any such reviews will

> result in staff surpluses, the procedures in clause 37 Staff Surplus below shall be adopted.

[36] A management of change clause with the same wording was included in the subsequently negotiated APEX and Waikato DHB Tradespersons Collective Agreement in effect from 16 August 2021.

The breaches of good faith

[37] Assessed against that statutory and contractual framework, the DHB failed to meet those good faith obligations in the following way:

(i) It commissioned a condition survey of CSSU equipment without arranging any involvement of the workers who maintained that equipment in providing information that could be relevant to addressing Mr Fitzpatrick's identified concern about the expected service duration of the equipment.

(ii) It then failed to share the NZVS report with the trades team, to seek information or comment about its contents, before making decisions on what to do about the concerns canvassed in it.

(iii) It decided to contract out work done by the trades team without first seeking information or comment from them on the effect that might have on the content and mix of their work.

(iv) It decided the trades team did not meet the AS/NZS standard of a competent person without seeking information or comment from them which might have been relevant to the assessment made.

[38] The DHB submitted no consultation was required for the steps taken to review the servicing of equipment and making the supposedly temporary decision to redistribute some of the maintenance check work. This was because, it said, those measures did not amount to what s 4(1A)(c) contemplated by referring to an adverse effect on the continuation of the employment of any of the trades work. In short, the DHB argued, no trades workers would lose their job as there was plenty of work for them to do elsewhere in the hospital. On that argument, the DHB did not need to provide them with any information or opportunity to comment before making decisions in the specific circumstances of the situation it faced.

[39] It was an analysis that cast the good faith obligations too narrowly. Even if, as the DHB submitted, there was no consultation obligation on that ground, two other aspects of the good faith obligations remained in play.

[40] Firstly, under s 4(1A)(b) the DHB had to be active and communicative in maintaining a productive employment relationship. It commissioned Mr Henderson to conduct a survey which touched on the work of the trades members but did not arrange any opportunity for the workers to provide information that may have helped with the analysis Mr Fitzpatrick was seeking. Similarly, once the DHB had the report, active and communicative managers could be expected to have provided an opportunity to comment on it so that any decision made could be assisted by the fullest picture possible.

[41] Secondly, that s 4(1A)(b) obligation to be active and communicative in maintaining the employment relationship then engages the instance referred to in s 4(1A)(4) of a proposal that "might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees". Emphasis in that provision has to be given to the word "might". It applies to any potential situation where contracting out of work could result.

[42] The obligation to be active and communicative over proposals to contract out work is not limited by the degree of change contemplated. It applies to where part of a worker's duties may be contracted out, not just where the worker's entire job could be affected. Neither does it refer only to proposals for permanent or on-going changes. It applies to changes which may be contemplated as temporary.

[43] For that reason, DHB submissions that discounted good faith obligations on the grounds that the changes contemplated were "minor", "temporary", "not material" and "not substantial" have not been accepted in the conclusions reached in this determination. Rather, the measure for what engaged good faith obligations to actively communicate in this case, before decisions were made, was the reference in the collective agreement's management of change clause to "any review (prior to the commencement) which may result in significant changes to either the structure, staffing or work practices affecting employee". The relevant word is "significant".

[44] The condition survey and decisions Mr Fitzpatrick made following it amounted to a review of work practices. Although the DHB considered the proportion of the work

involved was minor, the evidence established that the change contemplated involved a potential change to work practices which was "significant" for two reasons.

[45] Firstly, as evident from the witness statements of Mr Hayes and Mr Dizon, the trades team regarded their work in meeting the technical requirements of maintaining CSSU equipment to the necessary high standards as an important part of the mix in variety and complexity of work they did throughout the hospital. Contrary to the DHB's submission, the prospect that some, and potentially all, of that work could be removed from them was a significant change in work practice.

[46] Secondly, as became apparent through the evidence of Mr Fitzpatrick, the future of the work that the trades team did for the CSSU was being evaluated in the context of what the DHB expected would be a wider change in how the CSSU equipment was maintained. The contemplated replacement of sterilising machines with new units serviced by the suppliers' service engineers rather than the DHB's in-house trades staff was clearly an expected change in work practices, including the mix and complexity of work they did. However decisions about those purchases, and the potential impact on the work of the trades team of the DHB entering into such service arrangements with equipment suppliers, did not appear to have been the subject of any consultation with them up to that point.

[47] In short, the specific example of the condition survey report and decisions made after DHB managers got it, appeared indicative of the DHB's overly narrow interpretation and application of good faith obligations. It saw such actions as merely "operational matters" and an exercise of "managerial prerogative" rather than situations where the DHB should seek and could benefit from relevant information and views from the workforce that may be affected. The DHB could not fail to meet those good faith obligations to seek and consider worker input simply because, as it submitted, Mr Hayes' concerns appeared "more philosophical" and "future focussed" about whether the changes in the CSSU could be a 'thin edge of the wedge' for the DHB eventually contracting out its entire maintenance function.

[48] In this particular instance, the DHB could have gone some reasonable way towards meeting its good faith obligations by two steps that would have still accorded with the recognition in the public health sector code that there may be circumstances where time and resource constraints limit how much communication and consultation

can reasonably be done.[5] Firstly, Mr Henderson could have been asked to interview trades staff as part of his information gathering exercise. This could have generated information and explanations that made his eventual report more accurate and focussed. Secondly, Mr Mathers could have given Mr Hayes the survey report to read as part of seeking to talk to him about what might need to happen. Mr Hayes may have given a cursory response when Mr Mathers told him about the change who carried out some of the checks but, without Mr Hayes first seeing the report that had prompted it, a more detailed discussion would not have been able to meaningfully address the basis on which the managers had already made their decision about what to do. In a process of seeking a report and then acting on it that took the DHB managers involved more than six months, those two measures could have added some few days without affecting timeliness or straining resources. Engaging in good faith and acting promptly need not be mutually exclusive.

No orders for payment of a penalty or compliance

[49] For the following reasons the outcome in this determination is limited to the findings that there were breaches of good faith by the DHB. The penalty and order sought by APEX are not granted.

[50] APEX submitted a penalty was warranted because the failures in good faith behaviour met both the statutory standard of being "deliberate, serious and sustained" and were intended to undermine the collective agreement bargaining underway at the time.

[51] While it was possible that the DHB's actions were intended to undermine the trade staff in their collective bargaining, the evidence was not sufficient to make that inference on the necessary balance of probability. As likely was Mr Fitzpatrick's evidence that concerns on which he acted arose by coincidence at that time, sparked by wanting to check the validity of some proposed capital spending on expensive new equipment for the CSSU rather than by the ongoing industrial dispute. The "halfway house" he later opted for in having some rather than all checks conducted by the external contractor, in some ways minimising the immediate impact on the trades staff, supported a conclusion that he had taken some care to avoid a connection with the conflict between the parties over the collective bargaining.

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[5] Employment Relations Act 2000, Schedule 1B, clause 4(2)(e).

[52] And, while the outcome he adopted was deliberate and the DHB sustained that position through subsequent arguments, the breach was not so serious in its immediate impact of the workers to meet the level of seriousness that would warrant a penalty.

[53] Neither could the order sought by APEX be made. It wanted the Authority to order TWO to remedy the good faith breaches by returning the work of carrying out the six and 12-monthly service checks on the three operational sterilisers to the in-house trades team.

[54] Clause 23 of the public health sector good faith code refers to restoring the party subject to the breach of good faith to the position that party had been in before the breach. The difficulty in this case is that it cannot be said with certainty that, had the DHB acted in good faith by communicating or consulting with APEX and its members before any decision was made, the same and supposedly temporary contracting out decision would not and could not have been made. The obligation was to actively and constructively communicate or consult, not to negotiate and agree on the outcome of the employer's proposal. In the circumstances faced by Mr Fitzpatrick, albeit due to shortcomings in DHB processes and documentation, the solution he adopted would still have been open to him if he and Mr Mathers had followed all the necessary good faith steps. While APEX, understandably, would not have agreed with such an outcome because of its concerns about the true cost and negative effect of contracting out in the public health sector, the DHB could nevertheless still have legitimately taken that step if it had acted in good faith before doing so.

[55] Instead, APEX will now be able to rely on the findings made in this determination and the undertakings given in the DHB's submissions in these proceedings as the so-called longer-term solutions are discussed. These include commitments that Mr Fitzpatrick "understands the importance of the issue to the trades team and … fully intends to engage with them as to any next steps that are proposed" and "once any proposals are identified that could have an ongoing impact on the work of the team, formal consultation will occur".

Costs

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

[57] If they are not able to do so and an Authority determination on costs is needed APEX may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum, TWO would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[6]

Robin Arthur
Member of the Employment Relations Authority

[6] See www.era.govt.nz/determinations/awarding-costs-remedies.