IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2024] NZERA 257
3256219 and 3262599

	BETWEEN	NEW ZEALAND NURSES ORGANISATION INCORPORATED First Applicant
	AND	DAWN BARRETT and 10,926 OTHERS Second Applicants
	AND	TE WHATU ORA – HEALTH NEW ZEALAND Respondent
Member of Authority:	Helen Doyle	
Representatives:	Peter Cranney and Machrus Siregar, counsel for the Applicant Susan Hornsby-Geluk and Megan Vant, counsel for the Respondent	
Investigation Meeting:	17 April 2024 in Wellington	
Submissions Received:	On the day and from the Respondent on 18 April 2024	
Determination:	2 May 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] New Zealand Nurses Organisation Incorporated (NZNO) is a Union.

[2] The second applicants are members of the Union and are healthcare workers employed by Te Whatu Ora – Health New Zealand (Te Whatu Ora).

[3] Te Whatu Ora is a statutory entity and the employer of the second applicants.

[4] NZNO and the second applicants want the Authority to resolve a breach of the Nursing Pay Equity Claim Settlement Agreement (the agreement).

[5] The agreement provided that the settlement date will be the date on which the agreement is signed by all parties.[1] On 2 August 2023 the last signatory signed the agreement and that therefore is the settlement date.

[6] It was a term of the agreement in clause 18(a) that the amended pay rates would be implemented within six weeks of the settlement date. Implementation was required by 13 September 2023.

[7] The Union and second applicants say that Te Whatu Ora has breached clause 18(a) of the agreement by failing to implement the rates within the agreed timeframe for parts of the workforce being Auckland, Counties Manukau, Waitemata District and Nelson/Marlborough.

[8] Both statements of problems sought compliance orders, penalties payable to each of the second applicants, interest for late payment and costs.

[9] Equity pay rates have now been implemented for those parts of the workforce as below:

(a) Auckland – 26 October 2023.

(b) Counties Manukau – 1 November 2023.

(c) Waitemata – 1 November 2023.

(d) Nelson/Marlborough – 17 November 2023.

[10] The Authority is not therefore required to order compliance.

[11] Te Whatu Ora say in respect of the remaining remedies that penalties should not be ordered because the delay in implementation was not lengthy, the breach was an isolated one and will not be repeated. Further that there were specific circumstances all occurring together giving rise to unprecedented pressure on the payroll system. Te

[1] Nursing Pay Equity Claim Settlement Agreement clause 7.

Whatu Ora says that a punitive response is not deserved because the delays were due to payroll systems rather than inattention or lack of effort.

[12] Te Whatu Ora do not accept that an award of interest or costs is appropriate.

The issues

[13] The Authority needs to determine the following issues in this matter:

(a) Was there a breach of an employment agreement?

(b) Should a penalty be awarded under s 134(1) of the Employment Relations Act 2000 (the Act)?

(c) If a penalty is ordered what should the quantum be?

(d) Who should receive the penalty award?

(e) Should interest be awarded?

(f) Should costs be reserved?

The investigation process

[14] An investigation meeting was held in Wellington on 17 April 2024.

[15] Two separate statements of problem were lodged in this matter and by agreement were consolidated and dealt with together at the investigation meeting.

[16] The Authority heard affirmed evidence from Andrew Casidy who is employed by the Union in the role of Director of Operations and Member Support. The Authority heard affirmed evidence from Elizabeth Jeffs who is the Head of National People Services, People and Communications and employed by Te Whatu Ora. Both witnesses answered questions from the Authority and counsel. At the end of the evidence, submissions were provided to the Authority. To address a specific aspect of a submission in reply Ms Hornsby-Geluk and Ms Vant provided a further submission.

Was there a breach of an employment agreement?

[17] Section 13ZM(2) of the Equal Pay Act 1972 provides that the employment agreement (whether individual or collective) of an employee who is covered by a pay equity claim settlement is deemed to be varied to:

(a) require the employer to pay the employee the remuneration agreed in the pay equity claim settlement, if that remuneration exceeds the

> amount specified in the employment agreement before the variation required by this section; and
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> (b) include any other terms or conditions that are included in the pay equity claim settlement and that are more favourable to the employee than the terms and conditions of employment in the employee's employment agreement before the variation required by this section.

[18] The implementation of the amended pay rate payments for 10,927 employees was delayed for periods between six to nine weeks after 13 September 2023.

[19] There was a breach by Te Whatu Ora of the term of the agreement that certain amended pay rates would be implemented by 13 September 2023. This was deemed to be a term of each employees' employment agreement (individual or collective).

Should a penalty be awarded under s 134(1) of the Employment Relations Act 2000 (the Act)?

[20] A penalty is claimed under s 134 of the Employment Relations Act 2000. That section provides:

> (1) Every party to an employment agreement who breaches the agreement is liable to a penalty under the Act.

[21] Ms Hornsby-Geluk submits there is no need for punishment or deterrence which are described by the Employment Court as the two primary objectives of penalties.[2]

> [51] Penalties are essentially punitive in that they are intended to mark the community's disapproval of the conduct that amounts to a breach of a minimum employment standard. Although the focus of a penalty is on the conduct in the circumstances of the wrongdoer, the effect on, and material circumstances of, the "victim" are also relevant in the overall assessment exercise…..
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> [52] There is a general, as well as a specific, deterrent element to the imposition of a penalty. In addition to dissuading a particular employer from breaching again, it is one of the rationales for a penalty that persons in similar positions will be dissuaded from breaching minimum code standards by their awareness of their liability to pay a monetary penalty if that occurs.

[22] She submits Te Whatu Ora has acted in good faith and worked diligently to meet its payroll obligations during a period of extraordinary demand and any breach was due to an unfortunate and unprecedented set of circumstances.

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[2] *Borsboom v Preet PVT Ltd* [2016] ERNZ 514 at [51] and [52].

[23] Mr Cranney submits that the integrity of pay equity settlements is a fundamental aspect of the Equal Pay Act 1972. He refers in this regard to the scheme of the Act that a union represents both members and non-members and there are options to opt out of a union raised claim and prior to a fixing application so an employee may preserve the right to pursue other avenues of redress, such as those under the Human Rights Act 1993.[3]

[24] Before a settlement is signed it must be voted on by those who are covered by the union-raised claim (proposed settlement employee).[4] A process is required to be established for proposed settlement employees to vote on whether to approve or decline a proposed pay equity claim settlement.

[25] Te Whatu Ora entered into a pay equity claim settlement agreement and agreed to a time frame of six weeks for the implementation of the amended pay rates. There were very challenging circumstances facing payroll in some districts that caused delay.

[26] Te Whatu Ora tried as hard as possible to implement the equity rates after 13 September 2023. It is important that public and employee confidence be maintained in the implementation of pay equity claim settlements. Employees would likely have relied on the timeframe when voting on the proposed settlement. A six to nine week delay for implementation of the equity pay rates could not be described as a significant delay but equally could not be described as a minimal delay. The disadvantage caused by the delay in monetary amounts was not significant, but it could not be said there was no disadvantage. The delay in payment was not due to a mistake about what was required to be done.

[27] A penalty award is appropriate in this matter to express some disapproval of the breach and to dissuade further breaches not only by Te Whatu Ora but others who may enter into pay equity claim settlement agreements.

Assessing the quantum of the penalty?

[28] Counsel agree on the matters that must be considered in the assessment of penalties.

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[3] Equal Pay Act 1972 ss 13Y and 13ZZ.
[4] Equal Pay Act 1972 s 13ZF(3).

[29] Section 133A of the Act provides that the Authority must have regard to all relevant matters and that these include:

(a) The object in s 3 of the Act.

(b) the nature and extent of the breach;

(c) whether the breach was intentional, inadvertent, or negligent;

(d) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by any person because of the breach or involvement in the breach;

(e) whether the person or entity in breach has paid an amount in compensation, reparation, or has taken another steps to avoid or mitigate any actual or potential adverse effects of the breach;

(f) the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee;

(g) Previous conduct.

[30] There are further non-statutory considerations in *Borsboom* that the Court identified to be taken into account:[5]

(a) deterrence, both particular and general;

(b) degree of culpability;

(c) consistency with penalty awards in similar cases;

(d) ability to pay; and

(e) proportionality of outcome to breach.

[31] Some care needs to be taken as there is some overlap between the above matters and that they are not counted twice.

The object of the Act

[32] It was unfortunate that the amended pay rates were not implemented within six weeks of the settlement date. Te Whatu Ora was aware of the importance of the agreement and those in payroll worked hard to make the payments as soon as they could in what were very challenging circumstances. I am not satisfied there was inconsistent

[5] Above n 2 at [138] – [151].

conduct with the object of the Act so as to reflect that in as assessment of quantum of a penalty.

Nature and extent of the breach

[33] The breach of the timeframe in the agreement for implementation of the pay equity rates is the same for the 10,927 employees. The delay in implementation was between six to nine weeks.

[34] The maximum penalty in respect of each breach is $20,000.[6] The Union was not supportive of globalisation of the individual breaches. The breaches relate to the same obligation and the delay in implementation of the pay equity amended rates.[7] Assessing penalties on the basis of the maximum penalty for each breach for 10,927 employees produces an enormous and unrealistic amount. In *Labour Inspector v Parihar* it was stated that consideration of the maximum penalty tied to individual breaches would result in an enormous total and there would then have to be an artificial approach to discounting to a realistic level of penalties.[8]

[35] The breaches are appropriately globalised as they relate to the breach of the same obligation. It is a method that has been recognised by the Employment Court as principled and logical and providing a fair means to fixing a figure for appropriate maximum penalties.[9]

[36] That brings the starting point for an assessment of a penalty to $20,000.

[37] I now undertake an assessment of the severity of the breaches.

Whether the breaches were intentional, inadvertent, or negligent

[38] The Authority heard evidence from Ms Jeffs about the reason the implementation of the pay equity rates was not in accordance with the agreement for Auckland, Counties Manukau and Waitematea and Nelson/Marlborough.

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[6] Employment Relations Act 2000, s 135(2)(b).
[7] *Labour Inspector v Matangi Berry Farm Limited* [2020] ERNZ 67 at [44] to [48].
[8] *Labour Inspector v Parihar* [2019] ERNZ 406, at [39].
[9] Above n 7 at [49].

Amalgamation of 28 payrolls

[39] Ms Jeffs explained in her evidence that there was a lot going on for payroll at the time the amended pay equity rates were to be implemented. There was the establishment of Te Whatu Ora - Health New Zealand on 1 July 2022 and the amalgamation of the 20 district health boards from the Ministry of Health and seven other shared service entities. Approximately 102,000 employees were being paid through the payrolls. That meant that there had to be decisions on how to join teams that administered 28 payrolls to become one integrated team with one system. Decisions on the process to join the teams were only made in quite recently.

Delays in implementing pay equity rates in Auckland, Waitemata and Counties Manukau

[40] After three years of work there was scheduling of Holidays Act remediation payments for Auckland, Counties Manukau and Waitemata around or overlapping the time the pay equity rates were to be implemented. There was awareness of, and support for, the Holidays Act remediation payments by the unions including NZNO. I conclude from the evidence there would have been some understanding about the demands on the payroll as a result of the remediation payments.

[41] The scale of work to make the remediation payments and rectify the payroll system for Auckland and then Counties Manukau and Waitemata was considerable. There were three dress rehearsals and a "brown out" which meant the payroll was doing the minimum work required to run the business as usual pays. There was then a period of "black out" during which the payroll was not available at all for processing as it was reconfigured to comply with the Holidays Act and remediated data was loaded back into it. The "black out" was for a period of about 10 days in July 2023 for Auckland and 10 days in August and September 2023 for Counties Manukau and Waitemata.

[42] There were a significant number of other payroll changes that required implementation including changes from collective agreement settlements and other pay equity settlements at or about the same time. There was also catch up work after the "black out".

[43] Ms Jeffs evidence was that as the person responsible for payroll implementation and the Holidays Act remediation project she was confident that Te Whatu Ora was

doing everything it could to implement the payments as speedily as possible and that nothing more could be done.

Nelson-Marlborough

[44] The Holidays Act remediation payments had not occurred in Nelson-Marlborough and were not the reasons for the delay in implementing the pay equity rates.

[45] The head of the payroll team in that district had resigned in June 2023 and a replacement had not been able to be found and sourced and the chief financial officer has also resigned in the latter part of 2023. The position had not permanently been filled as at the date of the investigation meeting and there is a contractor filling the gap. The small payroll team had been struggling with the new system change and national way of working and was also undergoing a consultation process for structural change. They were not able to manage anything more than business as usual.

[46] Ms Jeffs' evidence was that there was an unfortunate set of circumstances in Nelson at the time that new pay rates were to be implemented with the small team, lack of leadership and restructuring underway.

[47] Ms Jeffs regarded the fact the new pay rates were implemented within 9 weeks of the specified date as actually quite an achievement.

Conclusions

Auckland, Counties Manukau and Waitemata

[48] There was an intentional business decision to prioritise the Holidays Act remediation payment. Te Whatu Ora was transparent about that with its union partners including NZNO. The evidence supports that business decision had the agreement of the unions including NZNO and it delivered about $240 million dollars to 30,000 current staff. As a result of that decision, it was not possible to meet the obligations under the agreement within the timeframe for implementation of the pay equity rates and they were delayed between six and seven weeks.

[49] I do not conclude that Te Whatu Ora deliberately intended when it entered into the agreement that it would be breached and there would be a delay in the implementation of the equity pay rates payments for those employees in Auckland,

Counties Manukau and Waitemata. I accept Ms Jeffs' evidence as likely that the team that entered the pay equity settlement had awareness of the holiday remediation work but likely did not fully understand the scale of the work required in the weeks that followed the remediation and rectification payments.

[50] I agree with Mr Cranney that agreements are meant to be kept even if difficult to do so. Looking at the circumstances overall it is not appropriate to categorise the breach that occurred in these districts as intentional and deliberate. An unrealistic timeframe for implementation for one third of the employees covered by the agreement was agreed to because there was some, but not full, understanding about the issues facing payroll in the districts that were impacted.

Nelson/Marlborough

[51] There was an unfortunate set of circumstances in Nelson with leadership resigning resulting in unfilled vacancies that impacted on the payroll team together with a restructuring that also impacted. It is appropriate to categorise the breach in this district as other than intentional or deliberate.

The nature and extent of any loss or damage

[52] Mr Cranney accepts that the loss of the use of money for each employee was minor. Te Whatu Ora have roughly calculated using the Ministry of Justice Civil Debt Interest calculator interest for each employee in the range of $2 to $16. The evidence supported the holiday pay remediation payments were significantly greater than the pay equity rates and whilst not an answer to a breach of another type there may have been a benefit to many of the second applicants in having those payments first.

Steps to mitigate

[53] The equity pay rates were implemented reasonably promptly within six to nine weeks of 13 September 2023.

Circumstances of the breaches and any vulnerability

[54] The breach was in circumstances where agreement was reached about remuneration that does not differentiate between male and female employees as

provided in the Equal Pay Act 1972.[10] It had taken a considerable period of time to reach the point of agreement. The amended pay rates were not implemented within six weeks of 2 August 2023 as agreed. It was a breach that impacted almost 11,000 employees or one third of those covered by the agreement.

[55] No particular vulnerabilities were identified. The employees were ably represented by their union.

Previous conduct

[56] There has not been previous conduct of this nature.

Culpability

[57] There are no other factors that require assessment to increase or decrease culpability that have not already been addressed.

Conclusion about severity of breaches

[58] I weigh the matters considered above to the extent they could be seen as aggravating or mitigating. An appropriate starting point that fairly balances the factors is 40 % of the maximum penalty which is a provisional figure of $8000.

Deterrence

[59] I make no adjustment under this consideration.

Ability to pay

[60] I make no adjustment under this consideration.

Consistency and proportionality

[61] A penalty is sought under s 134 of the Act on the basis that there has been a breach of a term of an employment agreement.

[62] I have considered awards made in some more recent cases for breaches of an employment agreement where there were issues with payment. No cases were directly

[10] Equal Pay Act 1972 – s 2AAC(b).

comparable so as to provide particularly useful guidance about a consistent award but two are set out below with a brief description of the payment breaches.

[63] In *Roberston v Stevryn Holding Limited and others* there was a breach of the employment agreement to pay the employee at all for 10 months and inadequately for a further four months. The first respondent was ordered to pay a penalty of $16,000 with a small adjustment made for the financial circumstances of the employer.[11]

[64] In *Byun and F & B Vulcan Limited (Formerly Known as Burgered Vulcan Limited) and others* there was a both a statutory breach with respect to holiday pay and a breach of the employment agreement for failure to pay wages. The employee was vulnerable and dependent on a visa for work. The amounts ordered for wage arrears and holiday pay were in the sum of $10,745.27 (gross). The breaches were interrelated and globalised. A penalty was ordered payable of $8000.[12]

[65] I take into account that the breaches in this matter were remedied within a relatively short timeframe and there was limited loss. Importantly Te Whatu Ora has not been found to have acted intentionally and deliberately in breaching its obligations. I take into account the importance of the agreement and compliance with its term for implementation of the amended pay rates and the number of employees affected.

[66] A proportionate and consistent outcome is a penalty in the sum of $6000.

Who should receive the penalty?

[67] Mr Cranney asked that the penalty be apportioned amongst the second applicants in accordance with s 136(2) of the Act.

[68] I am not satisfied it is appropriate for the penalty to be apportioned amongst the second applicants. The penalty recovered should be paid to the Crown.

Interest

[69] Mr Cranney seeks a calculation be undertaken and interest be paid by Te Whatu Ora to each of the second applicants on the basis that the second applicants have been

[11] *Robertson v Stevryn Holdings Limited and others* [2021] NZERA 452.
[12] *Byun v F&B Vulcan Limited and others* [2023] NZERA 606.

deprived of the use of money because of the delay in implementing the amended pay equity rates.

[70] The Authority has the power to award interest under clause 11 of the second schedule of the Act. Clause 11 provides as follows:

> 11 Power to award interest
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> (1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.
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> (2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

[71] Ms Hornsby-Geluk submits that the discretion to award interest is only triggered when the Authority is making a judgment that involves "the recovery of money," and the Authority may if it thinks fit "order the inclusion" of interest, "in the sum for which judgment is given." Ms Hornsby-Geluk submits that there is no outstanding claim in this matter for unpaid money and the second applicants have received payment of the money due to them as a result of the nursing pay equity settlement.

[72] There are two Authority determinations that support that submission.[13] *Dunn v The Ministry of Foreign Affairs and Trade* is analogous to the current matter. Mr Dunn had been reimbursed by the Ministry for a salary underpayment of about $20,000. He sought the payment of interest on the amount for the period it was unpaid in a claim before the Authority. The Member concluded in that matter that because the Ministry had paid Mr Dunn the remediation payment the express statutory power the Authority has to award interest in certain circumstances was not triggered.[14] The Authority concluded that it did not have jurisdiction to order interest payable in the circumstances and the claim did not succeed.

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[13] *Amin v Hutt and City Taxis Ltd* [2024] NZERA 176 at [12] and *Dunn v The Ministry of Foreign Affairs and Trade* [2022] NZERA 208.

[14] Employment Relations Act 2000 Schedule 2 clause 11and s 226 that relates to Demand notices served by Labour Inspectors. Holidays Act 2003 s 84(1)(a).

[73] In this matter the amounts owing have been paid to the second applicants. Mr Cranney suggested that the Authority look to other provisions if there was a difficulty with jurisdiction to order interest under clause 11 of the Second Schedule. He referred to s 162 and s 137(2) of the Act. Section 137 is concerned with the power of the Authority to order compliance. There has already been payment of the money owing and the claim in front of the Authority was for penalties and interest. That section therefore does not assist.

[74] Section 162 provides that the Authority may in any matter related to an employment agreement make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts.

[75] I accept Ms Hornsby-Geluk's submission that the Authority has an express power in schedule 2 clause 11 of the Act to award interest and that is what it should have regard to rather than the more general power. I am not satisfied that even if that were not the case interest in the District or High Court is awarded in the absence of a money judgment or recovery of money under the Interest on Money Claims Act 2016.

[76] There could be circumstances where reliance is placed on a contract between the parties where interest is specifically referred to in the event of default. The Authority was not referred to any such provision in the employment agreements in this matter.

[77] The Authority does not have jurisdiction to award interest in the circumstances of this matter where there is no "recovery of money" or "money judgment" in which to include interest.

Orders and findings made:

[78] Te Whatu Ora – Health New Zealand breached a term of the second applicants' employment agreements that the amended pay rates in the pay equity claim settlement agreement would be implemented within six weeks of 2 August 2023.[15]

[79] Te Whatu Ora – Health New Zealand is ordered to pay a penalty of $6000 to the Crown within 28 days of the date of this determination for a breach of s 134 (1) of the Employment Relations Act 2000.

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[15] Pay Equity Claim Settlement Agreement – clause 18(a).

[80] The Authority does not have jurisdiction in this matter to award interest.

Costs

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

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant [16] may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[83] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[17]

Helen Doyle
Member of the Employment Relations Authority

[16] Where it is not clear who may be seeking costs use "the party who believes they are entitled to costs".
[17] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1