IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE

[2025] NZERA 516
3313480

	BETWEEN	ASSOCIATION OF SALARIED MEDICAL SPECIALISTS INCORPORATED Applicant
	AND	HEALTH NEW ZEALAND – TE WHATU ORA Respondent

Member of Authority:	Shane Kinley
Representatives:	Peter Cranney, counsel for the applicant Megan Vant, counsel for the respondent
Investigation Meeting:	18 June 2025 in Wellington
Submissions:	Up to 21 August 2025
Determination:	22 August 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns a dispute between the Association of Salaried Medical Specialists Incorporated (ASMS) and Health New Zealand – Te Whatu Ora (HNZ) over how provisions associated with the Senior Medical and Dental Officers Collective Agreement (SMDOCA) should be interpreted and applied.

[2] The issues in dispute relate to the correct approach to off-setting in relation to shift allowances for emergency department (ED) employees under the SMDOCA, when is or was HNZ required to implement the ED shift allowance, and whether the term "ED allowance" is shorthand for the term "ED shift allowance". In addition, ASMS

seeks a declaration HNZ has acted contrary to good faith in relation to its position on the meaning of the term "ED allowance" and an order of costs.

[3] ED shift allowances were a key issue considered as part of facilitated bargaining between ASMS and HNZ in 2023 which led to the SMDOCA being entered into by the parties, following a recommendation from the facilitators issued on 3 November 2023 under s 50H of the Employment Relations Act 2000 (the Act). The facilitators' recommendation addressed the ED shift allowances in some detail, including implementation. On 7 November 2023 HNZ offered to settle the SMDOCA accepting the facilitators' "report and its recommendations in its entirety and the offer is the working provided in the Facilitators' report, acknowledging acceptance of the recommendations and wording in all aspects of the report". ASMS agreed to settle the SMDOCA in accordance with the facilitators' recommendation. The SMDOCA was signed on 30 November 2023, effective for a term from 1 September 2023 to 31 August 2024.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged for ASMS by Stephen Hurring, Director, Industrial of ASMS, and for HNZ by Michael Prior, an employment relations contractor who was HNZ's advocate in bargaining for the SMDOCA, Gretchen Dean, former Director, Employment Relations for HNZ and Annie Brodie, Project Manager and Industrial Relations Advisor for HNZ. Mr Hurring, Mr Prior, Mrs Dean and Ms Brodie answered questions, under affirmation, from me and from the representatives.

[5] At the conclusion of the investigation meeting, I timetabled for submissions to be provided and identified a number of points I considered it would be helpful for submissions to address. Counsel provided submissions in accordance with timetable directions made at the conclusion of the investigation meeting. Counsel for ASMS subsequently provided a memorandum clarifying a reference in submissions, in response to a request for clarification from me.

[6] As permitted by s 174E of 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.

The issues

[7] The issues requiring investigation and determination are:

(a) What is the correct approach to off-setting in relation to shift allowances for ED employees under the SMDOCA?

(b) When is or was HNZ required to implement the ED shift allowance?

(c) Is the term "ED allowance" shorthand for the term "ED shift allowance"?

(d) Has HNZ acted contrary to good faith in relation to its position on the meaning of the term "ED allowance"?

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

Approach to determining issues

[8] This matter was raised as a dispute under s 129 of the Act. I requested counsel address in submissions whether the terms of settlement, including the facilitators' recommendation and exchange of letters between HNZ and ASMS, form part of the collective agreement which can be subject to a dispute under s 129 of the Act or are otherwise able to be subject to a dispute under s 129 of the Act.

[9] HNZ said while the facilitators' recommendation does not form part of the SMDOCA, "the dispute or disagreement as to the interpretation of the [facilitators' recommendation] is an employment relationship problem in that it is a problem relating to or arising out of the employment relationship", as defined in s 5 of the Act. HNZ further said the Authority has jurisdiction to deal with this matter under s 161(r) of the Act, including "any action arising from or related to the employment relationship". HNZ also said the principles of contractual interpretation were relevant to the interpretation of the facilitators' recommendation.

[10] ASMS says that HNZ's "offer once accepted led to enforceable contractual terms for each relevant member", however, "It nonetheless endorses the pragmatic approach outlined by [HNZ]".[1]

[11] I accept the submissions of HNZ and ASMS that this matter can be determined as an employment relationship problem under s 161(r) of the Act, applying the principles of contractual interpretation to the interpretation of the facilitators'

[1] ASMS' submissions in reply appear to refer to an incorrect paragraph in HNZ's submissions, but clearly support HNZ's view that the Authority has jurisdiction to deal with this matter under s 161(r) of the Act.

recommendation. I consider this to be consistent with the Supreme Court's observations in *FMV v TZB*.[2]

Principles on interpretation

[12] The interpretation of terms in collective agreements and other agreements between parties to an employment relationship is guided by the legal principles applied to interpretation of contracts generally. Submissions referred to the Supreme Court's judgments in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[3] *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd*,[4] *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*[5] and *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[6]

[13] I approach the interpretation issues on the basis that the correct approach, as outlined by the Supreme Court, is an objective one where the text is of central importance:[7]

> … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning. …
>
> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.47 But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[14] The parties also referred to a number of other points in relation to the approach to interpretation, which I have addressed as part of the parties' submissions and analysis below.

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[2] *FMV v TZB* [2021] NZSC 102 at [93] to [95].
[3] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 (*Firm PI*).
[4] *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111.
[5] *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135.
[6] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85.
[7] *Firm PI*, above n 3 at [60] and [63] (footnotes omitted).

What is the correct approach to off-setting in relation to shift allowances for ED employees under the SMDOCA?

[15] In order to address this issue, I consider it is appropriate to firstly address the overall approach to the interpretation of the detail in Appendix 1 from the facilitators' recommendation headed "ED shift allowance", which also addresses issue [7](c) above – ie is the term "ED allowance" shorthand for the term "ED shift allowance"? I then secondly address specifics of what may be offset in implementing the "ED shift allowance".

Key provisions in the facilitators' recommendation

[16] The facilitators provided the following contextual summary as part of their recommendation, before turning to their substantive recommendation:[8]

> [8] Turning to the ED shift allowance. Our understanding is:
>
> a. The parties agree an ED allowance should be implemented for Senior Medical Officers (SMOs) working in South Island emergency departments where there is currently no allowance for working in the emergency department. The necessary investigatory work has been completed to identify the regions where SMOs do not receive an allowance for working in the emergency department.
>
> b. The parties agree that the same allowance should be implemented in the North Island where there is also no allowance for SMOs working in an emergency department. And the parties agree this should be implemented as soon as practicable after the necessary work has been completed to identify what if any allowances are provided to SMOs that work in emergency departments.
>
> c. Where the parties disagree is how and when the implementation of the ED allowance should be done for SMOs working in all other emergency departments i.e., those SMOs working in emergency departments who already receive some allowance, including where that allowance exceeds 20% and/or where the allowance is not directly identified as being for work in the emergency department.
>
> d. The parties are committed to working together on a wider SMO Remuneration Project

[17] The facilitators then addressed the different views of HNZ and ASMS, before setting out the following operative portion of their recommendation:

> [10] Our view is that:
>
> a. This disagreement about the overall implementation of an ED allowance should not prevent the ED allowance being implemented in the regions in the South Island which have been identified as not having an allowance or having an allowance below 20%.
>
> b. The implementation of an ED allowance for the remainder of the country should be implemented after the work has been done on identifying allowances nationwide and the implementation or

[8] Footnote defining allowance in paragraph [8]a. omitted.

levelling exercise is being carried out through the SMO remuneration project.

[11] So, clause 3 of the additional terms of settlement (set out in Appendix 1) records our recommendation giving effect to this view – it provides that those emergency departments where Te Whatu Ora already knows there is not an ED allowance or an equivalent allowance, because the investigatory work is complete, will receive the ED allowance and all other areas will wait until the investigatory work is done and the ED allowance can be implemented in line with all other allowances being implemented (or levelled) through the SMO remuneration project.

[18] Appendix 1 then set out in further detail the recommendation for an ED shift allowance, which is the primary matter in dispute between ASMS and HNZ, as follows:

3. ED shift allowance:

- The parties agree that an ED allowance will be implemented by Te Whatu Ora for SMOs working in working in the emergency departments in Nelson Marlborough Group, Southern – Queenstown Lakes Site, Timaru and West Coast, on the following terms:
    - SMOs will receive an allowance of 20% of their base salary for working in the emergency department.
    - The ED allowance will be offset against any additional payments or recognition any eligible SMO currently receives for working in the emergency department.
    - This ED allowance will be effective from 1 July 2023.
- The parties agree that they will work together to implement a standardised national ED allowance through the SMO Remuneration Project. The principles that will govern that ED allowance are:
    - SMOs who work in an emergency department will be eligible for an ED allowance.
    - The ED allowance will be calculated as 20% of the eligible SMO's base salary.
    - Where an eligible SMO receives up to 20% in pay or recognition, including inflated FTE and unworked time FTE, this amount shall be offset against the ED allowance and/or any other allowance implemented through the SMO Remuneration Project which the SMO is eligible to receive.
    - Where an eligible SMO receives more than 20% in pay or recognition, including inflated FTE and unworked time FTE, this amount shall be offset against the ED allowance and any other allowance implemented through the SMO Remuneration Project which the SMO is eligible to receive. If, after the offsetting the SMO retains an entitlement to an excess amount in pay or recognition then this remainder will likely be bundled as an individual grandparented allowance.
    - No eligible SMO will have their current pay reduced as a result of receiving the ED allowance.
    - The parties will complete the investigation phase, which will identify differences in payments and benefits received for working in an emergency department, by 1 March 2024.

- The parties will implement the ED allowance as soon as practicable after the investigation is complete and no later than 1 September 2024.
- SMOs who work in emergency departments in Nelson Marlborough Group, Southern – Queenstown Lakes Site, Timaru and West Coast will have their ED allowance and any other allowances they are entitled to receive as a result of the SMO Remuneration Project, standardised to align with the national ED allowance, if required.

Submissions of the parties – overall approach to the "ED shift allowance"

[19] ASMS say the facilitators' recommendation, once offered by HNZ and accepted by ASMS, required HNZ to "implement an ED shift allowance" for SMOs working in EDs in specified locations, on:

> … certain identified terms … [including] that the ED shift allowance would be offset against "any additional payments or recognition" that any eligible SMO currently receives as an ED shift allowance.

[20] ASMS say the phrase "ED allowance", the word "allowance" and the phrase "ED shift allowance" in the heading all have the same meaning and should be read as "ED shift allowance". ASMS says its interpretation is consistent with a purposive approach and claims the "parties agreed intent was to compensate employees for the rigors of shift work, being a pattern of work unique to ED department". ASMS clarified, in response to a question from me, that it considers paragraph [4](b) of the facilitators' recommendation supports this proposition.

[21] ASMS say the meaning of the phrase "ED shift allowance" is not disputed and it is entitled to rely on the words used, with the phrase "ED allowance" then following shortly after the heading in Appendix 1 of the facilitators' recommendation, as quoted at paragraph [18] above, is referring to the same thing. ASMS refers to HNZ's acceptance the phrases are used interchangeably, saying this only makes sense if the phrase "ED allowance" means "ED shift allowance", with there being no evidence HNZ's opposition to an "ED shift allowance" was ever communicated.

[22] ASMS claim an interpretation where "the shift allowance would offset all and any other type of allowance paid in [EDs] leads to absurd outcomes". The Supreme Court's judgment in *Firm PI* is referred to in support of the principle that absurd meanings are unlikely to be correct.[9]

[9] *Firm PI*, above n 3 at [88] to [93].

[23] HNZ say the facilitators do not refer to a shift system as part of the eligibility criteria for the ED shift allowance, rather it is stated to be for all SMOs working in EDs, regardless of hours or shift pattern worked. Offsetting is said to be for payments for working in EDs, with no direct reference to shifts, such as those which had been in the ASMS proposals for a shift allowance.

[24] While HNZ acknowledge the heading in Appendix 1 of the facilitators' recommendation, as quoted at paragraph [18] above, uses the phrase "ED shift allowance", it emphasises references to the allowance being paid for working in the ED. HNZ says it would never have agreed to a shift allowance, as proposed by ASMS during facilitation, and it accepted the facilitators' recommendation as it considered the language in the recommendation aligned with its offer presented during facilitation.

Analysis – overall approach to the "ED shift allowance"

[25] I consider resolution of this issue can simply be addressed by considering the ordinary and natural meaning of the words in Appendix 1 of the facilitators' recommendation under the heading "ED shift allowance". My interpretation of this text is supported by the contextual statements in the facilitators' recommendation.

[26] While HNZ's witnesses conceded at the investigation meeting the phrase "ED allowance", the word "allowance" and the phrase "ED shift allowance" had been used interchangeably in some contexts they were adamant they did not always mean the same thing and the context of Appendix 1 needed to be considered. I accept this position, where the words and content of clauses has an ordinary and natural meaning.

[27] The first set of bullets in Appendix 1 of the facilitators' recommendation under the heading "ED shift allowance" clearly refers to SMOs being paid "an allowance of 20% of their base salary **for working in the emergency department**" (emphasis added). This allowance can be "offset against any additional payments or recognition any eligible SMO currently receives **for working in the emergency department**" (emphasis added).

[28] There is no requirement to read any further meaning, such as that argued for by ASMS, into these bullets for the clause to be capable of being implemented consistent with the ordinary and natural meaning of the words. The first requirement of the clause can simply be applied consistent with the ordinary and natural meaning of the words if all SMOs working in an ED are paid an allowance of 20% of their base salary. The

second requirement of the clause, relating to offsetting, can also simply be applied consistent with the ordinary and natural meaning of the words if offsetting is restricted to any additional payments or recognition currently paid for working in an ED.

[29] Turning to the contextual statements in the facilitators' recommendation, the facilitators stated "After exploring various solutions to the impasse over the ED shift allowance the parties accepted there was not a solution that they could agree between them and this aspect was best resolved by a written recommendation by us". This statement is clear there was no common understanding prior to the facilitators' recommendation being issued, although other contextual statements such as paragraph [8]a. of the facilitators' recommendation (quoted at paragraph [16] above) were clear there was agreement to introduce an ED allowance for SMOs "working in South Island emergency departments where there is currently no allowance **for working in the emergency department**" (emphasis added, footnote omitted). I consider this and other contextual statements support HNZ's interpretation of what was agreed and there is insufficient support in the contextual evidence for a finding that what was agreed was a payment for shift work per se.

[30] While ASMS say the evidence supports a common purpose in developing a shift allowance based on its 2021 claim, I am not satisfied there was such a common purpose. ASMS's claim in 2021 included double-time for hours worked between 1700 and 0800 on Monday to Friday and for all hours worked on weekends and public holidays. What was agreed was an allowance of 20% of their base salary for working in the emergency department, which does not differentiate based on whether work is performed on an evening, overnight or weekend shift.

[31] ASMS referred to paragraph [4](b) of the facilitators' recommendation as supporting its position. I consider this paragraph is clear that there was not complete agreement between the parties over how the allowance should be implemented, as it states there are differences between the parties including:

> Clause 3 of the additional terms of settlement relating to a proposed ED shift allowance to be implemented. **Whilst the parties agree that an ED allowance should be implemented nationwide, they could not agree on various important aspects** – which we will address in more detail below. (emphasis added)

[32] The differences between the parties were also emphasised in paragraphs [8] and [10] of the facilitators' recommendation, as quoted at paragraphs [16] and [17] above.

[33] At the investigation meeting Ms Dean was firm in response to questions from ASMS's counsel that the content of the shift allowance clause in the facilitators' recommendation was clear and supported HNZ's position, which was more important that the inaccurate heading. Mr Prior said he was "less concerned about the title than the substance". I agree more emphasis should be placed on the substance of the clause.

Outcome – overall approach to the "ED shift allowance"

[34] I find HNZ's interpretation of the overall approach to the "ED shift allowance" is correct in that Appendix 1 of the facilitators' recommendation, notwithstanding the heading including the word "shift", requires payment of an allowance of 20% to SMOs of their base salary for working in the emergency department.

[35] I further find the term "ED allowance" was used interchangeably for and is shorthand for the term "ED shift allowance", however, do not consider this changes the substantive meaning of the content of the facilitators' recommendation, in terms of interpretation of the overall approach to the "ED shift allowance".

Submissions of the parties – What amounts should be able to be offset

[36] ASMS say the 20% shift allowance can be offset only against any existing shift allowance arrangements, citing paragraph [11] of the facilitators' recommendation quoted at paragraph [17] above which refers to HNZ paying the ED allowance where it "already knows there is not an ED allowance or an equivalent allowance, because the investigatory work is complete" (emphasis added). ASMS say its approach is consistent with "background knowledge reasonably available to the parties", subsequent communications between Mr Prior and Mr Hurring, and a purposive approach, reflecting the claimed "agreed intent … to compensate employees for the rigors of shift work, being a pattern of work unique to ED department".

[37] ASMS say allowing offsetting of "all and any other types of allowance paid in [EDs] leads to absurd outcomes". ASMS cite references in paragraph [9]b. of the facilitators' recommendation to other allowances paid in addition to the ED allowance such as "a rural allowance or city weighting allowance" and in Appendix 1 of the facilitators' recommendation, as quoted at paragraph [18] above, to "any other allowance implemented through the SMO Remuneration Project".

[38] ASMS' position is summarised in its submission:

> The text of the agreement does not provide for the extinguishment of any other type of allowance negotiated individually or collectively under a different head (e.g. recruitment and retention, availability etc.) The extinguishment of other types of allowance would require explicit and clear language). [sic]

[39] HNZ say:

> … the 20% ED allowance for working in the emergency department can be offset against any existing additional (i.e. over and above the requirements of the collective agreement) benefit or allowance which is **for working in the emergency department**. (emphasis in original)

[40] HNZ then set out the following table with what matters it considers are offsetable or not, and indicated it did not and had never taken "the position that the ED allowance would be offset against all and any other type of allowance paid in emergency departments":

Allowance	**Purpose**	**Offsetability**
Clinical leadership allowance.	Paid for the provision of clinical leadership, not for working in the emergency department.	Not offsetable.
Emergency department recruitment and retention allowance.	Paid to recruit and retain people to the emergency department.	Offsetable.
Location-based recruitment and retention allowance.	Paid to recruit and retain people to a particular region.	Not offsetable.
FACEM allowance (Fellow of the Australasian College for Emergency Medicine).	Paid to an emergency medicine SMO for working in the emergency department.	Offsetable.
Penal rates over and above those provided for in the collective agreement.	Paid to an SMO working in the emergency department in recognition of working in the ED.	Offsetable.
Rural ED allowance.	Paid to attract and retain SMOs working in the emergency department.	Offsetable
Telephone allowance.	Paid for the use of a personal phone.	Not offsetable.

[41] ASMS said in response that the above table had not been discussed, agreed to or seen by it prior to ratification. ASMS say "Of particular concern is retrospective conflating of different allowance types". It says recruitment and retention allowances

are governed by a separate clause in the collective agreement, for a different purpose to the ED shift allowance.

Analysis – What amounts should be able to be offset

[42] I consider resolution of this issue can also simply be addressed by considering the ordinary and natural meaning of the words in Appendix 1 of the facilitators' recommendation under the heading "ED shift allowance". My interpretation of this text is supported by the contextual statements in the facilitators' recommendation.

[43] In relation to the specified South Island EDs, the facilitators' recommendation clearly states "The ED allowance will be offset against **any additional payments or recognition any eligible SMO currently receives for working in the emergency department**" (emphasis added).

[44] In relation to the agreement between the parties to "work together to implement a standardised national ED allowance through the SMO Remuneration Project", the facilitators' recommendation includes twice in the recommended principles the following statement re offsetting against:

> … **[additional] pay or recognition**, including inflated FTE and unworked time FTE, this amount **shall be offset against the ED allowance and/or any other allowance implemented through the SMO Remuneration Project** which the SMO is eligible to receive". (emphasis added)

[45] The recommended principles also refer to the ED allowance being for "SMOs who work in an emergency department" and "identify[ing] differences in payments ad benefits received for working in an emergency department".

[46] I consider the ordinary and natural meaning of the facilitators' recommendation, adopted by the parties, is offsetting is only permitted for payments which are clearly for working in the emergency department.

[47] In terms of the examples provided by HNZ, I consider the following four allowances are clear and accept the treatment proposed by HNZ:

Allowance	**Offsetability**
Clinical leadership allowance.	Not offsetable.
Location-based recruitment and retention allowance.	Not offsetable.
FACEM allowance (Fellow of the Australasian College for Emergency Medicine).	Offsetable.

Allowance	Offsetability
Telephone allowance.	Not offsetable.

[48] Mr Hurring agreed at the investigation meeting that the allowances above which HNZ said were not offsetable should not be offset. His evidence focussed on the other allowances which he considered were being incorrectly claimed by HNZ to be offsetable.

[49] The other three types of allowances appear to have mixed purposes and would need to be clearly demonstrated as being **for working in the emergency department** to be offsetable. Ms Brodie referred to Waitemata as an example where she says a "recruitment and retention allowance is currently paid to all SMOs working in the [ED. HNZ] considers this to be an allowance paid for working in the [ED], and therefore, that it is offsetable". Similarly, Ms Brodie says extended penal rates paid in Waitemata "are paid for working in the [ED] and are therefore offsetable" and "rural" allowances paid at Tokoroa, Taumaranui and Thames are really "for working in the emergency department".

[50] Ms Brodie said at the investigation meeting that "[District Health Boards] before HNZ found different mechanisms to pay allowances". This was clearly the case, but I do not accept historic choices of DHBs to use different labels or mechanisms for allowances should be overridden in the absence of clear evidence of the purpose of those allowances.

[51] I consider these allowances will need to be approached on a case-by-case basis and there would need to be clear evidence of the allowance being paid **for working in the emergency department** rather than for recruitment and retention purposes, due to the hours worked in the case of penal rates, or due to a location-based payment. Absent clear evidence an allowance is primarily **for working in the emergency department** I consider these allowances should not be offsetable.

[52] While HNZ may consider this will amount to double-payment of allowances, I consider this is a situation where the mixed-labelling of existing allowances means I cannot be satisfied with a broad approach to allow all of those allowances to be offset. In reaching this view, I consider to the extent a mixed-purpose or mixed-label allowance is to be offset or extinguished, in part or in full, then this would require explicit and clear agreement. I do not consider HNZ have provided sufficient evidence to support

its assertions these allowances are paid primarily **for working in the emergency department**.

[53] Ms Brodie also referred to the FACEM allowance paid in Rotorua, which HNZ say should be offsetable but ASMS do not agree. I accept this allowance could only be obtained by a SMO who has the recognised vocational training in emergency medicine required to be a FACEM, which I further accept is only applicable in relation to work in the emergency department. There was no evidence of this being a mixed-purpose or mixed-label allowance, hence I consider it appropriate to allow for it to be offsetable.

[54] Mr Hurring provided an example of a recruitment and retention allowance for the West Coast, which he says "was not offsetable as it was negotiated for and contractually agreed for a different purpose". I agree, so long as that allowance was clearly for recruitment and retention reasons and not **for working in the emergency department**. I understand based on Mr Prior's evidence that HNZ's position is the same, so long as that allowance is a location-based recruitment and retention allowance.

Outcome – What amounts should be able to be offset

[55] I find the ordinary and natural meaning of the facilitators' recommendation, adopted by the parties, is offsetting is only permitted for payments which are clearly for working in the emergency department.

[56] In terms of the specific allowances identified, I find the following:

Allowance	**Offsetability**
Clinical leadership allowance.	Not offsetable.
Emergency department recruitment and retention allowance.	Further assessment required on case-by-case basis.
Location-based recruitment and retention allowance.	Not offsetable.
FACEM allowance (Fellow of the Australasian College for Emergency Medicine).	Offsetable.
Penal rates over and above those provided for in the collective agreement.	Further assessment required on case-by-case basis.
Rural ED allowance.	Further assessment required on case-by-case basis.
Telephone allowance.	Not offsetable.

When is or was HNZ required to implement the ED shift allowance?

Has HNZ acted contrary to good faith in relation to its position on the meaning of the term "ED allowance"?

[57] I consider it appropriate to address these issues together, given submissions for ASMS said it "seeks only a declaratory determination at this stage to the effect that non-implementation by the agreed date breached the agreement".

Submissions of the parties

[58] HNZ said "Once the issues relating to offsetting have been resolved, [it] will be able to implement the ED allowance in the remaining districts and services, and notes that, as per the terms of the Recommendation, this will be paid effective from 1 September 2024." HNZ also objected to ASMS's claim that HNZ had acted contrary to good faith, as reflected in ASMS' statement of problem, by resiling from implementing the agreement to avoid obligations.

Analysis

[59] Ms Brodie's evidence included the following statements:

> [HNZ] is ready and willing to implement the ED allowance and to backdate payment to 1 September 2024. However, ASMS does not agree with the offsetting that we have proposed based on the requirements of the Recommendation. This litigation will presumably resolve the impasse, and implementation will be able to proceed.
>
> In the areas where the existing allowances are clear and offsetting is not in dispute, implementation has already occurred.

[60] I accept HNZ were ready and willing to implement the ED allowance but find there was a genuine dispute between ASMS and HNZ as to what was permitted in terms of offsetting. I do not accept this demonstrates HNZ breached its good faith obligations to ASMS. In reaching this finding, I record both ASMS and HNZ's witnesses presented evidence of honest beliefs in their respective positions. I do not consider, however, in the context of the dispute over what had been agreed that it was unreasonable or a breach of the good faith duty for HNZ to maintain its position.

[61] At the investigation meeting I asked Mr Hurring what he thought was necessary to complete the investigation which was required before the standardised national ED allowance through the SMO Remuneration Project could be implemented and what should happen where there wasn't agreement about offsetting. Mr Hurring appeared to

accept that once there was clarity about what was offsetable, then there could be negotiations over the implementation of the standardised national ED allowance.

[62] Both Ms Brodie and Mr Prior responded to questions at the investigation meeting by saying the allowance could be implemented once there was clarity about what was offsetable. Mr Prior also said a HNZ Governance Group had chosen to progress implementation on a serve by service basis, which got tied up for individuals in the dispute over what was offsetable. I consider it was regrettable some individuals may have missed out on earlier payment of an allowance due to this, where their circumstances were clear but there was dispute about the treatment of allowances for others in the same service. Ultimately HNZ have committed to backdating the payment to 1 September 2024 and I am not satisfied any delay amounts to a breach of the duty of good faith by HNZ in relation to those individuals who had delayed payment of allowances in these circumstances.

[63] Mr Hurring was clearly frustrated following the settlement of the SMDOCA and raised concerns about the slow pace of implementation of the ED allowance including failures to provide information in a timely manner, culminating in ASMS bringing this matter before the Authority. I can understand Mr Hurring's frustration, as he clearly was of the view what he thought should be implemented, could be done so quickly.

[64] Mr Hurring was also clearly frustrated that some districts at HNZ had delayed the provision of information necessary for the SMO Remuneration Project and calculation of the broader ED allowance, as provided for in Appendix 1 of the facilitators' recommendation, as quoted at paragraph [17] above. Again, I can appreciate Mr Hurring's frustration at the delay in the provision of data, which appeared to be shared by some HNZ staff. This was not however the basis of the claimed breach of HNZ's duty of good faith, which was focussed on HNZ resiling from implementing the agreement based on the facilitators' recommendation to avoid obligations. I am not satisfied any delays represent a breach of HNZ's duty of good faith.

Outcome

[65] In terms of what should come next, now the interpretation of what is required under the overall approach to the ED allowance (at paragraph [34] above) and the specific approach to offsetting (at paragraphs [55] and [56] above) has been determined,

the parties should be able to relatively quickly implement the ED allowance. HNZ have committed to backdating the payment to 1 September 2024. I consider that is an appropriate date for the ED allowance to be effective from.

[66] Some time will be needed for HNZ to confirm the calculations of ED allowances, taking into account this determination, and to discuss implementation with ASMS.

[67] Given ASMS sought only a declaratory judgment of breach of the agreement between ASMS and HNZ, I do not consider it appropriate to formally specify a timeframe for implementation of the ED allowances. Had I specified a timeframe my preliminary view is a period of 28 days would have been appropriate, absent agreement between the parties to a longer timeframe.

[68] I do not consider the declaratory breach sought by ASMS is appropriate, given my finding there was a genuine dispute between ASMS and HNZ as to what was permitted in terms of offsetting. Where the obligations under an agreement are under dispute in that way, I consider seeking to obtain clarity over what is required is appropriate and a declaration of breach would only be appropriate where the obligations were clear and not met.

[69] I further find ASMS has not established that HNZ breached its duty of good faith to ASMS in relation to the matters covered by this determination.

Orders

[70] For the above reasons no orders are made.

[71] I expect, however, HNZ will implement the ED allowance for all SMOs covered by the SMDOCA in accordance with this determination (particularly paragraphs [34], [55] and [56] above) as soon as is practicable after the date of this determination, and promptly agree a date and any arrangements necessary to do so with ASMS.

Should either party contribute to the costs of the other party?

[72] The Authority's presumption in relation to disputes about the application, interpretation or operation of a collective agreement is parties will bear their own

costs.[10] ASMS indicated through its statement of problem that it sought costs. I indicated costs may be addressed further at the investigation meeting if ASMS considered there are grounds to displace the presumption parties will bear their own costs in relation to disputes.

[73] While this matter has been determined as an employment relationship problem under s 161(r) of the Act, rather than a dispute under s 129 of the Act, I consider this is a matter where it is appropriate parties bear their own costs. No submissions were made to the contrary and accordingly costs will lie where they fall.

Shane Kinley
Member of the Employment Relations Authority

[10] Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6, bullet ii, available at: https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.