

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 60
3266599

BETWEEN MIDWIFERY EMPLOYEE
 REPRESENTATION AND
 ADVISORY SERVICE
 Applicant

AND HEALTH NEW ZEALAND -
 TE WHATU ORA
 Respondent

Member of Authority: Marija Urlich

Representatives: Simon Mitchell KC, counsel for Applicant
 Susan Hornsby-Geluk, counsel for Respondent

Investigation Meeting: On the papers

Submissions and
information received: 4 and 24 October 2024, from the Applicant
 29 August, 10 October and 11 November 2024, from the
 Respondent

Determination: 10 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Midwifery Employee Representation and Advisory Service (MERAS) applies to the Authority to enforce terms of a memorandum of understanding (2023 MoU) entered with Health New Zealand – Te Whatu Ora (HNZ-TWO) on 15 June 2023 on behalf of midwives who had left their employment by 1 April 2022.

[2] HNZ-TWO says there is a preliminary issue which must first be determined – whether this matter is fully and finally settled between the parties by way of the pay

equity claim settlement entered on 19 October 2023. This determination deals with the preliminary issue.

The Authority's investigation

[3] The parties have filed submissions and supporting affidavits within the directed timetable. The affidavits are from Jennifer Downes, TWO-HNZ's principal industrial specialist and Samuel Jones, the industrial lead for MERAS.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all information and submissions received.

Issues

[5] The issue requiring investigation and determination is whether all matters are fully and finally settled between the parties.

Background

[6] In 2017 a pay equity claim was raised by MERAS during bargaining for a multi-employer collective employment agreement (the MECA). The claim was consolidated with another similar claim and progressed with the nursing pay equity claim. During the claim process interim payments were agreed and made to covered employees including MERAS members. These interim payments were provided for in a 2021 Memorandum of Understanding (2021 MoU) and the 2023 MoU.

[7] Under the 2021 MoU MERAS members covered by the MECA on the date the new MECA was ratified received payments described in the MoU as "pay equity increase to base rates" and "pay equity lump sum payments". The parties then agreed on 8 December 2021 that a further lump sum payment would be made to MERAS members covered by the MECA at 30 November 2021.

[8] Then, under the 2023 MoU the parties agreed to a further lump sum payment to eligible MERAS members less amounts received under the 2021 MoU. A new pay rate

back dated to 4 April 2022 was also agreed. The 2023 MoU stated the payment would be made to employees whose employment agreements were varied to implement its terms and was not intended to have retrospective effect.

[9] On 12 September 2023 Mr Jones emailed the Deputy Chief People Officer of TWO-HNZ raising concerns about the application of the backpay lump sum payments provided in the 2023 MoU to former employees:

In relation to those who finished employment with Te Whatu Ora prior to 4 April 2022 but worked during the period related to the lump sum payments and qualifying service we are still not in agreement with your interpretation of the interim settlement.

Throughout the variation to the expired collective agreement and MoU it references MERAS members covered by the claim which includes these former employees of Te Whatu Ora and the DHB's and specifically refers to dates and periods of service going backwards when outlining those entitlements. In addition, there was discussion during the process about ratification including those who were previously employed because Te Whatu Ora insisted the expired Collective Agreements were varied going backwards which is reflected in the dates the amended rates applied.

...

[10] Mr Green responded on 19 September that HNZ-TWO did not agree with MERAS' view former employees were entitled to the lump sum payment and provided a detailed response. Mr Jones replied on 13 October that the parties remained in dispute and requested mediation. This is the dispute MERAS now seeks to bring before the Authority.

[11] On 19 October 2023 MERAS, NZNO and HNZ-TWO settled the midwifery pay equity claim. Clause 18C of the settlement agreement includes:

This Agreement is in full and final settlement of:

i. Any claims relating to back pay or backdating pay equity rates and/or remuneration for past work prior to the Settlement Date connected with the Midwifery Pay Equity Claim.

...

ii. All matters forming part of the proceedings filed by MERAS in the Employment Relations Authority (File Number 3204659) and any other issues or potential claims arising out of the bargaining and settlement of the pay equity claim, save only to the enforcement of this Agreement and Pay Equity Claim Settlement.

The parties' positions

[12] HNZ-TWO submits:

- (i) the parties settled the Midwifery Pay Equity Claim and the settlement included any other issues or potential claims including back pay or back dating arising out of bargaining and settlement of the pay equity claim;
- (ii) the matter is fully and finally settled between the parties and MERAS is barred from pursuing the claim;¹ and
- (iii) MERAS distinction between enforcement of the earlier MoU and the effect of the settlement is not sustainable because the context of the settlement is clear including the lump sum dispute for which there is no carve out.

[13] MERAS submits:

- (i) the matter before the Authority is one of interpretation and enforcement;
- (ii) parties to the settlement agreement are entitled to enforce such agreements and though not a s 149 record of settlement, its provisions and the Court's guidance on the meaning and application of such are useful;
- (iii) such guidance includes that "full and final" must be subject to exceptions and an absolutist approach may not be consistent with broader public policy considerations;²
- (iv) it would be premature for the Authority to find in favour of HNZ-TWO as it has not had a full and substantive opportunity to consider the proper interpretation of the two memoranda and settlement agreement;
- (v) clause 18(c)(i) of the settlement agreement does not bar the Authority from considering the provisions of the MoU to consider whether they have been implemented when properly constructed, and as they have not been, that the terms should be enforced onto HNZ-TWO; and

¹ *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129 at [39] – [40].

² *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12; *8i Corporation v Marino* [2017] NZEmpC 69 at [22].

- (vi) reading all three documents together (the settlement agreement and the two memoranda) it makes no sense to exclude eligibility of payments to those who left employment prior to 4 April 2022.

Discussion

[14] The key documents including the MoUs and the settlement agreement have been provided to the Authority and I have considered them and the arguments raised. The settlement agreement includes settlement of the parties' MECA negotiations.³ In addition, entitlements to former employees is a feature of the settlement. The settlement records agreement reached by the parties of matters in addition to the pay equity claim settlement of matters including backpay arising from the MECA negotiations settled by lump sum payments to employees employed by HNZ-TWO "...at any time during the period 1 January 2020 to 3 April 2022..."⁴

[15] Having raised a dispute with HNZ-TWO about the application of the lump sum payment in the 2023 MoU and subsequently entered a settlement agreement which settles all disputed claims for backpay, MERAS is unable to revive the dispute. There is no carve out for the disputed lump sum issue which I find is captured by the broad wording of clause 18Ci. The dispute was live between the parties when the settlement negotiations were undertaken, and the parties were represented throughout the dispute raising and settlement negotiation process.

[16] MERAS does not seek to have the whole settlement agreement set aside. It says the ability to pursue the dispute raised by Mr Jones in the 12 September email is preserved because the entitlement (pending resolution of the dispute in its favour) is preserved through the settlement agreement. That position is not sustainable given the clear evidence the dispute was live between the parties at settlement, and it follows that it must reasonably have been in their contemplation when the settlement was entered. Having done so, the dispute is compromised by that settlement which is expressed as fully and finally settling all matters between the parties arising from the pay equity claims and the MECA bargaining.

³ Midwifery Pay Equity Claim Settlement Agreement, clause 11.

⁴ Above, clause 18A.

[17] There is no jurisdictional impediment to such a settlement being entered. The Equal Pay Act 1972 does not prevent a pay equity claim settlement extending to deal with the matters addressed in clause 18 of the parties' settlement document.⁵ There is an important public interest in such mechanisms being able to be used to finally resolve matters between parties to complex disputes of this nature.

Outcome

[18] MERAS is barred from pursuing this claim and the Authority does not have jurisdiction to consider the matter further.

Costs

[19] In matters involving collective agreements and pay equity the Authority's usual approach is that parties will bear their own costs.⁶

Marija Urlich
Member of the Employment Relations Authority

⁵ Equal Pay Act 1972, s 13ZH.

⁶ Practice direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi.