

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-A-TARA ROHE**

[2026] NZERA 42  
3313201

BETWEEN            APEX INC  
                                 Applicant

AND                    SOUTHERN COMMUNITY  
                                 LABORATORIES LIMITED  
                                 Respondent

Member of Authority:    Geoff O’Sullivan

Representatives:        Andrew Little, Counsel for the Applicant  
                                 Dianna Hudson, Counsel for the Respondent

Investigation Meeting:    3 October 2025 At Wellington

Submissions and Other    Up to and including 28 October 2025  
Information Received:

Determination:            27 January 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Apex seeks compliance orders, first, requiring Southern Community Laboratories Limited (SCL) to comply with the Collective Employment Agreement (CEA) by applying the rates of pay payable under clause 4 of the Settlement Agreement and clause 5 of the CEA to members of Apex who are employees or former employees who took annual leave between 3 July 2023 and 12 April 2024, and secondly requiring SCL to pay the contractually correct salary or wages to employees whose employment terminated after the date the CEA was expressed to have come in to force (3 July 2023) but before the CEA was ratified.

[2] SCL say they have complied with all contractual provisions. They say new salaries and rates were ratified on 4 March 2023 and any backpay was paid on 12 April

2023. They say they have complied with all their obligations in that they undertook individual calculations to determine the backpay quantum for each employee which addressed the application of the new rates to annual leave taken during the backpay period by members employed as at the date of ratification.

[3] SCL says it was not required to apply backpay to employees whose employment ended between the period of 3 July 2023 and 4 March 2024. SCL says backpay for this group was not a bargaining claim nor was it agreed to in the applicable Terms of Settlement.

[4] Although Apex's claim is couched in essence as compliance orders, the issue is in reality a dispute as to the meaning of contractual terms and with agreement of Counsel this is how the matter has been dealt with.

### **The Authority's Investigation**

[5] For the Authority's investigation written witness statements and supporting documentation were lodged by Tracy Havard, the payroll manager at Awanui Group. The Awanui Group payroll officer is based in Dunedin where the payroll was processed for 2,030 waged and salaried employees on a fortnightly and monthly basis. The SCL payroll is part of this group and covers 1,149 employees. Samantha Ford, the chief people officer at Awanui Group, also gave evidence on behalf of SCL. Both parties provided oral and written submissions.

[6] On 14 August 2025, the parties had filed an agreed Statement of Facts. The pertinent agreed facts are:

- (a) The applicant Union represents or represented a number of employees employed in laboratory services in Hawkes Bay, Wellington, and the South Island.
- (b) The Respondent employer operates laboratory services and is or was the employer of employees affected by this application.
- (c) The Union and employer are parties to a collective employment agreement known as the Apex and Southern Community Laboratories Collective Agreement 1 July 2023 to 30 September 2024 (the Collective Agreement) which came into effect following ratification on 4 March 2024 of Terms of Settlement dated 26 February 2024.

- (d) The Terms of Settlement and the Collective Agreement provided for new salary and wage levels to come into force from the first full pay period beginning 3 July 2023.
- (e) The new salary and wage levels were implemented by the employer effective from 26 February 2024. Backpay was paid in a separate manual pay-run on 12 April 2024.

### **Annual Leave**

[7] Apex claims that SCL has not applied the new salary and wage levels to annual leave taken by relevant employees after 1 July 2023 and before 26 February 2024.

[8] SCL says that the application of backpay to annual leave entitlements was not raised as a claim by the Union. Backpay was applied solely to the ordinary weekly rate and not retrospectively to the average weekly earnings rate used for annual leave calculations. Annual leave payments based on average weekly earnings were calculated at the commencement of each leave period in accordance with statutory requirements.

### **Terminated Employees**

[9] The Union claims the employer has not paid backpay reflecting the new salary and wage levels payable under the Collective Agreement to employees whose employment terminated after the date the Collective Agreement was expressed to come into force (the first full pay period beginning 3 July 2023) and before the Terms of Settlement were ratified on 4 March 2024.

[10] The employer says paying backpay to employees who left their employment during the period between the date the Collective Agreement is expressed to be in force and their termination date (where the termination took effect before the ratification of the Terms of Settlement) was not raised as a claim by the Union and that the bargaining notice states the intended coverage for the Collective Agreement is “*All workers who are employed or engaged to be employed ...*” and further that the situation in respect of terminated employees is not addressed in legislation, the Collective Agreement or in the Terms of Settlement.

[11] The employer says it is customary practice that backpay has never been paid to terminated employees unless it was an agreed term of settlement.

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

### **The issues**

[13] Apex seeks determinations from the Authority that:

- (a) The employees of SCL who took annual leave between 3 July 2023 (the date the new rates took effect) and 4 March 2024 (the date the Agreement was ratified) are entitled to have the pay they received as pay for that annual leave recalculated on the basis of the new pay rates (the rates ratified on 4 March 2024); and
- (b) Employees of the SCL whose employment terminated after the date the new pay rates took effect (3 July 2023) and before the Terms of Settlement were ratified (4 March 2024) are entitled to backpay for the period of their employment falling between those dates.

[14] SCL takes the position that it has complied with its obligations and that the individual calculations undertaken to determine the backpay quantum for each employee addressed the application of the new rates to annual leave taken during the backpay period by members employed as at the date of ratification.

[15] SCL says it was not required to apply the backpay to employees terminated for whatever reason between the period 3 July 2023 and 4 March 2024. They say this was not part of the bargaining claim put forward by Apex, and nor was it agreed to in the applicable Terms of Settlement.

### **The Collective Employment Agreement (CEA)**

[16] The CEA covering the period 1 July 2023 to 30 September 2024 came into force on 1 July 2023. Clause 1.2 of the CEA provided that the CEA applied to:

“All employees who are employed or engaged to be employed to supervise or perform pathology tests and/or associated duties in the laboratory service including information technology ...”.

[17] Clause 42 provided that the Agreement shall be deemed to have come into force on 1 July 2023 and continue in force until 30 September 2024.

[18] The salary and wage rates were ratified by Apex members on 4 March 2024. The new rates were stated as effective 3 July 2023 being the nearest pay period to the CEA commencement date of 1 July 2023.

## **Analysis**

### *Employees Who Took Annual Leave Between 3 July 2023 and 4 March 2024*

[19] Apex's claim in this regard was clarified during the investigation meeting. In its Statement of Problem, Apex was alleging there had been a failure by SCL to comply with its obligations under the CEA and the associated Terms of Settlement in relation to the calculation of holiday pay in accordance with the Holidays Act 2003. However following the filing of the Statement in Reply and evidence from Ms Havard, it became clear that Apex's concern in this regard was that it could not understand how SCL had calculated pay owing and accordingly could not be satisfied that SCL's calculations of holiday pay were correct.

[20] The position became clearer following Ms Havard's filing of a further written statement dated 26 September 2025, including a detailed analysis of spreadsheets used to support the calculations. Ms Harvard spoke to her evidence and Apex's counsel had the opportunity to question her on the basis for the calculations.

[21] SCL's position was that it had complied with its obligations and that the individual calculations it now presented had determined the backpay quantum for each employee addressing the application of the new rates to annual leave taken during the backpay period by members employed at the date of ratification.

[22] Ms Havard's evidence confirmed that all annual leave taken by employees in the period 3 July 2023 to 4 March 2024 was calculated correctly and calculated on earnings at the time that the leave was taken. All sums owing were paid in a lump sum as backpay on 12 April 2024. Section 21 of the Holidays Act 2003 provides for the calculation of annual holiday pay.

[23] Ms Havard's evidence which I accept shows that the calculations were made pursuant to the provisions of s 21(b)(i) and (ii) of the Holidays Act. Once counsel for Apex had had the opportunity to question Ms Havard as to her method of calculation, it became apparent that there was no evidence to show that the calculations were incorrect. On the contrary, the evidence given in that regard was that SCL had spent a

considerable time in ensuring the calculations were robust. It is worth noting other points made by SCL regarding this question.

[24] The calculation method used by SCL in this case was identical to the method previously used in bargaining with Apex and had never been called into question. Further, the payroll system used by SCL is an internationally recognised system, Pay Global. Although because of the time that had passed it was not possible for the system to recalculate annual leave payments on the basis sought by Apex, a manual exercise was undertaken in respect of two employees and there was no evidence that the calculations relied on to calculate earnings at the time the leave was taken, were anything other than accurate.

[25] In its Statement of Problem, Apex alleges SCL was required to pay backpay (the contractual correct salary or wages) to employees whose employment terminated after the date the CEA was expressed to come into force and before the Terms of Settlement provided with the new terms of the Collective Agreement were ratified by members of the Applicant. To the extent that it needed to be, this claim was clarified during the investigation meeting to be a claim that SCL failed to pay contractually correct salary or wages to employees whose employment was terminated and were not employed at the time the CEA was agreed to. Apex's position was that these employees should have the benefit of the backdating clause in the CEA, whereas SCL's position was that as those employees were not employed at the time the CEA was agreed to, any backdating clause could not apply to them.

[26] Apex submits that the right of a former employee to backpay for the circumstances of this case, arises by operation of law, namely s 52 of the Act and s 4 of the Wages Protection Act 1983. Apex submitted that the recovery of partially unpaid wages in this type of situation, is contemplated by s 131(1) of the Act and applies regardless of any agreement expressed or implied. Both parties referred me to *NZ Amalgamated Engineering, Printing and Manufacturing Union and George Marks v Assa Abloy New Zealand Limited*<sup>1</sup>. In that case the Collective Agreement contained a provision at clause 4 stating:

“This agreement should come into force on the 1<sup>st</sup> of July 2004...”.

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<sup>1</sup> WA 178/05. 21 November 2005.

The Collective Agreement also provided for a wage increase. Mr Marks was employed by the respondent in that case on or behalf and after 1 July 2004 but was made redundant on 31 October 2004 before the Collective Agreement was concluded but after it came into force. The Authority found that the plain words of the Collective Agreement were that the new Collective Agreement would come into force on 1 July 2004 and that wages and allowances were to be increased by the agreed percentage (3.75%) from that date. It found, workers in Mr Mark's position should be able to enforce the new wage provisions even though they had since left Assa Abloy's employment.

[27] The contrary argument posed by SCL, is that in this case the issue is when did the CEA come into force. Further, SCL says the implication of backpay to employees whose employment was terminated between 3 July 2023 and 4 March 2024 was not addressed as a claim during bargaining and was not addressed in the Terms of Settlement. It notes that the bargaining notice shows that intended coverage is for "all employees who are members of the Union and are employed or engaged to be employed...". Both parties agreed that the CEA came into effect following ratification on 4 March 2024 following Terms of Settlement dated 26 February 2024.

[28] The coverage clause in the agreement provides:

#### **1.0 COVERAGE**

- 1.1. The parties agree that any new employee, whose work is covered by this agreement and who is engaged by the employer between the date this collective agreement is signed and the expiry date shall be offered in writing the opportunity for this Collective Agreement to apply to them...and further;
- 1.2. This Collective Agreement shall apply to all employees who are employed or engaged to be employed to supervise or perform pathology tests and/or associated duties in the laboratory service including information technology....

[29] If the CEA was to be treated as commencing on 1 July 2023 in all respects, there would have been no need for the reference in 1.1 above to the date the CEA was signed.

[30] Further, it would be stretching the interpretation of clause 1.2 to say that employees who were not employed at the date of the signing of the agreement were deemed to be employees with all the normal rights and obligations which would attach to an employee, without that employee's express consent.

[31] Employees whose employment had terminated prior to the signing of the CEA could be viewed as “strangers” to the agreement. They have no privity of contract.

[32] Section 56 of the Act provides that a Collective Agreement is only enforceable by employees who are employed by an employer that is a party to the Agreement, and who are members of a Union that is party to the Agreement. Those employees whose employment ended prior to the signing of the Agreement were not employed at the time the new CEA was agreed to and could not be entitled to the benefit of any entitlements in the new CEA. No ex-employees gave evidence before the Authority, accordingly there is no evidence as to what or how they viewed the new CEA. It is also unlikely that they remained members of the Union after their employment terminated, although there is no evidence either way in that regard. To include an ex-employee in a back dated CEA would, in light of the provisions of S56, require at least an express provision.

[33] I have considered the Authority’s decision in *Tim Snow and Others v Fonterra Cooperative Group Limited*<sup>2</sup>. In that case, the applicants were employed by Fonterra as maintenance trade persons at its Edendale facility. They sought a determination that superannuation provisions in the Collective Employment Agreement that covered their work, had retrospective effect following a backdating of the Collective Agreement. The Authority approached the matter by considering whether it was the intention of the parties that the superannuation benefit under the Collective Employment Agreement would be backdated and further, whether the superannuation benefit was capable of being fulfilled retrospectively. The Authority found that there was no explicit provision in the Terms of Settlement that the superannuation benefit was to operate at an earlier date. The Authority ultimately found that the parties did not intend the superannuation benefit in that case to apply retrospectively. It also found it was not capable of being fulfilled retrospectively.

[34] In this case before me, Apex’s bargaining claims contain no reference to an implementation date for the claimed rate increase nor any reference to backdating or who such backdating might apply to. The plain meaning of the CEA indicates the parties agreed that the new rates would apply from 3 July 2023 to those employees under the coverage of the Bargaining Notice. Further, there was a specific agreement

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<sup>2</sup> ERA Christchurch CA111/07, 12 September 2007

that a pro rata lump sum payment would be made to employees who were party to the Collective Agreement as at 13 February 2024 and had not resigned from their employment before 1 July 2024.

[35] SCL's evidence was that backpay was not, and had never been, paid to employees who had left employment during the period of negotiations and prior to ratification. It appears not to have been an issue in the past. I find that SCL specifically did not intend to agree there would be backpay made to employees no longer employed at the time of ratification. Further, there is no express provision including such ex-employees and nor was the issue covered in bargaining claims submitted by Apex.

[36] Apex Inc has not made out its claims and accordingly no orders are made.

### **Costs**

[37] In reality this matter is a dispute as to the meaning of contractual terms, the Authority's practice direction on costs would suggest that this is a matter where costs lie where they fall. Accordingly, no order as to costs is made.

Geoff O'Sullivan  
Member of the Employment Relations Authority