IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 3
WRC 17/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ASSOCIATION OF PROFESSIONAL AND EXECUTIVE EMPLOYEES INCORPORATED Plaintiff
AND	THE NEW ZEALAND DISTRICT HEALTH BOARDS (listed in the attached schedule) Defendants

Hearing: 3 November 2011
(Heard at Wellington)

Appearances: Bill Manning, counsel for the plaintiff
Peter Chemis and Amy de Joux, counsel for the defendants

Judgment: 25 January 2013

JUDGMENT OF JUDGE A A COUCH

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[1] When there is a strike or lockout in the health sector, it is vital that patient safety not be compromised. The Employment Relations Act 2000 (the Act) makes provision for that in the code of good faith for public health sector which is Schedule 1B to the Act (the Code). This case concerns the meaning and operation of parts of the Code designed to ensure that life preserving services are available during industrial action.

[2] The broad scheme of the Code is that, when notice of industrial action is given, the employers and unions involved must negotiate arrangements for the provision of life preserving services. If they are unable to agree, an adjudicator has

power to make a binding determination. This case focuses on the extent of the adjudicator's jurisdiction.

[3] The dispute was investigated by the Employment Relations Authority (the Authority). In its determination[1] the Authority accepted the narrower view advanced by the defendants. It did so, however, expressing concern that this result would mean that disputes about the provision of life preserving services, which might best be resolved promptly by a medical expert, would have to be referred to the Authority.

[4] The plaintiff challenged the whole of the Authority's determination and the matter proceeded before the Court in a hearing de novo. Evidence was given by witnesses for both the plaintiff and the defendants but this was not controversial and the witnesses were not cross examined. The purpose of their evidence was to provide context for the submissions and, in particular, to identify the practical issues created by the provisions of the Code in question. The parties also provided a comprehensive set of documents showing the history of dealings between the parties about the provision of life preserving services and how the practical difficulties had arisen and been dealt with.

Legislation

[5] The Code was inserted into the Act in December 2004. It provides a code of conduct for virtually all parties to employment relationships in the public health sector and augments the duties that all employers, employees and unions have under the Act. Section 100D(2)(b) of the Act provides specifically that the Code does not limit the general duty of good faith in the Act.

[6] Clause 2 sets out the purpose of the Code:

> **2 Purpose**
>
> The purpose of this code is—
>
> (a) to promote productive employment relationships in the public health sector:
>
> (b) to require the parties to make or continue a commitment—

[1] [2011] NZERA Wellington 86.

(i) to develop, maintain, and provide high quality public health services; and

(ii) to the safety of patients; and

(iii) to engage constructively and participate fully and effectively in all aspects of their employment relationships:

(c) to recognise the importance of—

(i) collective arrangements; and

(ii) the role of unions in the public health sector.

[7] Clause 3 provides definitions including:

life preserving services means—

(a) crisis intervention for the preservation of life:

(b) care required for therapeutic services without which life would be jeopardised:

(c) urgent diagnostic procedures required to obtain information on potentially life-threatening conditions:

(d) crisis intervention for the prevention of permanent disability:

(e) care required for therapeutic services without which permanent disability would occur:

(f) urgent diagnostic procedures required to obtain information on conditions that could potentially lead to permanent disability

[8] Clause 4 lays out further general requirements which include the requirement for the parties to "engage constructively" and "participate fully and effectively" in the employment relationship: cl 4(1). Parties must also "create and maintain open, effective, and clear lines of communication": cl 4(2)(b). Importantly, the parties must "use their best endeavours to resolve, in a constructive manner, any differences between them": cl 4(4). Clause 5 requires that every employer must be a good employer.

[9] Clauses 11 to 13 of the Code are at the heart of this case:

Patient safety

11 General obligation for employers to provide for patient safety during industrial action

During industrial action, employers must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability.

12 Contingency plans

(1) As soon as notice of industrial action is received or given, an employer must develop (if it has not already done so) a contingency plan and take all reasonable and practicable steps to ensure that it can provide life preserving services if industrial action occurs.

(2) If an employer believes that it cannot arrange to deliver any life preserving service during industrial action without the assistance of members of the union, the employer must make a request to the union seeking the union's and its members' agreement to maintain or to assist in maintaining life preserving services.

(3) The request must include specific details about—

(a) the life preserving service the employer seeks assistance to maintain; and

(b) the employer's contingency plan relating to that life preserving service; and

(c) the support it requires from union members.

(4) A request must be made by the close of the day after the date of the notice of industrial action.

(5) As soon as practicable after the employer has made a request but not later than 4 days after the date of the notice of industrial action, the parties must meet and negotiate in good faith and make every reasonable effort to agree on—

(a) the extent of the life preserving service necessary to provide for patient safety during the industrial action; and

(b) the number of staff necessary to enable the employer to provide that life preserving service; and

(c) a protocol for the management of emergencies which require additional life preserving services.

(6) An agreement reached between the parties must be recorded in writing.

13 Adjudication

(1) If the parties cannot reach agreement under clause 12(5) they must, within 5 days after the date of the notice of industrial action, refer the matter for adjudication by a clinical expert or other suitable person as agreed under clause 8.

(2) The adjudicator must conduct the adjudication in a manner he or she considers appropriate and must—

(a) receive and consider representations from the parties; and

(b) in consultation with the parties, seek expert advice if the adjudicator considers that it is necessary to do so; and

(c) attempt to resolve any differences between the parties to enable them to reach agreement and, if that is not possible, make a determination binding on the parties; and

(d) provide a determination to the parties as soon as possible but not later than 7 days after the date of notice of industrial action.

(3) The parties must use their best endeavours to give effect to the determination.

(4) The parties must bear their own costs in relation to an adjudication.

[10] The scheme of this part of the Code is clear. Sections 90 and 91 and Schedule 1, Part A of the Act require that 14 days' notice be given of any strike or lockout in a hospital care institution or any necessary supporting service. Clauses 12 and 13 of the Code set out short and specific time frames for the agreement or determination of the terms on which employees affected by the proposed industrial action will be involved in providing life preserving services. This timetable, as it operates in relation to a strike, was conveniently summarised by Mr Chemis in his submissions:

Day 1	Union issues notice of industrial action.
Day 2	If the DHB believes it cannot arrange to deliver any life preserving services without union assistance it must make a request to the union seeking the union's and its members' agreement to maintain or to assist in maintaining life preserving services.
Days 3 to 5	The parties must meet and negotiate in good faith and make every reasonable effort to agree on the three matters set out In clause 12(5)(a)-(c).
Day 6	If the parties cannot reach agreement under clause 12(5) they must refer the matter to adjudication.
Day 7 to 8	The adjudicator must attempt to resolve any differences between the parties to enable them to reach agreement. If that is not possible the adjudicator must make a determination as soon as possible *"but not later than 7 days after the date of notice of industrial action".*
Day 15	Strike.

[11] The effect of this timetable is that the parties have at least 7 days prior to the start of industrial action to put in place specific arrangements for affected employees to participate in providing life preserving services.

Issue

[12] The issue in this case is the scope of the jurisdiction which the adjudicator has under cl 13 to make a determination. The defendants say that jurisdiction is limited to the three issues described in cl 12(5). The plaintiff says that, in addition to

determining those issues, the adjudicator may also determine any other issue which is "reasonably ancillary" to any or all of those issues.

[13] There was evidence about issues which have arisen in the course of strikes involving the plaintiff, its members and some of the defendants. Typically, a life preserving services agreement will provide that members of particular occupational groups of striking employees will be available to work in a life threatening situation when requested by the employer. This is said to have given rise to three specific issues:

(a) Who is to decide whether a particular patient requires "life preserving services". This is described as the "gatekeeper" issue.

(b) How the requirement to provide life preserving services is to be communicated to the employee required to work. This is described as the "conduit" issue.

(c) How striking employees are to be paid for providing life preserving services and/or being on call to perform such work.

[14] It was common ground that these three issues fell outside the scope of the specific issues set out in cl 12(5)(a) to (c). The plaintiff says that, on a proper construction of the legislation, they are issues which an adjudicator can determine under cl 13(2). The defendants say that the adjudicator's jurisdiction is limited to the three issues in cl 12(5) and, if these issues cannot be agreed, they can only be determined by the Authority.

Principles of Interpretation

[15] The decision in this case is a matter of statutory interpretation. The fundamental principles to be applied in that process are those in s 5 of the Interpretation Act 1999:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[16] How those basic principles should be applied was discussed in *Commerce Commission v Fonterra Co-operative Group Ltd*[2] where Tipping J said:

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[17] What Tipping J went on to say in the *Fonterra* case is also helpful:

> [24] Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

[18] Consistent with that approach, I also have regard to what the full Court said in *Vice-Chancellor of Massey University v Wrigley*:[3]

> [44] We also recognise that our role in this case is not to focus narrowly on the meaning of particular words but rather to give practical effect to the legislation in accordance with both the words used and the purpose of the legislation.

Discussion

[19] Both Mr Manning and Mr Chemis provided me with comprehensive and thoughtful written submissions in support of the parties' positions. I read them in full. As the hearing progressed and I was able to discuss those submissions with counsel, however, the key points became clear and sensible concessions were made. Rather than summarise how the case for each party was initially presented, therefore, I focus on the elements of the matter which have led me to my decision.

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[2] [2007] NZSC 36, [2007] 3 NZLR 767.
[3] [2011] NZEmpC 37.

[20] The broad scheme of cl 12 and 13 is clear and sensible. Once an employer decides that it requires assistance from potentially striking employees to maintain patient safety, it must make a request to the union for that assistance: cl 12(2). That request must include the information specified in cl 12(3). The request containing that information then forms the basis for negotiation. The negotiation must be in good faith and the parties must make every reasonable effort to agree on the three issues set out in cl 12(5). If the parties cannot agree in terms of clause 12(5), the matter must be referred to an adjudicator whose role is to assist the parties to resolve their differences and, if that cannot be achieved, to make a binding determination.

[21] What is not clear and consistent is the detail of this process. The scope of the information the employer must provide under cl 12(3) is wider than that required to reach agreement on the issues specified in cl 12(5). For example, cl 12(3)(b) requires the employer to provide specific details of its contingency plan. Those words suggest that the employer must provide the whole contingency plan. If the contingency plan is to be effective, it will inevitably deal with issues other than the extent of life preserving services necessary to provide for patient safety and the number of staff required. For example, it will need to specify the nature of life preserving services required and where they will be delivered. It will also need to provide a mechanism for deciding when life preserving services are required and how they are to be delivered.

[22] As the negotiations under cl 12(5) are to be informed by the details provided under cl 12(3) and that includes the contingency plan as a whole, it follows that the scope of negotiations required by cl 12(5) will be broader than the three specific issues described in (a) to (c) of that subclause.

[23] If agreement under cl 12(5) cannot be reached, the parties must refer "the matter" to the adjudicator. The expression "the matter" is vague and does not directly reflect the language of cl 12. As a matter of common sense, it must be limited to aspects of the negotiation on which the parties could not agree and this is reflected in the reference in cl 13(2)(c) to "differences between the parties". What is entirely unclear, however, is whether "the matter" includes all aspects of the negotiation under cl 12(5) or only those specified in paragraphs (a) to (c).

[24] Such uncertainty in a statute is unsatisfactory but it may be explicable in this case by the legislative history. This was described by the full Court in *Service & Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board*:[4]

> [35] To ascertain Parliament's intention, we have examined the relevant legislative history materials. There are fewer in respect of Schedule 1B than is usual. That is because it appears that the schedule was conceived only after the first reading of the Bill and its referral to the Select Committee. We were told by counsel, including counsel involved closely in the legislative process, that the schedule was drafted in haste and the first reference to it was in the majority report of the Committee to the House. At pages 16 and following of the report of the Transport and Industrial Relations Committee, the majority recorded the concern of some submitters that a new code of good faith for the public health sector would undermine the then existing code for this sector developed by the New Zealand Council of Trade Unions ("NZCTU") and district health boards collectively. The report noted:
>
> The majority considers that this code of good faith reflects the good faith objectives of this bill as the intent of this clause as introduced was to help reduce uncertainty over employers' obligations. The majority supports the inclusion of the code of good faith for the public health sector in the bill to reinforce the existing agreement between the New Zealand Council of Trade Unions and District Health Boards New Zealand in the public health sector.
>
> The majority recommends an amendment to Schedule 1, inserting new [Schedule 1B] to the principal Act, which outlines a code of good faith for the public health sector based on the code agreed between the New Zealand Council of Trade Unions and District Health Boards New Zealand….
>
> [36] This tends to indicate an intention by the Select Committee to adopt, or at least follow closely, the then existing informal code.

[25] Given this uncertainty of meaning, I take the approach described by Tipping J in the second quotation from the *Fonterra* case set out above. The essential guides to meaning must be purpose and context.

[26] The immediate purpose of clauses 11 to 13 of the Code is to maintain patient safety during industrial action in the public health sector. Clause 11 expressly says so and these three clauses appear under the heading "patient safety". Pursuant to clause 11, sole responsibility for maintaining patient safety rests with the employer.

[27] By its very nature, patient safety is of critical importance and cannot be compromised to meet other objectives. It follows that the provisions of the Code designed to assist employers in providing life preserving services during industrial

[4] [2007] ERNZ 553.

action should be interpreted in a manner which allows patient safety to be maintained. That requires an effective contingency plan. It is the employer's responsibility to produce and implement that plan but, to the extent that the employer needs the assistance of potentially striking employees, the Code must be interpreted in a manner which enables a fully effective contingency plan to be put in place.

[28] Achieving that object undoubtedly requires more than ensuring there is agreement or a determination of the three specific issues set out in cl 12(5)(a) to (c). Examples include the two issues mentioned earlier. In addition to the number of staff necessary to enable the employer to provide life preserving services, it must also be decided what services those staff are to provide. Similarly, the extent of life preserving services necessary to provide for patient safety must include the nature of those services.

[29] Another critical issue is whether employees called on to provide life preserving services will do so without question and leave any disputes about the validity of the request until later. This was described as a "work first, question later" arrangement. The defendants' initial position was that this was outside the scope of both negotiations under cl 12(5) and the adjudication provided for in cl 13. In the course of argument, however, Mr Chemis agreed that the parties must be able to negotiate such an agreement and the adjudicator must have jurisdiction to decide it if the parties could not agree. That concession was very properly made as, without agreement on that issue, the effectiveness of any contingency plan could be seriously compromised.

[30] In addition to the primary purpose of this part of the Code to ensure patient safety, I must also have regard to cl 2 which sets out the purpose of the Code as a whole[5] and to s 3 of the Act which sets out the overall object of the legislation:

> **3 Object of this Act**
>
> The object of this Act is—
>
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—

[5] Reproduced above at [6].

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and

(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and

(iii) by promoting collective bargaining; and

(iv) by protecting the integrity of individual choice; and

(v) by promoting mediation as the primary problem-solving mechanism; and

(vi) by reducing the need for judicial intervention

…

[31] Mr Manning laid emphasis on these wider objects. In particular, he submitted that the part of the Code in issue should be interpreted in a way which achieves its primary purpose of patient safety "without destabilising any more than necessary the balance between the competing interests of the DHBs on the one hand, and of workers in the public sector and their unions on the other". I agree.

[32] An important aspect of that moderation must be that the adjudicator should have no more jurisdiction than is strictly necessary to ensure an effective contingency plan can be put in place by the employer. That principle is well illustrated by the issue of payment for life preserving services provided by otherwise striking employees. It is not necessary to decide how and when such employees are paid in order to provide those services. Such issues can and should be negotiated in collective bargaining and, as the Authority observed, any dispute in a particular case can be resolved by a claim for arrears of wages.

[33] Equally, such matters can be the subject of general agreement between the parties likely to be involved in any industrial action. That is what has happened between the parties in this case. Several issues related to the provision of life preserving services were agreed in the bargaining process agreement which applied to the negotiations generally. Very responsibly, the parties recognised that industrial action might be taken and that employees may be asked to provide life preserving services pursuant to the Code. In anticipation of that possibility, they agreed on a number of issues such as the identity of a clinical expert to act as adjudicator under

cl 13 of the Code and a mechanism for quickly deciding disputes about the provision of life preserving services without any delay in the provision of those services.

[34] While the parties are to be commended for including such provisions in their bargaining process agreement, the patient safety provisions of the Code must be given a meaning which enables an effective contingency plan to be put in place even in the absence of such prior agreement. To achieve that end, the scope of negotiations under cl 12(5) and the jurisdiction of the adjudicator under cl 13 must be wide enough to permit the parties to agree, or the adjudicator to determine, all issues relating to the provision of life preserving services necessary to make the employer's contingency plan effective. But the interpretation of those provisions should be no wider than is strictly required for that purpose.

[35] Thus, I find that the proper interpretation of the patient safety provisions of the Code is:

(a) the parties may negotiate under cl 12(5) any issues directly related to the proposed contingency plan detailed by the employer under cl 12(3); and

(b) the jurisdiction of the adjudicator under cl 13 to determine matters not agreed by the parties under cl 12(5) extends to any issue strictly necessary to ensure the effective operation of the employer's contingency plan but no further.

[36] Applying that approach to the particular issues used as examples in this case, I conclude that the gatekeeper and conduit issues would be within the adjudicator's jurisdiction to the extent that they were necessary for the effective operation of the contingency plan. Equally, the adjudicator would be able to determine the nature of life preserving services to be provided and the particular type of skilled personnel required to provide them. If the parties did not agree on a work first/question later arrangement, it would be within the adjudicator's jurisdiction to impose one. On the other hand, issues relating to payment and any other issues which did not directly affect patient safety or which were raised only as a matter of preference or convenience would not be within the adjudicator's jurisdiction.

Comment

[37] In reaching the conclusions set out above, I have not discussed the content of cl 12(5)(c). The parties were agreed, and I accept, that the use of the word "emergencies" confines its scope to totally unpredictable, major events. By their very nature, it is difficult to plan in detail for such events and impossible to predict with any accuracy the extent to which life preserving services may be required. While the parties are required by the Code to make provision for such events, it may well be that it is simply an agreement to suspend industrial action during the emergency.

[38] By operation of s 183(2) of the Act, the determination of the Authority is set aside and this decision stands in its place.

Costs

[39] Costs were not sought by any party, either in the pleadings or in counsel's submissions. That is appropriate. The case was brought before the Authority and the Court in a genuine effort to obtain a greater degree of certainty which would benefit all concerned. There will be no order for costs.

A A Couch
Judge

Signed at 11.15 am on 25 January 2013.

Schedule of defendants

Northland District Health Board

Waitemata District Health Board

Auckland District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Tairawhiti District Health Board

Taranaki District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Capital and Coast District Health Board

Hurt Valley District Health Board

Wairarapa District Health Board

Nelson Marlborough District Health Board

West Coast District Health Board

Canterbury District Health Board

South Canterbury District Health Board

Southern District Health Board