**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2018] NZEmpC 47**
**EMPC 117/2016**

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| IN THE MATTER OF | a rehearing of part of a challenge to a determination of the Employment Relations Authority |
| BETWEEN | NEW ZEALAND NURSES ORGANISATION<br>Plaintiff |
| AND | WAIKATO DISTRICT HEALTH BOARD<br>Defendant |
| AND | CENTRAL REGIONS TECHNICAL ADVISORY SERVICES LIMITED<br>Intervener |

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| Hearing: | 13 February 2018<br>(Heard at Auckland) |
| Court: | Judge B A Corkill<br>Judge J C Holden<br>Judge M E Perkins |
| Appearances: | R Harrison QC and J Lawrie, counsel for plaintiff<br>P David QC and A Russell, counsel for defendant<br>B Scotland, counsel for intervener |
| Judgment: | 15 May 2018 |

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**JUDGMENT OF THE FULL COURT**

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[1] This judgment resolves a non-de novo challenge of an Employment Relations Authority (the Authority) determination, concerning eligibility for a retiring gratuity.[1]

[1] *New Zealand Nurses Organisation v Waikato District Health Board* [2015] NZERA Auckland 18.

[2] At issue is the interpretation of a grandparented clause in the District Health Boards/New Zealand Nurses Organisation Nursing and Midwifery Multi-Employer Collective Agreement, 1 March 2012 to 28 February 2015 (the MECA). This clause applies to the Waikato District Health Board (WDHB), the defendant in these proceedings, and to employees covered by the MECA who are members of the New Zealand Nurses Organisation (NZNO). It does not apply to people who were employed by WDHB after 30 June 1992 (the cut-off date). It provides that WDHB "may pay a retiring gratuity to staff retiring from the organisation who have had not less than 10 years' service with the employer…".

[3] The Authority found that "retiring" as used in the MECA, means there is "an end, to (and, that is a withdrawal from) the occupation that the employee was engaged in during their service to WDHB".

[4] NZNO challenges that interpretation. It seeks declarations that

(a) Ms Panettiere, who was the employee who challenged WDHB's interpretation of the retiring gratuity provision, "retired from the organisation" within the meaning of that provision, and

(b) the words "may pay a retiring gratuity to staff retiring from the organisation", are applicable to circumstances where the employee in question has, on termination of employment with WDHB, the requisite qualifying years of service in terms of the retiring gratuity provision.

[5] WDHB supports the interpretation of the Authority.

[6] The intervener, Central Regions Technical Advisory Services Ltd (CRTAS), provides shared workforce and employment relations services to New Zealand's 20 District Health Boards, including WDHB. It negotiated the MECA that is the subject of these proceedings. The MECA includes other grandparented clauses providing for retirement gratuities with respect to other District Health Boards (DHBs). CRTAS sought intervener status on that basis. NZNO and WDHB agreed

to the intervention on conditions so that CRTAS could file legal submissions relevant to the representation of the interests of other DHBs that are bound by similar clauses in collective agreements to which those other DHBs are parties.

[7] CRTAS supports the position being advanced by WDHB.

## History of the proceedings

[8] The original applicants in the Authority were the NZNO and Ms Panettiere, who was employed by WDHB as a midwife before she left to work on contract as a lead midwife carer. WDHB said, in those circumstances, Ms Panettiere was not entitled to be considered for a retiring gratuity because she did not cease to work as a midwife, but simply chose to continue her career in private practice. WDHB also said Ms Panettiere lacked the requisite service as her employment had not been continuous and further because she was not an employee of WDHB on the cut-off date.[2]

[9] The Authority found that Ms Panettiere, who had worked for WDHB (or another qualifying entity) for more than ten years in total but with a break in service, met the service requirement. However, the Authority found that she did not qualify for a gratuity because she had not retired as she had not "withdrawn" from her occupation and profession.[3]

[10] In this Court, NZNO and Ms Panettiere challenged the Authority's finding that Ms Panettiere had not retired from WDHB; WDHB cross-challenged the finding that Ms Panettiere had the requisite service.

[11] The case was originally heard by Judge Ford, who found that Ms Panettiere did not qualify for consideration for the retiring gratuity because she was not employed by WDHB on the cut-off date.[4]

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2 Ms Panettiere's breaks in service included between July 1990 and August 1992, so that she was not employed by WDHB on the cut-off date.

3 At [39], [46].

4 *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 50 at [48].

[12] Judge Ford formally dismissed the challenge brought by NZNO and Ms Panettiere, reasoning that, having upheld the WDHB cross-challenge:[5]

> …I do not find it necessary to go on to consider whether Ms Panettiere's voluntary resignation in 2012 amounted to a 'retirement' within the meaning of the retirement gratuity contained in Appendix 2(a) of the MECA.

[13] While that judgment resolved Ms Panettiere's position, NZNO applied for recall and/or a rehearing of its separate challenge, arguing that it was entitled to a ruling on the matters of interpretation raised. A rehearing was granted by former Chief Judge Colgan in his judgment dated 12 July 2016.[6] WDHB appealed that decision to the Court of Appeal but was unsuccessful.[7]

[14] This rehearing of NZNO's challenge proceeds on the basis of the evidence heard by Judge Ford and the further submissions from the parties and intervener.[8]

[15] The clause in the MECA provides that WDHB "*may* pay a gratuity to staff retiring from the organisation…" (emphasis added). There is accordingly a potential issue about the parameters of WDHB's discretion to pay (or not pay) a retiring gratuity to staff retiring from WDHB with the requisite service, but that matter is not under consideration in the present case. That is because the parties agreed in the Authority that, if Ms Panettiere succeeded, WDHB would pay her the amount of the retiring gratuity calculated according to the MECA.[9]

[16] Because of the importance of the issue, Chief Judge Inglis directed that it be considered by a full Court. It was originally intended that it be heard together with another claim removed from the Authority, *Mathews v Bay of Plenty District Health Board*.[10] However, counsel in the latter case then informed the Court that procedural

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5 At [49].

6 *NZ Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 89.

7 *Waikato District Health Board v NZ Nurses Organisation* [2017] NZCA 247, (2017) 14 NZELR 386.

8 The evidence of Professor Susan St John, which had been heard in the original proceeding, was challenged by WDHB but was admitted using the wide powers of admissibility that the Court has, but with the Court being clear that weight would be an issue for the Court.

9 Less PAYE, if any, together with interest at 5 per cent running from the date of Ms Panettiere's resignation.

10 *Bay of Plenty District Health Board v Mathews* [2017] NZERA Auckland 185.

difficulties had arisen so that it was no longer feasible for the two proceedings to be heard together; they are accordingly proceeding separately.

## The MECA provisions

[17] As noted, the provision under consideration is a grandparented provision. Clause 40.0 of the MECA provides that:

> Retiring Gratuities are available to employees who are retiring from DHBs where those provisions existed in Collective Agreements which were in place prior to 1 July 2004. Those DHB-specific provisions are attached as Appendix [2(a)] to this MECA.[11] All cut off and implementation dates expressed in those DHB-specific provisions will continue to apply in each DHB.

[18] Appendix 2(a) then includes clauses arising from 13 previous collective agreements that had provisions relating to retiring gratuities, and notes there is no such clause with respect to a further six collective agreements.

[19] The provision which is specific to WDHB relevantly reads:

> **RETIRING GRATUITIES**
>
> NOTE: This clause shall not apply to employees employed after 30 June 1992.
>
> (1) The employer may pay a retiring gratuity to staff retiring from the organisation who have had not less than 10 years' service with the employer, with the employer and one or more other District Health Board or its predecessors and with one or more of the following services: the Public Service, the Post Office, New Zealand Railways or any university in New Zealand.
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> …

[20] The provision includes a scale of maximum gratuities, which range from 31 days' pay for 10 years' service up to 183 days' pay for not less than 40 years' service.[12]

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[11] The clause references 1(b) but all parties accept that is an error and it should read 2(a).

[12] "Days" being consecutive rather than working days.

## The history of the relevant entitlements

[21] There are two relevant entitlements whose history needs to be considered.

[22] *Retiring* gratuities have been present in the contractual terms and conditions offered by WDHB and its predecessor health sector employers for a significant period: sub-cl (1) above.[13]

[23] They were included for employees from at least 1990 when employees were covered by an award and employed by Area Health Boards, including the Waikato Area Health Board.

[24] At that stage, the clause also made provision for a separate discretionary *resignation* gratuity:

> (5) A General Manager may also grant half the normal entitlement to those employees resigning after not less than 10 years' service to take up other employment.

[25] In the first collective employment contract in November 1992, employees who were employed after 30 June 1992 were excluded from the retiring gratuities clause, and the resignation gratuity clause.

[26] In late 1993, the then employer, Health Waikato Ltd (Health Waikato), announced an intention to cease paying resignation gratuities under the retiring gratuities clause. This was driven by costs issues faced by Health Waikato. Its right to unilaterally cease such payments was challenged by the New Zealand Public Service Association at the time, but as part of the collective bargaining for a new collective employment contract, the parties agreed that the option of a gratuity on resignation would be removed from the retiring gratuities clause in the collective employment contract, effective 1 August 1994.

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[13] The New Zealand Nurses Association New Zealand Area Health Boards Nurse Award 1990/91.

[27] Another change was prompted by the Human Rights Act 1993 (the HR Act).[14] From 1 March 1999 until 30 June 2002 all collective employment contracts provided for the parties to review the retiring gratuities clause to ensure compliance with legal changes resulting from that Act.

[28] In the first MECA, which commenced in 2002 and covered the Northern Districts, retiring gratuities in respect of WDHB were moved to an appendix.

[29] The first national MECA covering all the DHBs took effect on 1 July 2004 and carried over the WDHB grandparented clause that is set out above.[15]

[30] This clause carried on unchanged to the MECA now before us.

## The competing arguments

[31] NZNO argues that, in interpreting the retiring gratuities clause, the words "from the organisation" in the phrase "retiring from the organisation" need to be given full effect as they indicate that the WDHB provision is not about "retiring" in the sense of ceasing all gainful employment – an outdated concept; rather they provide for "moving on" from WDHB, or "leaving the [organisation]", following the requisite 10-year period of demonstrated loyalty. It says that retiring gratuities are one of the ways WDHB acknowledges and rewards loyal employees.

[32] NZNO further argues that the contractual provisions at issue here must be interpreted consistently with WDHB's statutory "good employer" obligations, and, in particular, its Equal Employment Opportunities (EEO) policy. It says these obligations support its interpretation.

[33] In addition, NZNO contends that the WDHB interpretation of "retiring from the organisation" directly or indirectly imposes a restraint of trade on employees, and that such an interpretation ought to be avoided.

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14 Human Rights Act 1993, s 30A.
15 At [19].

[34] NZNO seeks a declaration that Ms Panettiere retired from the organisation within the meaning of the retiring gratuity provision; alternatively, it seeks a declaration that the retiring gratuity is applicable to circumstances where the employee in question has, on termination of employment with WDHB, the requisite qualifying years of service in terms of the retiring gratuity provision.

[35] The interpretation advanced by NZNO is that the retiring gratuity provision applies without limit to resignation by a qualifying employee, and also to an involuntary termination of employment such as a dismissal for redundancy.

[36] For its part, WDHB argues that the natural and ordinary meaning of the words used in the retiring gratuity clause establishes a clear and understandable set of requirements for a payment of gratuity. To qualify, an employee must have been employed prior to 1 July 1992, he or she has to have not less than 10 years current continuous service, and has to be withdrawing from work on a permanent basis.

[37] WDHB says Ms Panettiere was not retiring since she had not withdrawn from her occupation and profession. It says the conduct of both parties confirmed that "retiring" occurred when employees permanently cease regular paid employment; that this mutual conduct was relevant in determining the meaning of the retiring gratuity clause.

[38] In reaching that position, WDHB says that the words "from the organisation" simply provide confirmation that the retirement would take place from the employ of WDHB.

[39] In support of its argument that withdrawing from work is a requirement, WDHB points to the factual matrix or background to the MECA including that:

- The WDHB retiring gratuity clause remained in substantially the same terms throughout its inclusion in industrial awards, collective employment contracts, and collective agreements down to its inclusion in the MECA.

- Early awards under the Labour Relations Act 1987 contained, in addition to the retiring gratuity provisions, a further discretion to pay a gratuity equivalent to 50 per cent of the retiring gratuity to employees who resigned to take up other employment.[16]

- In 1992, as a result of fiscal imperatives in a time of economic recession, various terms and conditions in the collective employment contract were changed and phased out. This included a change to the retiring gratuity provision, which along with other clauses was grandparented.

- In 1994, WDHB sought to remove the provision that allowed gratuities to be paid to employees who were not retiring, but resigning.[17] After the union parties disputed its right to do this, an agreement was reached for the removal of the resignation gratuity provision from the collective employment contracts and from 1994 onwards, the relevant individual agreements have only contained provision for payment of gratuities on retirement.

[40] WDHB relies on the context and history behind the clause as demonstrating that both parties to the MECA have, for many years, proceeded on the basis that "retiring" under the retiring gratuities provision means, and retiring gratuities are paid, where employees are "permanently ceasing regular paid employment". WDHB says this mutual conduct is relevant in determining the meaning of "retiring" or "retirement" in the MECA.

[41] CRTAS says that, within the context of the MECA, "retiring from the organisation" means to leave the employee's career and/or the workforce, with the intention that this is permanent. It says that this definition of retirement is consistent with its plain and ordinary meaning, or "conventional usage", how it is used and

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16 These awards were converted into collective employment contracts with the passing of the Employment Contracts Act 1991 so that the last national award became the applicable collective employment contract under the Act.

17 As noted, the employer was actually Health Waikato.

understood in the context of everyday language, and specifically in the employment context.

[42] CRTAS submits that in general parlance, "resigning" and "retiring" have different meanings and cannot be simply interchanged.

[43] In common with WDHB, CRTAS:

- points to the removal of the resignation benefit in 1994;
- says that the words "from the organisation" do not add to or alter the meaning of "retiring" in this context; and
- when the 2012 MECA was negotiated, the parties had a mutual understanding of what "retiring" meant in the retiring gratuity clause.

## Principles of interpretation of collective agreements

[44] All parties helpfully pointed to the principles of contractual interpretation applicable in cases such as this. In that respect, they were largely on common ground.

[45] The Supreme Court in *NZ Airline Pilots Assoc Inc v Air New Zealand Ltd*[18] and *AFFCO NZ Ltd v NZ Meat Workers and Related Trades Union Inc*[19] confirmed that the applicable principles of contractual interpretation for employment agreements were those set out in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand,* where the Court stated:[20]:

> [60] ... 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.

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18 *NZ Airline Pilots Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111 at [71].

19 *AFFCO NZ Ltd v NZ Meat Workers and Related Trades Union Inc* [2017] NZSC 135 at [38].

20 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432. (footnotes omitted)

[46] Having made that comment, the Supreme Court went on:

> [63] 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. 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.

[47] In *AFFCO NZ Ltd*, the Supreme Court emphasised that circumstances which are part of the "shared background against which both parties ... negotiated ..." a collective agreement may require an interpretation that is consistent with that shared background.[21]

[48] A related point was made by then Chief Judge Colgan in *New Zealand Airline Pilots Assoc Inc v Air New Zealand Ltd*, when he referred to the history of a collective agreement. He remarked:[22]

> ... Collective agreements ... represent the development of a particular employment relationship between an employer and a union over a long period, which is confirmed and altered from time to time in collective instruments which must and do expire and are renegotiated. So, not only must the Court consider the relevant context in which the parties agreed originally ... but regard must also be had to [a clause's] adoption and re-adoption in successor collective agreements which have been settled in evolving circumstances.

## The issues

[49] The case comes down to whether the phrase "retiring from the organisation" simply means departing from the organisation, in which case, provided employees have the requisite service and were employed on the cut-off date, they are entitled to be considered for a retiring gratuity, regardless of what they intend to do after they leave; or whether "retiring from the organisation" has a narrower meaning so that an employee must be intending to withdraw substantively from the workforce. Under this interpretation the words "from the organisation" are simply descriptive as to

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21 *AFFCO NZ Ltd*, above n 19, at [44].

22 *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14]. Subsequently, this point appears to have been accepted by the Supreme Court in *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd*, above n 18, at [44]-[45].

from where the employee has retired. In short, is the phrase to be read as meaning "**retiring** from the organisation", or as "retiring from the **organisation**"?

## Effect of discontinuance of the resignation benefit

[50] Counsel for WDHB, Mr David QC, and for CRTAS, Mr Scotland, placed strong reliance on the interplay between the two provisions to which we have referred. They say the retiring gratuity provision must be construed in light of the resignation gratuity provision. The definition in the former provision definitively determines that a narrow interpretation of the term "retirement" applies, at least in respect of those relevant awards and collective employment contracts which contained provision for a resignation gratuity. It was submitted that at least until 1994 "retiring from the organisation" in the retiring gratuities clause did not include resignation where the employee intended to continue working. That is because there was a separate provision governing that event, namely the provision of a resignation gratuity worth 50 per cent of the value of the full gratuity. This provision would have been meaningless if the words "retiring from the organisation" were construed to permit employees leaving their employment with the WDHB but continuing to work elsewhere.

[51] WDHB and CRTAS also argue that the removal of the resignation gratuity in 1994 from the subsequent collective employment agreement does not reveal an intention on the part of the parties to expand the definition of retirement to include employees resigning and continuing to work elsewhere. Rather, it revealed an intention to limit the gratuity to what was left of the two previous alternatives, namely retirement in the traditional sense of withdrawing from the workforce.

[52] For his part, Mr Harrison QC, counsel for NZNO, resisted the submissions on several grounds. First, he argued that such a submission treated WDHB as having been the employer throughout, when that had not been the case either in fact or in law.

[53] Second, with the deletion of the "resignation gratuity" provision, the meaning of "retiring from the Board" (later the organisation) was set at large.

[54] Third, the current MECA had to be construed on the basis of the language it now contains, rather than language that appeared many years ago in prior contracts or agreements.

[55] To evaluate these submissions, it is necessary to set out in some detail the history of the retiring gratuity clause, the removal of the provision as to resignation, and the consequences of those steps. The evidence on these topics is contained in the many documents placed before the Court, and in the oral evidence of Ms Gledhill, the Employee Relations and Remuneration Consultant for the WDHB.

[56] As already mentioned, the provisions relating to the retirement and resignation benefits were grandparented in November 1992, in respect of persons employed prior to June 1992.

[57] Next, we refer to the 1993 resolution of the Health Waikato Board that it would no longer pay resigning gratuities. The recommendations approved by the Board demonstrate that the intent of the exercise was to cease making payments to employees who were resigning their employment, but to continue paying retirement gratuities:

> 6.1 That the practice of paying half gratuities to staff who **voluntarily resign** cease on 1 January 1994 ...
>
> 6.2 That the Chief Executive Officer has the discretion to approve genuine **retiring** gratuities, on a case by case basis, for those staff who have not reached 65 years of age ...[23]

[58] We consider that the use in the resolution of the words "voluntarily resign" and "genuine retiring gratuities", and the emphasis in the written resolution, was to emphatically distinguish the two concepts. As a result, the following notification was given by Health Waikato to its employees in December 1993, with the same emphasis:

> From **1 January 1994** the Company will no longer make half gratuity payments to those staff who **voluntarily resign** from the employment of Health Waikato Limited. This decision is consistent with the position adopted by other Crown Health Enterprises and Area Health Boards in the past.

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[23] Original emphasis.

...

> **Retiring gratuities** will continue to be paid in accordance with employment contract provisions to those staff who are eligible to receive these payments in both retirement and staff surplus (severance) situations ... [24]

[59] The Public Service Association (the PSA) raised a dispute which focused on the removal of the provision to cease payments for those who voluntarily resigned. The essence of the union's objection was that Health Waikato had acted unilaterally by not consulting the PSA as a party to one of the collective contracts which had grandparented the relevant provisions.

[60] Bargaining then took place in which, in the general process of give and take which accompanies such negotiations, it was agreed that the resignation component of the clause would indeed be removed from the next collective agreement. However, Health Waikato confirmed it would pay a resignation gratuity to all employees who resigned throughout 1994.

[61] From then onwards, the modified clause was repeated in its 1994 form in all applicable collective employment contracts and agreements, up to 2012.

[62] It is plain that there was a distinction in the 1992 collective employment contract between "retirement" and "resignation". We find that the contract obviously distinguished between retirement on the one hand, and resignation on the other. Whilst there was initially a debate as to the removal of the resignation clause, its deletion was ultimately agreed upon. But the parties clearly intended that the primary obligation, which related to retirement, would continue to be grandparented. The distinction between the two concepts did not alter then.

[63] Nor did this occur subsequently. There are three later pieces of evidence that confirm the relevant parties intended this distinction would continue to apply to the provisions as subsequently grandparented.

[64] First, Ms Gledhill confirmed that in the 21 years since the removal of the resignation gratuity clause, there had been no claims by employees for the payment

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[24] Original emphasis.

of such a gratuity when an employee was resigning from WDHB or its predecessors with the intention of continuing work. This fact supports an inference that the parties intended that such a person was not entitled to a resignation gratuity.

[65] Second, the longstanding process by which requests for a retiring gratuity would be made is also relevant. Employees seeking payment were (and are) required to sign a statutory declaration; this states that the employee is not, and has no intention of, taking up further regular paid employment on a permanent basis. The evidence before the Court was that the statutory declaration was put in place after consultation with the various unions. Its purpose was to drive home to employees when applying that they needed to make an honest and true declaration of their intentions. This agreed mechanism is a further pointer to the mutual understanding of the parties.

[66] Third, the evidence as to the financial provisions made for the applicable liability is also part of the factual matrix. This evidence is not dispositive of the interpretation issue, but is relevant to it.

[67] The Board of Health Waikato recorded that as at 30 June 1993, provision had been made for all gratuity payments of $6.3 million.

[68] It appears to be the case that successor bodies continued to make the necessary provision, as might be expected. Ms Gledhill explained that by 30 June 2015, WDHB carried a liability for retirement gratuities for $12.45 million, being a current liability of $2.9 million and a non-current liability of $9.4 million.

[69] She said that the current liability relates to staff over 64 years of age, being based on an assessment that a retiring gratuity could probably be paid in the next 12 months. The latter, the non-current liability, relates to employees under 64 years of age, being based on an assessment that there is a reduced likelihood that retirement gratuities would have to be paid in the next 12 months. The effect of the evidence is that the classifications, although based on age, assessed whether the retiring employee is likely to proceed to alternative employment; if so, the liability is considered to be non-current.

[70] The Court was not provided with the quantum of these liabilities at the time when the MECA was negotiated in 2012; but such information would have been available in the annual reports of the WDHB. The manner in which the WDHB was treating this significant liability would have been evident as public information. There is no evidence of dispute between the parties as to that provision, which suggests that information as to the financial provision is part of the common understanding which the parties held when they entered into their agreement.

[71] Returning to Mr Harrison's first submission, then, the evidence as to the history of the grandparented provisions, including the removal of the resignation benefit in 1994, was clearly carried forward continuously until March 2012, when again it is plain that the parties intended that the clause would be repeated in its pre-existing form. Although the employing entity changed, there is no evidence that the meaning and intent of the retiring gratuity provision changed. It simply rolled over with the rest of the employees' terms and conditions pursuant to statutory transitional provisions;[25] and applied to WDHB just as it had applied to its statutory predecessors.

[72] Turning to Mr Harrison's second point as to the removal of the resignation gratuity provision, he accepted that whilst that particular provision was operative, there was undoubtedly an argument that the contract at that point distinguished between retirement on the one hand and resignation on the other. But as already mentioned, he also submitted that with the deletion, the meaning of "retirement" was set at large. We disagree. As we have already determined, the distinction between the two concepts of retirement and resignation did not alter in 1994, or later.

[73] Mr Harrison also submitted that the resignation gratuity was a "case specific cap or limitation on the sum that would otherwise be payable", to reinforce his submission that this particular aspect of history is of no current relevance. Again, we disagree. The provision relating to the resignation gratuity applied to employees resigning to "take up other employment"; the provision for a retiring gratuity did not include such language. We consider that a reasonable reader would conclude there

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[25] For example, Health Reforms (Transitional Provisions) Act 1993, s 12.

was a distinct difference between the two concepts, and that the resignation clause was not simply a financial cap.

## Relevant legislative provisions?

[74] In this section, we deal with several aspects of the legislative history, as raised for NZNO.

[75] First, we refer to s 6(2) of the Finance Act (No 2) 1941 (the Finance Act). The sub-section authorised a discretionary gratuity payment to a qualifying employee on his or her "retirement from the service of any local authority".

[76] In 1948, this provision was construed for the purposes of what was in effect a redundancy situation by the Supreme Court in *Waimari County v Rutherford*.[26] The Court stated that the provision was intended to:[27]

> ... [E]nable a local authority to reward a faithful servant on his leaving the service of the local authority. There is no limitation on the nature of the retirement, as, for instance, age, or infirmity. Nor does the sub-section mean retirement from work.
>
> ...

[77] The section was discussed again by this Court in *Feeney v Auckland Regional Council*, another redundancy case.[28]

[78] In 1962, language similar to that in s 6(2) of the Finance Act was adopted when s 52A was inserted into the Hospitals Act 1957.[29] The phrase "retirement from the service of ..." was used. That section was ultimately repealed.

[79] After the hearing had concluded, the Court requested further memoranda from the parties in both this proceeding and in the *Mathews* proceeding to address a cause of action recently introduced in the later proceeding based on s52A of the Hospitals Act. Mr Harrison, in a supplementary submission, said that in this

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26 *Waimari County v Rutherford* [1948] NZLR 300 (SC).
27 At 305.
28 *Feeney v Auckland Regional Council* AEC53/93, 22 October 1993.
29 Hospitals Amendment Act 1962, s 2(1).

proceeding NZNO did not assert that s 52A gave rise to a separate cause of action. However, he said that the plaintiff relied on that provision as forming part of the significant historical statutory context which supported its contractual interpretation, this being a reference to the then statutory provisions and to the findings made in such cases as *Waimari County* and *Feeney*.[30]

[80] It is not in dispute that there are narrower and wider meanings, as these and other cases have recognised.[31] The meaning must depend on what the parties intended in the particular circumstances. In this case, there is no evidence that the parties regarded the above legislative history or the judgments discussing it as being a relevant aspect of context when agreeing any of the contracts or agreements which are in evidence before the Court.

[81] Rather, the evidence shows that after s52A was repealed in 1988, the parties (or their predecessors) when entering into the relevant awards, contracts and agreements, considered that "retiring" and "resigning" have different meanings and applied in different circumstances.

[82] Next, we consider the NZNO submission that the "legal and social landscape" has altered since the retiring gratuities clauses were grandparented into the various agreements. Mr Harrison pointed to the amendments made to the HR Act, effective from 1999, which he says made it unlawful for employers to require employees to retire at a particular age. He says that the interpretation being advanced by WDHB is based on an employee paradigm that no longer exists, and which results in unfair, and indeed irrational distinctions being drawn between equally "long-serving (qualifying) employees," only based on what they do once they have terminated their employment with WDHB.

[83] What the parties agreed to was that they would make necessary changes to the clause to comply with the amendments. However, there was no change to the language in the retiring gratuities clause itself, and no evidence the parties intended

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30 *Waimari*, above n 26; *Feeney*, above n 28.

31 For example, *Auckland District Local Authorities Officers Union v Takapuna District Council* [1978] ACJ 153 at 155; *Auckland Provincial District Local Authorities Officers' IUOW v Glen Eden Borough Council* [1983] ACJ 479 at 482-483.

the meaning of "retirement" would alter. The change to the HR Act simply meant that attaining the particular age of 65 was no longer an occurrence that could be relied on to terminate an employment agreement.

[84] If a qualifying employee chose to work beyond age 65, then retire, they could apply for the retiring gratuity at that later age; conversely if an employee elected to retire at a younger age than 65, likewise they could apply for the retiring gratuity. But this did not alter the established meaning of "retiring" contained in the retiring gratuities provision. The qualifying thresholds still would have to be met, including that the employee was "retiring" from WDHB.

[85] Mr Harrison also referred to the "good employer" obligations on WDHB contained in the New Zealand Public Health and Disability Act 2000 and the Crown Entities Act 2004, the latter including the requirement for an Equal Employment Opportunities (EEO) programme. He said these affected the settled interpretation of the MECA provision.[32]

[86] The first difficulty with this submission is that Health Waikato also had these obligations: s 11(2)(c) of the Health and Disability Services Act 1993 provided that one of the objectives of Crown health enterprises was to be a "good employer", which the Act defined to include requiring an EEO programme.[33]

[87] In any event, there was no evidence that the parties intended that their understanding would change, or that the employer would now need to, and did, make provision for a new and substantial liability as a result of an EEO programme being introduced.

[88] Further, an EEO programme would be expected to apply to all employees; the retiring gratuity provisions apply only to the limited group: that is, employees employed on or before the cut-off date. This too indicates that the parties did not consider that the introduction of an EEO programme required the retiring gratuity to be applied more widely.

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[32] New Zealand Public Health and Disability Act 2000, ss 21 and 22; Crown Entities Act 2004, s 118.

[33] Health and Disability Services Act 1993, s 2.

[89] On this issue then, the "good employer" obligations do not alter the meaning of "retirement" in the agreed contractual arrangements.

[90] On the argument advanced that the concept and primary meaning of retirement had changed over time, and in particular by March 2012 it is evident, even on NZNO's own case, that by the early 1990s the concept of retirement in the public service was capable of being interpreted broadly. As we have noted, this is apparent in the cases of the Employment Court and even earlier, in those of the Arbitration Court, that recognised that wider interpretations (of the kind that NZNO argues for) were available.[34]

[91] The debate here, however, is not about whether the concept of "retirement" has in fact changed over time, but whether the parties intended at any point, and, in particular, by March 2012, that a different meaning should be ascribed to the term from that to which the parties initially agreed.

[92] Our conclusion on this issue is that no such change in meaning was intended.[35]

## Other provisions in the MECA

[93] Both parties pointed to other provisions in the MECA as supporting their respective positions. However, limited assistance can be gleaned from those other provisions.

[94] WDHB pointed to the definition of "attrition" in the management of change provisions of the MECA. In that definition "retire" and "resign" are referred to separately.[36] That perhaps supports the idea that the parties recognised that, in common parlance, the concepts differ, but we do not consider that this use of language aids the meaning to be given to the retiring gratuity clause.

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34 *Auckland Provincial District Local Authorities Officers' IUOW v Glen Eden Borough Council* above n 31, at 482–484; *Feeney v Auckland Regional* Council, above n 28, at 18-19.

35 Having reached this conclusion we have not been persuaded that the evidence of Dr St John has weight for present purposes.

36 Along with transfer, death or being promoted.

[95] NZNO points to other grandparented provisions contained in the Appendix affecting other district health boards, which contrast with the WDHB provision, for example referring expressly to "employees permanently retiring from the workforce …". They are not a compelling aid to interpretation. That is because those clauses came from awards and collective employment contracts between other entities. There is no evidence that the parties intended there to be a correlation between the various grandparented provisions; indeed, the reverse. Clause 40 of the MECA confirms that the provisions were DHB-specific and were provisions that existed in collective agreements which were in place prior to 1 July 2004. They would operate according to their own terms, which is why they were all separately recorded.

[96] We refer to the notice provision. The only way in which an employment relationship could end was, relevantly, by the employee giving notice. There is no express reference in the termination clause to "resignation". Such a notice must be given, whether the person is "retiring" or "resigning". Accordingly, the clause does not assist our interpretation either way.[37]

[97] These various considerations are not determinative.

## Restraint of trade?

[98] NZNO submitted that, on WDHB's interpretation, the retiring gratuity clause would operate as an unreasonable restraint of trade, which prima facie would deprive an employee of the right to work. NZNO says that an interpretation that avoids an unreasonable and consequently invalid restraint of trade is to be preferred.

[99] However, the retiring gratuity provision, interpreted in the way contended for by WDHB, would not stop a person from working – it merely would preclude him or her from receiving the gratuity. In any event, and as noted by Mr Scotland, the alleged unlawfulness does not assist in the interpretation of the clause. If the clause amounted to an invalid restraint, that would not change the objective meaning of the clause; it would simply impact on its enforceability.

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[37] NZNO also submitted that it was of no consequence that Ms Panettiere resigned on notice rather than explicitly retired. The defendant does not argue otherwise and the point is accepted.

[100] We do not accept this argument.

## The retiring gratuity as a reward for service

[101] NZNO submits that the retiring gratuity is a reward for loyal long service, noting:

(a) the scale of maximum retiring gratuities; and

(b) that a gratuity may be paid where an employee dies before he or she retires.

[102] Mr Harrison submitted that this supports the proposition that a voluntary resignation by an otherwise qualified long-serving employee will qualify as "retiring" for retiring gratuity purposes. We agree that the payment relates to long service, since that is one of its qualifying aspects. However, it is not universally available. As Ms Panettiere's circumstances indicate, there are threshold criteria that must be met; if not met, the entitlement is not given. Moreover, the grant of the gratuity is the subject of discretion (the scope of which is not currently before the Court). In short, not all employees who have worked for long periods for WDHB will receive the benefit. Whilst the gratuity may be seen as a reward for long and loyal service, this factor does not resolve the interpretation issue.

## Other points

[103] All parties referred to dictionary definitions. These are of limited assistance and do not affect our conclusions.

[104] We also observe that the extent to which the term "retirement" might allow for casual, part-time and/or project work, and/or work in a field different from the employee's principal career, will depend on the particular context in which it is being considered.

[105] In its written submissions NZNO placed some emphasis on the fact that employees who later agreed to be employed on a MECA's terms and conditions are entitled to rely on the meaning of the words at the time the agreement was entered

into. However, if anything, the argument goes the other way. The grandparented provisions relate only to those employees who were employed on or before the cut-off date. The position of persons employed after the cut-off date is not relevant. A reasonable reader might assume that the affected employees were aware of how the entitlements worked, including that the resignation provision had been removed in 1994. Therefore, they might be expected to make their decisions in reliance on the settled understanding.

## Answering the key question

[106] We turn then to the key question of what the parties intended when they settled the MECA.

[107] In the present context, the evidence demonstrates that the parties' common understanding of the meaning of "retire" is that it is something more than simply moving on from WDHB. In our view, the clause means that a departing employee is "retiring" for the purposes of the retiring gratuity clause if, at the time of departing WDHB, he or she is not, and has no intention of, taking up on an on-going basis further regular paid work, whatever the employment status of the worker.[38] We have reached this view taking into account the evidence of Ms Gledhill, the policy documents, and the statutory declaration that was developed in 2000 and signed by Ms Panettiere in February 2013.

## Outcome

[108] NZNO's challenge is unsuccessful. An employee is retiring from WDHB for the purposes of the retiring gratuity clause of the MECA if the employee will not be, and has no intention of, taking up on an on-going basis further regular paid work, in any capacity. This means that Ms Panettiere did not "retire from the organisation" within the meaning of the retiring gratuity provision. Our articulation of the meaning of the clause varies slightly from that of the Authority. In that respect, the determination of the Authority is set aside and the decision of the court stands in its place.

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[38] Whether as an employee or self-employed.

[109] Costs are reserved. Our preliminary view is that this was a test case so that costs should lie where they fall. If, however, the parties cannot reach agreement on this issue, an application for costs should be lodged within 21 days; any response should be filed 21 days thereafter.

J C Holden
Judge
for the full Court

Judgment signed at 2.30 pm on 15 May 2018