

industrial action the DHBs must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability. If the DHBs consider that life preserving services cannot be delivered without the assistance of union members who are undertaking industrial action, then the process under cl 12 of the Code must be followed in order to reach an agreement in respect of the provision of such services (the agreement is referred to as a life preserving services agreement (an LPS Agreement)).

[3] Relevant to an assessment of the current application was the fact that the parties have previously been at odds over the enforceability of LPS Agreements, including those reached during the course of strike action in June 2021. The Union says that LPS Agreements are not legally binding, are not enforceable and non-compliance cannot give rise to a breach of either the Code or good faith. Nor, it is said, can the Union direct individual members to give up their lawful right to strike, and accordingly it can only be required, under an LPS Agreement, to use “best endeavours” in discharging its obligations.

[4] The DHBs applied to the Employment Relations Authority for declarations, essentially to clarify the legal position, and urgency was sought. The parties agreed that the proceedings should be removed to the Court for hearing. Despite the position adopted by the parties, who are represented by very experienced and senior counsel, the Authority declined leave for reasons set out in a determination dated 5 August 2021.¹ The DHBs immediately filed an application for special leave to remove the matter. Given the tight timeframes involved, I convened an urgent telephone conference this morning. The parties’ positions remained unchanged – immediate removal was sought.

[5] After hearing from counsel, I ordered the immediate removal of the matter from the Authority and indicated that my reasons would follow. These are my reasons.

¹ *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZERA 346 (Member van Keulen).

Legal framework

[6] The Employment Relations Act 2000 (the Act) generally requires matters to be filed in the Authority. The usual process is for the matter to be dealt with in that forum with rights of challenge to the Court. Parties may, however, apply for removal to the Court and, where such an application is declined, may apply for special leave from the Court. The Authority also has the power to remove a matter of its own motion.² While the tests that the Authority (on a removal application) and the Court (on a special leave application) must apply are slightly different, both provide that leave may be granted where the matter raises an important issue of law other than incidentally or where the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.³

[7] The Authority declined the application on the basis that, while important questions of law had been identified, they were questions that were anticipatory, in the sense that they may or may not arise. The Authority approached the issue of urgency on the same basis – the matter might be urgent if agreement could not be reached and adjudication failed, but the success or otherwise of those steps had yet to be determined. Both parties submit that the Authority erred in its approach to the s 178(2) exercise, prompting the application for special leave.

[8] The approach to an application for special leave can be summarised as follows. There is no presumption in favour of, or against, removal. In exercising its discretion, the Court must have regard to s 178(2) of the Act and (to the extent relevant) the factors contained within it. The Court has a discretion to refuse leave, even where one or more of the factors listed in s 178(2) are made out.⁴

[9] There are plainly important questions of law which arise in the proceedings other than incidentally. They can be summarised as follows:

² Employment Relations Act 2000, s 178(3).

³ Employment Relations Act 2000, ss 178(2)(a)-(b) and 178(3).

⁴ The Court of Appeal has recently touched on the limited statutory grounds for removal, although in a case which did not engage s 178(2): *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192 at [48]. See also the discussion in *Jackson v The Aorere College Board of Trustees* [2021] NZEmpC 109 at [5]-[6].

- Whether the Authority or Court has jurisdiction to make the declarations sought?
- Whether an LPS Agreement is binding and enforceable?
- Can a breach of an LPS Agreement give rise to breach of the Code and/or breach of good faith?
- Can a party refuse to enter into an LPS Agreement unless it is subject to a “best endeavours” qualification?

[10] Are these important questions of law “likely to arise other than incidentally” for the purposes of s 178(2)? A review of the circumstances points squarely to the answer to that question. In this regard the parties have asked for the issues to be resolved in the context of the current industrial action. Negotiations for 20 LPS Agreements across 20 DHBs are being conducted and the timeframe for agreement is today. If no agreement is reached the parties must attend adjudication on Monday. The questions have already arisen, underscored by the position adopted by the parties in respect of these issues to date.

[11] The first strike is less than two weeks away. The matter is clearly of such a nature and of such urgency that it is in the public interest to remove it to the Court.

[12] For completeness, I considered whether to exercise my discretion to decline leave despite having accepted the parties’ submission that their dispute involves important questions of law and in the context of urgent negotiations; timeframes under the Code; and looming strike action. Both parties are represented by very experienced counsel. Both parties want to have the matter removed to the Court. There is no issue in this case that one or other of the parties may be prejudiced by losing, for example, a right of challenge. If the matter remained in the Authority a challenge to the Court would be almost inevitable. It is desirable, including from a time-efficiency perspective, to remove the matter to the Court for urgent hearing.

[13] The application for special leave, which was supported by the Union, was accordingly granted and the matter was immediately removed to the Court for hearing.

Next steps

[14] The following directions were made at this morning's conference following discussion with counsel:

- (a) the Registrar is to set the matter down for an urgent hearing at the Employment Court Wellington on Wednesday next week;
- (b) the DHBs are to file and serve a statement of claim in the Court by 5pm today;
- (c) any statement of defence or other response to the claim is to be filed and served by midday Monday 9 August 2021;
- (d) the affidavit of Ms Aitcheson filed on behalf of the DHBs and dated 2 August 2021 is to be admitted in these proceedings;
- (e) any affidavit/s in reply are to be filed and served by the Union by 5pm Monday 9 August 2021;
- (f) the parties are to simultaneously file and serve an outline of written submissions by 1pm Tuesday 10 August 2021;
- (g) any updating affidavit or agreed statement of facts is to be filed and served by 5pm Tuesday 10 August 2021.

[15] I record that I raised the possibility of urgent mediation. The parties have been in discussions. Counsel are agreed that mediation would not assist. In the circumstances I did not consider that a direction to mediation would assist in resolving matters.⁵

⁵ Employment Relations Act 2000, s 188(2).

[16] Leave was reserved to apply, on reasonable notice, for any further directions or orders.

[17] No issue of costs arises on this application.

Christina Inglis
Chief Judge

Judgment signed at 12.40 pm on 6 August 2021

APPENDIX A

District Health Boards of New Zealand

Auckland District Health Board

Northland District Health Board

Waitemata District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Tairāwhiti District Health Board

Taranaki District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Hutt Valley District Health Board

Capital and Coast 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