IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 226
EMPC 474/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED (APEX) Plaintiff
AND	TE WHATU ORA – HEALTH NEW ZEALAND (IN RESPECT OF THE FORMER DISTRICT HEALTH BOARDS LISTED IN THE ATTACHED SCHEDULE) Defendant

Hearing:	25-28 July 2022 (Heard at Auckland)
Appearances:	W Manning and G Bowker, counsel for plaintiff S Hornsby-Geluk, counsel for defendant
Judgment:	7 December 2022

JUDGMENT OF JUDGE J C HOLDEN

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[1] In 2020, the then Auckland District Health Board, Waitematā District Health Board, Waikato District Health Board, Taranaki District Health Board and Hawkes Bay District Health Board (the DHBs) agreed with the New Zealand Public Service Association (the PSA) to temporarily change the way in which weekend penal rates were calculated for their members employed as medical laboratory workers at the DHBs. That change was set out in side letters between the DHBs and the PSA (the Letters of Understanding).

[2] The Association of Professional and Executive Employees Inc (APEX) says the Letters of Understanding created an unlawful preference for PSA members, prohibited by s 9 of the Employment Relations Act 2000 (the Act). APEX also says the DHBs breached their duty of good faith to APEX.

[3] APEX went to the Employment Relations Authority (the Authority) but, in its determination of 1 December 2021, the Authority found that the DHBs had not given members of the PSA an unlawful preference, nor had they breached their duty of good faith.[1]

[4] APEX challenges that determination and this judgment resolves that challenge.

[5] The key facts follow.

APEX and the PSA both represent medical laboratory workers

[6] Te Whatu Ora – Health New Zealand has now replaced the 20 former district health boards, shared services agencies and Te Hiringa Hauora – Health Promotion Agency, with that change taking effect from July 2022. The issues in these proceedings arose prior to then, when the district health boards were in place.

[7] APEX had a Multi-Employer Collective Agreement (MECA) with the DHBs as well as with Northland, Counties Manukau, Canterbury and West Coast District Health Boards and the New Zealand Blood Service with a term running from 7 September 2016 until 6 September 2019 (the APEX MECA). The APEX MECA covered all APEX members employed by the employer parties as medical laboratory workers and, as at March 2020, was continuing in force pursuant to s 53 of the Act.

[8] The PSA had MECAs with all 20 of the district health boards, covering various groups of allied health workers including its members employed by the district health boards as medical laboratory workers. There were two PSA MECAs in place, one with the Auckland, Waitematā and Counties Manukau District Health Boards (the

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1 *Association of Professional and Executive Employees Inc v Auckland District Health Board* [2021] NZERA 538 at [77] (Member van Keulen).

Auckland PSA MECA) and one with the other 17 District Health Boards (the RONZ PSA MECA).

[9] The terms of the three MECAs on remuneration were different:

(a) The penal rates for weekend work under the APEX MECA were time and a half (T 1.5) for the first three hours worked before midday Saturday and then double time (T 2) for all other weekend hours.

(b) The Auckland PSA MECA had a salary scale that was 6.5 per cent higher than the APEX MECA and penal rates for weekend work that were the same as in the APEX MECA.

(c) The RONZ PSA MECA had a salary scale that was 7.5 per cent higher than the APEX MECA (and one per cent higher than the Auckland PSA MECA) but with penal rates of T 1.5 for all weekend hours.

[10] There also was a Single Employer Collective Agreement in place between the PSA and the New Zealand Blood Service (the NZBS SECA) covering medical laboratory workers working at NZBS.

New APEX MECA negotiated

[11] In July 2019, APEX initiated bargaining for the renewal of the APEX MECA. In the course of collective bargaining, APEX raised two claims (amongst others) relating to salary scales and penal rates for weekend work. The employer parties were represented by the central agency, Technical Advisory Services (TAS).

[12] After a reasonably protracted period of bargaining, the parties attended facilitation on 27 March 2020. A facilitator's recommendation was issued the same day, and, on the basis of this recommendation, the employer parties made a formal offer to APEX on 31 March 2020. A new APEX MECA based on this offer was ratified on 6 April 2020 and signed on 7 April 2020.

[13] In relation to salary and weekend penal rates the new APEX MECA provided:

(a) a salary scale increase so that all APEX members covered by the new APEX MECA were on the same scale as in the Auckland PSA MECA (that is the lower salary scale);

(b) weekend penal rates for all APEX members covered by the new APEX MECA, except those employed by the Auckland and Waitematā District Health Boards, of T 1.5 for the first three hours of work on Saturday morning and T 2 for all other hours worked in the weekend (that is the higher penal rates).

(c) weekend penal rates for APEX members employed by the Auckland and Waitematā District Health Boards, of T 2 for any hours worked on Saturday morning up until 6 am (for Auckland DHB) or 8 am (for Waitematā DHB), T 1.5 for the first three hours of work between 6 am or 8 am and 12 midday on Saturday and T 2 for all hours worked from 12 midday on Saturday through Sunday (that is the higher penal rates with the addition of better rates for early Saturday morning work).

COVID-19 arrives in New Zealand

[14] From early 2020, the COVID-19 pandemic was escalating overseas. People working in the health sector, including in medical laboratories, were increasingly aware of, and concerned about, the serious impacts it was having on populations overseas, and on hospitals. Several witnesses gave compelling evidence of the information being received, especially from Italy, where the situation was dire.

[15] The first case of COVID-19 in New Zealand was reported on 28 February 2020. As is well known, the New Zealand Government put in place the alert level system, with New Zealand going into Alert Level 2 on Saturday, 21 March 2020, moving to Alert Level 3 on Monday, 23 March 2020 and then to a strict Alert Level 4 from 26 March 2020.

[16] As this was happening, the district health boards were concerned to ensure that as few impediments to laboratory testing were in place as possible, as the expectation was that the need for testing would increase significantly.

PSA raises issue with weekend penal rates

[17] On 20 March 2020, the PSA contacted TAS to raise a concern that PSA members employed as medical laboratory workers under the RONZ PSA MECA would be paid less for weekend work than their APEX colleagues. The PSA followed up with an email on 23 March 2020:

> Further to our discussions on Friday afternoon attached please find the relevant clauses from the NZBS SECA that we are seeking to include in the [RONZ PSA MECA] as a variation. The need for this as discussed has arisen from a number of contacts that we have had from our Laboratory Services members concerned that as the testing for COVID 19 ramps up they may/will be required to work weekends and longer hours to provide the necessary cover.
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> They are rightly, also concerned that if they were to work weekends they would be doing so alongside their colleagues who are APEX members and who are paid T2 for working all hours between midday Saturday to Midnight Sunday at T2. We also think that this would be unfair. We therefore, propose that our MECA be varied to reflect what we have already agreed for our NZBS members. The NZBS SECA provides 2 salary scales, A (scale A) for those employees who are required to work weekends during their ordinary hours and the other (scale B) for those that work Monday to Friday. Scale A mimics the [Auckland PSA MECA] scales, where the weekend penal rates is higher in comparison to the [RONZ PSA MECA].

[18] The variation to the RONZ PSA MECA to align it with the NZBS SECA would have given the medical laboratory workers covered by the RONZ PSA MECA the opportunity to be paid higher penal rates for weekend work, but at the sacrifice of a lower salary rate.

[19] TAS discussed the issue internally, but considered that a reduction in salary was not possible and that there were potential difficulties with attempting to amend the RONZ PSA MECA.

[20] TAS considered the best approach would be to use a side letter per site that would not vary the salary but would increase weekend penal rates. Although the PSA's expressed concern was over the difference between the weekend penal rates for its members and those for their APEX colleagues, TAS proposed aligning the weekend

penal rates in the RONZ PSA MECA with those in the Auckland PSA MECA. TAS thought that would be workable, provided the arrangement was temporary and linked to COVID-19.

[21] Various draft Letters of Understanding were exchanged between TAS and the PSA. The PSA continued to endeavour to include amendments to other matters such as night allowances, remote call arrangements and a varying scale for one-off payments, but those were not accepted. TAS saw those claims as being the PSA "asking to pick the eyes out of the APEX deal with none of the trade-offs".

[22] Initially TAS suggested a timeframe until 31 October 2020, being the date that the then current MECAs were due to expire, but then agreed with the PSA to pay the higher penal rates until new MECAs were settled.

[23] Ultimately, TAS sent draft Letters of Understanding to the eight potentially affected district health boards, explaining the proposal, and inviting each of the chief executives to sign the applicable Letter of Understanding if the district health board accepted the proposal.

[24] The DHBs signed and returned the Letters of Understanding to TAS. Three other potentially affected district health boards decided not to proceed with the proposal.

[25] The new PSA MECAs came into effect in May 2022, at which time the Letters of Understanding ceased to apply.

[26] The effect of the signed Letters of Understanding for Taranaki DHB, Hawkes Bay DHB, and Waikato DHB was to provide that PSA members employed in those DHBs as medical laboratory workers would be paid no less for weekend work than their APEX colleagues – that is, they would be paid the greater amount for weekend work from applying either their current (lower) penal rate using their (higher) salary rate or the Auckland PSA MECA (higher) penal rate but at the Auckland (lower) salary rate. In other words, they gained the "high/high" package. By contrast, the APEX colleagues working alongside them stayed on their "high/low" package.

[27] The effect of the signed Letters of Understanding for PSA members employed at Auckland DHB and Waitematā DHB was to provide a small change to the way in which the penal rates were calculated to align the rate with the new APEX MECA. The change meant that all their rostered hours from midnight Friday to 0600 Saturday (Auckland DHB) and 0800 Saturday (Waitematā DHB) were converted from T 1.5 for the first three hours and T 2 thereafter, to T 2.

APEX learns of arrangement

[28] APEX learnt of the Letters of Understanding on or about 11 May 2020 and made informal inquiries of TAS. Those inquiries did not elicit a fulsome response.

[29] APEX formally raised the matter with TAS on 8 June 2020. A response came from the Director of Employment Relations on 17 June 2020, essentially dismissing APEX's concerns and advising that the DHBs had no obligation to make offers to APEX members based on agreements reached with the PSA. TAS provided further information to APEX in answer to a request under the Official Information Act 1982.

The principal issue is around preference

[30] Section 9 of the Act, around which the case revolves, provides:

> **9 Prohibition on preference**
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> (1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,—
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> (a) any preference in obtaining or retaining employment; or
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> (b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.
>
> (2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.
>
> (3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits—
>
> (a) of a collective agreement:

(b) arising out of the relationship on which a collective agreement is based.

[31] The principal issues are:

(a) Did the terms of the Letters of Understanding constitute an arrangement conferring a preference on the PSA members they covered?

(b) If so, did they do so because of the union membership of the people who received it?

(c) If so, what remedies follow?

Section 9 has been considered previously

[32] The parties both refer to previous cases in which s 9 has been considered by the Courts. The cases show the difficulties that arise from the section.

[33] *National Union of Public Employees (Inc) v Asure New Zealand Ltd* was heard by the full Court of the Employment Court.[2]

[34] The Court found that "any preference" meant a priority or the giving of an advantage to some person or persons by reason of membership or non-membership of a union, or any particular union, over another person or persons because of the absence of that union membership status.[3]

[35] The Court noted the change from "by reason of" used in the former s 7 of the ECA to "because" in s 9 of the Act, but did not consider that was a material change as both terms were synonymous. The Court relevantly noted the introduction of s 9(2), which the Court said had the effect of focussing the Court's inquiry on the reasons for the preference.[4]

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2 *National Union of Public Employees (Inc) v Asure New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC). The Court comprised Travis, Colgan and Shaw JJ.

3 At [46]–[50].

4 At [52].

[36] The Court found that consideration of whether a preferential arrangement has been conferred on somebody *because* a person is or is not a member of a union or a particular union involved not only issues of causation but consideration of the intention or motive behind the preference.[5]

[37] In cases since, however, the Courts have moved away from there being any role for intention or motive. In *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, Judge Shaw found that the issue under s 9 is what caused the preference to be conferred. If it was union membership, then it was prohibited.[6] In an unsuccessful application for leave to appeal the Employment Court decision, the Court of Appeal held there is no warrant in the wording of s 9 to require a further inquiry into subjective motive, once the statutory test is met.[7] In *Pact Group v Service and Food Workers Union Nga Ringa Tota Inc*, Chief Judge Colgan expressly said that he considered *Asure* was wrongly decided on the matter of intent, concluding that "The word "because" in s 9(1) connotes consequence but does not require proof of intention to achieve that consequence".[8]

[38] Section 9 can be contrasted with ss 4A, 59B and 59C of the Act, where intention is required to find breaches of good faith.

[39] Ultimately, and as agreed by the parties, motive is not the issue; the question for the Court is simply whether the terms of the Letters of Understanding gave enhanced penal rates *on the basis of* membership in a particular union (here, the PSA).

The Letters of Understanding constituted a "preference"

[40] The DHBs say that it was only PSA members covered by the RONZ MECA who received a short-term increase in penal rates, for a specific purpose – to ensure employees who may be required to work additional weekends were sufficiently incentivised to do so, thereby ensuring certainty of coverage for weekends.

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5 At [57].

6 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd* [2009] ERNZ 54 (EmpC) at [49].

7 *Taylor Preston Ltd v New Zealand Meat Workers Union and Related Trades Union* [2009] NZCA 372 at [26].

8 *Pact Group v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZEmpC 119, [2014] ERNZ 247 at [61].

[41] Although APEX accepts that, viewed in isolation, the arrangements in the Letters of Understanding brought the penal rates for PSA members into line with the APEX penal rates, it says there was a material advantage. I agree with that submission. Prior to the Letters of Understanding, the PSA members' lower penal rates were balanced out by higher salary rates in the MECA. Increasing the penal rates therefore gave them better overall remuneration.

[42] In any event, there was a preference to PSA members in the decision to offer them an increase in their penal rates without also offering one to APEX members.

[43] Accordingly, the Letters of Understanding provided a benefit to PSA members that was not provided to APEX members.

Arrangements were on the basis of union membership

[44] The DHBs say the context in which this case arose is critical. It points to the sudden arrival of the pandemic, which internationally had devastated healthcare systems. There was significant uncertainty as to what impact this would have and how the DHBs would cope. They note that the immediate Government priority was on testing and it was expected that the medical laboratories would need to ramp up their capacity.

[45] Therefore, at the time the PSA approached the DHBs, it was expected there would be a need for increased capacity and testing, including across weekends. The DHBs' perception at the time was that the arrangements for rostering and overtime then in place would not be enough to deal with the surge in testing required. The DHBs note that they could not unilaterally change rosters and roster patterns to require employees to work additional weekends – this required their goodwill and consent.

[46] They say that the change to penal rates was not a material enhancement but rather a focussed and timebound term designed specifically to ensure service delivery during the initial stages of the COVID-19 outbreak.

[47] The DHBs say that there were some differences between the various MECAs, some favouring APEX members and others favouring PSA members, which had

developed over successive bargaining rounds. However, the DHBs were quite clear that they were not interested in addressing these broader issues. Rather the sole focus was on removing a disincentive for employees to work on weekends, given that was what had been identified by the PSA and its members as an issue.

[48] In summary, the nub of APEX's case is that the Letters of Understanding conferred a benefit on the PSA members employed as laboratory technicians by the DHBs, and did so because of their membership of the PSA; not of APEX.

[49] APEX, however, goes further and says that the motivation behind the Letters of Understanding was not, as the DHBs say, to ensure service delivery during the initial stages of the COVID-19 outbreak, but was to blunt the competitive gains APEX achieved in its facilitated settlement.

[50] It says the pandemic was being used by the PSA, with the complicity of TAS, as convenient cover for arrangements that were being made to prefer one union (the PSA) and its members over another (APEX). The underlying suggestion is that the DHBs found APEX to be more difficult to deal with than the PSA and wished to promote membership of the PSA over APEX.

[51] APEX's view of the facts relies on hindsight and fails to take sufficient account of the context in which the Letters of Understanding were agreed.

[52] There is no doubt that in March 2020 there was real concern over the pressure the laboratories might come under from the pandemic, and uncertainty as to how New Zealand would be impacted.

[53] The reports from Italy and elsewhere were alarming, and the Government was clearly determined to take steps to try and prevent a similar scenario happening in New Zealand. Testing was a key part of the Government's strategy.

[54] It was against this background that TAS agreed to suggest the Letters of Understanding to the DHBs. Decisions were made urgently; there was no ability to wait and see what happened. The point was to remove any possible hurdles that may

have impacted on the laboratories' ability to respond with the urgency and resources required. It was in that context, the PSA raised the concern that its members may be required to work weekends on lower penal rates than their colleagues, which was seen as a potential obstacle to co-operation.

[55] As it transpired, the pressures in 2020 were not as anticipated, but that is an assessment made in hindsight. The anticipated risk of the laboratories being faced with a huge increase in testing was not far-fetched, as was seen in 2022 when such pressures did emerge.[9]

[56] Further, the timeline does not support APEX's suggestion. The PSA first approached TAS seeking a variation prior to the facilitation with APEX occurring and the outcome being known.

[57] The evidence was that TAS was motivated by a genuine concern about the potential for the pandemic to overwhelm laboratory capacity over the weekends. That was the driving force behind TAS's agreement to recommend the implementation of the Letters of Understanding for a confined period of time.

[58] However, as noted, the issue for the Court is not motivation, but consequence. That is, under the agreement, was the boost in the penal rates based on union membership or some other criteria?

[59] The DHBs submitted that, as Auckland PSA members did not get any increase the criteria was simply employees with "lower" weekend penal rates, rather than union membership. I do not accept that argument, including because the Auckland PSA members did gain a benefit. It was not as big a benefit as for the RONZ PSA members, but the Auckland PSA members gained a potential extra T 0.5 per hour for the first three hours of weekend work.

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9 Allen+Clarke *COVID-19 PCR Testing Backlog – Rapid Review* (Ministry of Health, June 2022) at 8.

[60] This means that all members of the PSA potentially received some type of increase; no member of APEX received any type of increase. There was a preference provided on the basis of union membership.

Position not affected by s 9(2) or s 9(3)

[61] The DHBs also pointed to s 9(2) and s 9(3) of the Act but I do not consider either subsection assists.

[62] While Chief Judge Colgan in *Pact Group* accepted that s 9(2) meant that the prohibition in s 9(1) will not apply simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer, he did not see the need to discuss the company's intention or motivations when applying s 9(2). What he found was significant in the case was that the employer had passed on a higher rate of remuneration to non-union members than was received by union members in materially identical circumstances.[10] Chief Judge Colgan's approach is consistent with that of the Court of Appeal in *Taylor Preston Ltd*.[11]

[63] What s 9(2) does is recognise that a difference in terms of employment in itself is not enough to be a "preference". Rather than a call to analyse the employer's motives, it requires an analysis of whether there is an actual benefit on the basis of union membership rather than "simply" a difference. There is no dispute here that the terms of employment in the APEX MECA and in the PSA MECAs are different, and no suggestion from APEX that the differences between the MECAs give rise to an unlawful preference. The Letters of Understanding, however, introduced a benefit (an increase in penal rates) for PSA members that was by reason of their union membership.

[64] Section 9(3) recognises that unions and employers are free to negotiate and agree upon terms and conditions in a collective agreement which might otherwise infringe upon the prohibition on preference provisions in s 9(1). In that way it reflects

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10 *Pact Group v Service and Food Workers Union Nga Ringa Tota Inc*, above n 8, at [66]-[67].
11 *Taylor Preston Ltd v New Zealand Meat Workers Union and Related Trades Union*, above n 7.

the Act's object to build productive employment relationships by promoting collective bargaining. It requires the Court, as part of the interpretation exercise in determining whether a provision in a collective agreement infringes the prohibition on preference, to have regard to what the term or condition was intended to recognise. If the intention of the provision is to recognise the benefits of a collective agreement or the benefits arising out of the relationship on which a collective agreement is based, then no preference is conferred which breaches s 9.[12]

[65] Section 9(3) is not engaged here. The Letters of Understanding were not a term or condition of a collective agreement. More significantly, the arrangements in the Letters of Understanding were not intended to recognise the benefits of a collective agreement and/or arising out of the relationship on which a collective agreement is based, as is required by the subsection.

[66] The Letters of Understanding breached s 9 of the Employment Relations Act 2000.

What is the effect of the finding of unlawful preference?

[67] Section 10 of the Act governs the effect of the Court's finding. It provides:

> **10 Contracts, agreements, or other arrangements inconsistent with section 8 or section 9**
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> A contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with section 8 or section 9.

[68] In *Taylor Preston Ltd*, Judge Shaw noted the Authority's concern that the effect of s 10 would be that affected employees, who had received the preference, would have to be retrospectively deprived of their additional remuneration. She said that "while that may well be an outcome it is not a reason for finding that there was no unlawful preference".[13] The Court, however, made no orders, with the parties being left to attempt to resolve entitlement issues between them.[14]

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12 *Northern Amalgamated Workers' Union of New Zealand Inc v Fletcher Concrete and Infrastructure Ltd (T/A Golden Bay Cement)* [2016] NZEmpC 2, [2016] ERNZ 1 at [62]-[63].
13 *New Zealand Meat Workers and Related Trades Union v Taylor Preston Ltd*, above n 6, at [65].
14 At [67].

[69] When faced with s 10 in *Pact Group*, Chief Judge Colgan noted the difficulty the employer would have in recovering monies paid, even if it was inclined to do so.[15] He concluded that a compliance order under s 137 of the Act requiring the company to give the same benefit to the adversely affected employees was an available remedy. I am not convinced that is the case. In any event, no compliance orders are sought here.

[70] It seems to me that the effect of s 10 is that, to the extent the preference remains on foot, it is ineffectual; to the extent employees had not received payment in accordance with the preference, that is not enforceable.

[71] Here, however, where payment has already been made and the Letters of Understanding have expired, s 10 has no consequence.

Was there a breach of good faith?

[72] In addition to its claim under s 9 of the Act, APEX claims that, by entering into the Letters of Understanding, the DHBs breached the duty of good faith they owed to APEX and its members in their employ. This is because APEX says they knew, or ought to reasonably have known that, in breach of s 9 of the Act, the Letters of Understanding would, or were likely to confer a benefit on medical laboratory workers who were PSA members in their employ to the relative disadvantage of medical laboratory workers who belonged to APEX and/or to APEX itself. It says the failure to comply with the duty of good faith was deliberate, serious and sustained, justifying a penalty.[16] There is a high bar.[17]

[73] APEX relies on s 4A(a) of the Act. In particular, it refers to the DHBs being complicit with the PSA in using COVID-19 as a "cover" to justify the Letters of Understanding to blunt the competitive gains APEX gained in its facilitated settlement. I agree with APEX that, if the DHBs had been complicit with the PSA in the manner

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15 *Pact Group v Service and Food Workers Union Nga Ringa Tota Inc*, above n 8, at [102].
16 Employment Relations Act 2000, s 4A(a).
17 *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112, [2016] ERNZ 733 at [120].

suggested, that would have been a breach of good faith and likely would have warranted a penalty. I have found that not to be the case.

[74] The DHBs could be criticised for not engaging with APEX on the arrangements, knowing the impact they would have on APEX members. The inference from the evidence is that TAS was aware of the potential for these arrangements to be seen as problematic by APEX.

[75] I accept, however, that good faith does not require an employer to inform one union of its dealings with another.[18] I also accept that, when formally approached, TAS responded to APEX. The reply dated 17 June 2020 was certainly concise, but it was not misleading and further relevant information was sent the same day.

[76] I do not consider the DHBs failed to act in good faith.

Costs should be agreed

[77] The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.[19] Those costs ought to be able to be agreed. If that does not prove possible, APEX may apply for costs by filing and serving a memorandum within 20 working days of the date of this judgment. Te Whatu Ora is to respond by memorandum filed and served within 15 working days thereafter, with any reply from APEX filed and served within a further 5 working days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 3.30 pm on 7 December 2022

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[18] *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ 537 (EmpC) at [48].

[19] "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

Schedule of former District Health Boards

Auckland District Health Board
Waitematā District Health Board
Waikato District Health Board
Taranaki District Health Board
Hawkes Bay District Health Board