IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 148
ARC 54/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AUCKLAND DISTRICT HEALTH BOARD AND 20 OTHER DISTRICT HEALTH BOARDS NAMED IN THE ATTACHED SCHEDULE Plaintiffs
AND	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Defendant

Hearing: 4, 5 and 15 September 2008
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge A A Couch

Appearances: Hamish Kynaston and Mark Donovan, counsel for the plaintiffs
Bill Manning and Anna Paton, counsel for the defendant
Peter Cranney, counsel for NZ Council of Trade Unions as intervener
Tim Cleary, counsel for Business New Zealand as intervener

Judgment: 3 November 2010

JUDGMENT OF THE FULL COURT

---

[1] As part of the duty of good faith, the Employment Relations Act 2000 (the Act) requires parties engaged in collective bargaining to provide certain information to each other on request. This decision concerns the scope and application of those provisions.

[2] The New Zealand Resident Doctors Association (the RDA) is a union representing doctors employed in public hospitals known as Resident Medical Officers (RMOs). For some years, the RDA has been party to a series of multi employer collective agreements (MECAs) with the plaintiffs who are District Health Boards operating public hospitals and employers of RMOs (the DHBs). The parties began bargaining for a new MECA in May 2007. In the course of bargaining, the RDA invoked the parts of the Act relating to the provision of information for the purposes of bargaining. The RDA was dissatisfied with the DHBs' response and alleged that, as a result, they were in breach of their statutory duty in several respects. The DHBs denied any such breach.

[3] This dispute was investigated by the Employment Relations Authority which gave a determination[1] in favour of the RDA. The Authority found that the DHBs were in breach of the duty of good faith in two respects and issued a compliance order requiring the DHBs to remedy one of those breaches. The DHBs challenged the whole of the Authority's determination and the matter came before the Court in a hearing de novo.

[4] This is the first occasion on which the Court has been asked to consider these particular provisions of the Act. For that reason, and because of the potential for the decision to affect other parties engaged in collective bargaining, a full Court was convened and we invited Business New Zealand and the New Zealand Council of Trade Unions to seek leave to be heard as interveners. Both chose to do so and we have been assisted by the submissions made on their behalf.

[5] When the Chief Judge convened the full Court, he nominated Judges C M Shaw and A A Couch as members to sit with him. When the matter came on for hearing, Judge Shaw was unavailable and the remaining two members sat as a quorum as permitted by s 210(1) of the Act.

[6] We initially heard the parties on 4 and 5 September 2008. At that time, bargaining was still in progress and the issues raised by the proceeding remained alive. When the Court reconvened on 15 September 2008 to hear further

[1] AA225/08, 30 June 2008.

submissions, we were informed that agreement had been reached and bargaining concluded. As the principal remedy sought by the RDA was a compliance order, settlement effectively left the proceedings without any practical significance. The parties nevertheless asked us to decide the issues before us on the basis that it would assist them and others in future collective bargaining. We agreed to that request but with the qualification that other cases would have priority.

Statutory provisions

[7] The sections of the Act giving rise to the issues in this case are:

> **32 Good faith in bargaining for collective agreement**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> …
>
> (e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.
>
> …
>
> (5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.
>
> …
>
> **34 Providing information in bargaining for collective agreement**
>
> (1) This section applies for the purposes of section 32(1)(e).
>
> (2) A request by a union or an employer to the other for information must—
>
> (a) be in writing; and
>
> (b) specify the nature of the information requested in sufficient detail to enable the information to be identified; and
>
> (c) specify the claim or the response to a claim in respect of which information to support or substantiate the claim or the response is requested; and
>
> (d) specify a reasonable time within which the information is to be provided.
>
> (3) A union or an employer must provide the information requested—
>
> (a) direct to the other; or
>
> (b) to an independent reviewer if the union or employer providing the information reasonably considers that it should be treated as confidential information.
>
> (4) A person must not act as an independent reviewer unless appointed by mutual agreement of the union and employer.

(5) As soon as practicable after receiving information under subsection (3), an independent reviewer must—

(a) decide whether and, if so, to what extent the information should be treated as confidential; and

(b) advise the union and employer concerned of the decision.

(6) If an independent reviewer decides that the information should be treated as confidential, the independent reviewer must—

(a) decide whether and, if so, to what extent the information supports or substantiates the claim or the response to a claim in respect of which the information is requested; and

(b) advise the union and employer concerned of the decision in a way that maintains the confidentiality of the information; and

(c) answer any questions from the union or employer that requested the information, in a way that maintains the confidentiality of the information.

(7) Unless the union and employer otherwise agree, information provided under subsection (3) and advice and answers provided under subsections (5) and (6)—

(a) must be used only for the purposes of the bargaining concerned; and

(b) must be treated as confidential by the persons conducting the bargaining concerned; and

(c) must not be disclosed by those persons to anyone else, including persons who would be bound by the collective agreement being bargained for.

…

Facts

[8] As there is no longer a live issue between the parties, we set out the facts of this case in outline rather than in detail. Those facts now provide an example of the circumstances in which the issues of interpretation and application may arise rather than the basis for any remedies.

[9] As noted earlier, the RDA and the DHBs have had a series of MECAs in recent years. One such MECA expired on 30 June 2007. Collective bargaining for a new MECA began on 2 May 2007. The lead advocate for the DHBs in this bargaining was Mick Prior. The RDA's principal advocate was Deborah Powell.

[10] The DHBs have collective agreements with other unions. Some of these are MECAs, including such a collective agreement with the Association of Salaried Medical Specialists, the union representing senior doctors employed in public hospitals.

[11] In the course of negotiations on 29 April 2008, which were chaired by a statutory mediator, Mr Prior tabled a new offer on behalf of the DHBs which included the following statements:

> This offer represents the full extent of the financial parameters available for RMOs and more than the funding available to DHBs.
>
> This offer is consistent with the financial parameters of other health settlements including that of the senior doctors.

[12] One aspect of Dr Powell's response to this document was to ask Mr Prior to provide the financial parameters for the senior doctors' settlement in order that the RDA might properly consider the offer. Mr Prior refused to do so.

[13] This statement became a focus for subsequent correspondence in which Mr Prior avoided the expression "financial parameters" used in the offer tabled on 29 April 2009 by referring to "DHB parameters". In a letter dated 9 May 2008, Dr Powell referred again to the original statement made in the offer tabled on 29 April 2008 and made a specific request that the DHBs provide their costings of the settlement with senior doctors and all other health practitioners achieved by the DHBs in the preceding 12 months. This request was recorded as having been made pursuant to s 34 of the Act.

[14] Mr Prior responded in a letter dated 20 May 2008 in which he implicitly declined to provide the information sought by the RDA. Various reasons were given including the statement: "We are also concerned that the information could be misused to the detriment of the relationship between DHBs and other employees and unions." Mr Prior concluded by saying:

> Having said that, and to provide independent verification, I am prepared to meet with the mediator to discuss what comparisons there are that may usefully be drawn between the costings of the SMO settlement and the DHBs' current RMO offer. This process will hopefully go some way to satisfy NZRDA that the offer made is consistent with the DHB funding of other health settlements.

[15] In this letter, Mr Prior used the term "DHB funding" rather than the term "financial parameters" used in the original statement. The significance of this difference became apparent to the RDA in June 2008 when Dr Powell read an affidavit by Mr Prior filed in the proceedings which were then before the Authority.

What Mr Prior said was that, in addition to their general funding, the DHBs had received special funding from the government which was used to settle some of the collective agreements, including the senior doctors. By referring to "DHB funding" as opposed to "financial parameters", Mr Prior was excluding that special funding from the costings. The effect of this was that the DHBs withdrew the claim originally made on 29 April 2008 that overall costing of the offer made to the RDA was consistent with the costing of the settlement for senior doctors.

Issues

[16] Arising out of these facts, a number of issues were pursued regarding the interpretation and application of ss 32(1(e) and 34. They may be summarised as follows:

a) What is the scope of the obligation to provide information under s 32(1)(e)?

b) What are "claims" and "responses to claims" for the purposes of s 32(1)(e)?

c) Under s 32(1)(e), can a party request information from another party in relation to a claim or response it has made itself?

d) What is the extent of the obligation in s 32(1)(e) to disclose "information that is reasonably necessary" to substantiate a claim?

e) Once a claim is made, does s 32(1)(e) continue to apply to that claim after the claim is withdrawn?

f) What is the meaning of "*confidential*" in s 34(3)(b)?

g) Does the Authority have jurisdiction to resolve disputes about whether s 34(3)(b) is properly invoked?

h) How are subss (3) to (6) of s 34 to be applied if the parties cannot agree on an independent reviewer?

Discussion and decision

Scope of s 32(1)(e) and meaning of "claims"

[17] For the RDA, Mr Manning advanced an argument based on a broad purposive approach to s 32 in the context of the Act as a whole. He submitted that s 32 is intended to achieve the overall purposes of the Act with respect to collective bargaining. He pointed to the acknowledgement in s 3(a)(ii) of the Act of "the inherent inequality of power in employment relationships" and promoted the proposition that "knowledge is power".

[18] Building on this foundation, Mr Manning submitted that the obligation under s 32(1)(e) is a wide one and should encompass all information relevant to any statement made in the course of bargaining.

[19] For the New Zealand Council of Trade Unions, Mr Cranney also took an approach based on the purpose of the Act as a whole. He submitted that s 4 of the Act imposes a general duty of disclosure as part of the overall duty of good faith and, as s 32 amplifies the duty of good faith in relation to collective bargaining, the obligation under s 32(1)(e) to provide information should be similarly wide.

[20] The DHBs also adopted a purposive approach, but a much narrower one focussed on the immediate context of s 32(1)(e). Mr Kynaston submitted that the purpose of the requirement to provide information about claims made is to keep the parties to collective bargaining honest. He said that this purpose can be achieved by requiring the provision of only enough information to verify the accuracy of any specific statements made.

[21] Mr Cleary's submissions on behalf of Business New Zealand focussed on the meaning of the word "claims" in s 32(1)(e). Arguing from a historical perspective, Mr Cleary submitted that "claims" means formal expressions of position in bargaining and excludes all other statements or assertions of fact made in the course of bargaining.

[22] In construing s 32(1)(e), our starting point must be the statutory principles of construction set out in the Interpretation Act 1999, as explained in the decisions of superior courts.

[23] Section 5 of the Interpretation Act 1999 provides that: "The meaning of an enactment must be ascertained from its text and in the light of its purpose". Describing how this ought to be applied in practice, Justice Tipping said in Commerce Commission v Fonterra Co-Operative Group Ltd:[2]

> 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.

[24] Taking this approach, our first consideration is the natural meaning of the words used. The everyday meaning of the word "claim" includes a demand that a collective agreement contain or omit a particular provision but it is not limited to that meaning. It also includes any assertion of fact. That broad meaning, however, must necessarily be qualified by the rest of the text. One such qualification is contained in the final words of the paragraph that the claim is "made for the purposes of the bargaining". We see this as limiting the scope of s 32(1)(e) to statements made for the purpose of advancing or opposing demands made about the content of the proposed collective agreement.

[25] Another critical limitation is that s 32(1)(e) imposes an obligation to provide information for the purposes of supporting or substantiating "claims". It follows that "claims" cannot include statements incapable of being supported or substantiated. Otherwise, the statute would be imposing obligations which were impossible to meet. A mere wish, for example "we want a 4 percent increase in wages", will not be a claim for the purposes of s 32(1)(e) because, without more, it is incapable of being substantiated by information. On the other hand, a statement in response to that wish, for example "we cannot afford to increase wages by 4 percent" will be a

claim for the purposes of s 32(1)(e) because it is an assertion of fact made for the purposes of bargaining and capable of substantiation by information.

[26] In our view, that everyday meaning of the words used in s 32(1)(e) is consistent with its purpose in the context of the Act. Section 32 as a whole is concerned with defining and promoting good faith in collective bargaining. Honesty and transparency are key aspects of the duty of good faith of particular importance in bargaining. If a party to collective bargaining seeks to advance its position or counter another party's position by saying that certain circumstances exist, the collective bargaining process will be assisted by all concerned knowing whether that statement is accurate. In that sense, we accept Mr Kynaston's submission that the essential purpose of s 32(1)(e) is to "keep the parties honest".

[27] This construction is consistent also with the place of s 32 in the scheme of the Act as a whole. The opening words of s 32 make it clear that it is concerned with certain aspects of the general duty of good faith imposed by s 4. One of the key aspects of that duty set out in s 4(1)(b) is not to mislead or deceive. Making an assertion of fact in the course of bargaining which cannot be supported or substantiated, would be misleading or deceptive. By creating a right of access to information supporting such claims, therefore, s 32(1)(e) provides a strong incentive to the parties to collective bargaining to avoid making claims which are misleading or deceptive.

[28] It will be apparent from this discussion that we do not accept the interpretation advanced by Mr Cleary. His submissions required us to have regard to extrinsic materials in relation to statutory wording which is not unclear and whose natural meaning is consistent with the purpose of the Act.

[29] Equally, we do not accept the very broad constructions urged on us by Mr Manning and Mr Cranney. The approach advanced by Mr Manning emphasised purpose at the expense of the meaning of the text. Mr Cranney's submission that s 4 imposes a general duty of disclosure of information relating to collective bargaining, deprives s 32(1)(e) of any purpose. To the extent it may be argued that a wider

---

[2] [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

obligation to provide information is required to achieve the purposes of the Act, that should be addressed under the general provisions of s 4 rather by attempting to stretch the meaning of s 32(1)(e) beyond the elastic limit of the words used.

Can a party seek information from the other party about its own claims or responses?

[30] The wording used in s 32(1)(e) does not directly answer this question but, focussing solely on the words used, the logical result would be that information could be requested from any party in relation to claims made by any party.

[31] This literal construction is obviously inconsistent with the purpose of the section which we have found to be to keep the parties honest in collective bargaining. The effect of it would be to enable a party to effectively interrogate another party by making strategically calculated or even speculative "claims" and requiring the other party to substantiate them. Such behaviour would be inconsistent with the general duty of good faith imposed by s 4. To the extent that a party wishes to know the other party's position on an issue in bargaining, it can simply ask a question across the table. If the answer is an assertion of fact, that may then be the subject of a request for information.

[32] We conclude that, on a proper construction of s 32(1)(e), it does not permit a party to collective bargaining to require the provision of information in relation to a claim it has made itself.

What information is "reasonably necessary"?

[33] This question arises in the context of the expression in s 32(1)(e) "information that is reasonably necessary to support or substantiate claims or responses to claims". Put into that context, the question partly answers itself. It cannot mean information which does not support or substantiate the claim made. It therefore excludes information which tends to undermine or contradict the claim.

[34] This leaves as the only issue whether what is "reasonably necessary" includes all information which tends to support the claim or simply enough to provide verification. If all possibly relevant information was to be provided, that is what the

Act would have said. It does not do that. Rather, it refers to what is "reasonably necessary to support or substantiate". The natural meaning of those words is that what must be provided is sufficient information to demonstrate to an objective standard that the claim is well founded, but not necessarily any more. That meaning is consistent with the purpose of s 32(1)(e) being to ensure that assertions of fact are made honestly and in good faith.

[35] We think there must also be an element of proportionality in the extent of the response required to a request for information. Part of the scheme of the Act is that the bargaining process should operate efficiently and effectively to achieve a collective agreement within a reasonable time after the initiation of bargaining. That bargaining process should not be diverted or unduly delayed by obligations imposed on the parties in the course of it. Thus, the response required to a request for information should not be out of proportion to the importance of the claim in the bargaining.

[36] On this basis, we find that the term "reasonably necessary" is a measure of the extent to which the available information needs to be provided. It is an objective measure but one which must, in the first instance, be applied by the parties themselves in deciding how much and what information should be provided in response to a request.

If a claim is withdrawn, does the obligation to provide information lapse?

[37] Again, on a literal interpretation of the words used, it could be said that once a claim is made to which s 32(1)(e) applies, the statutory obligation to provide information on request arises and there is no statutory mechanism to stop it. Having regard to the purpose of s 32(1)(e) set out above, however, that makes little or no sense. Taking that literal approach to its logical extreme would mean that a party could be required to provide information after the bargaining process was over and a collective agreement concluded. That cannot have been the purpose of the provision.

[38] The key to this issue lies in the purpose of s 32 as a whole being to promote good faith in collective bargaining. Once a claim (whether in the sense of a demand or an assertion of fact) is withdrawn or abandoned, it ceases to be a factor of the

bargaining process. The very fact of withdrawing a claim will also, in most cases, amount to a concession that the claim cannot be supported or substantiated. Such a damaging concession will be something parties will wish to avoid and will equally tend to keep them honest in the claims they make.

[39] On a broader view, it must also be consistent with the overall duty of good faith that parties be permitted to withdraw claims which are made inappropriately or by mistake. To do otherwise would be misleading or deceptive. Equally, parties must be permitted to set aside claims as part of a compromise reached in the course of bargaining.

[40] We conclude that, once a claim is withdrawn, the right to require information in relation to that claim must lapse. Equally, if information has already been requested in relation to a claim before it is withdrawn, the obligation to provide that information will lapse when the claim is withdrawn.

What is the meaning of "confidential" in s 34(3)(b)?

[41] This question arises in the context of providing information to an independent reviewer if the party providing the information "reasonably considers that it should be treated as confidential information". The dictionary meaning of "confidential" is "intended to be kept secret" and that accords with the everyday meaning of the word.

[42] Applying that meaning in practice would mean that s 34(3)(b) could be invoked by a party responding to a request under s 32(1)(e) if that party reasonably believed that the information ought not to be disclosed to the other party or, through that party, to others. This would require an actual belief to that effect and grounds for that belief which were substantial and objectively sufficient.

Does the Authority have jurisdiction to resolve disputes about whether s 34(3)(b) is properly invoked?

[43] The essential aspect of this issue is whether the Authority has jurisdiction to determine whether a party's belief that information requested under s 32(1)(e) should be treated as confidential is reasonably held.

[44] Subject to certain exceptions, s 161(2) of the Act declares that the Authority does not have jurisdiction to make a determination about "any matter relating to bargaining". One of the exceptions, however, is s 161(f) which includes in the Authority's primary jurisdiction:

> (f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

[45] In light of that provision, the question becomes whether the provisions of s 34 are "good faith obligations". There is a simple, logical argument that they are. Section 34(1) provides "This section applies for the purposes of s 32(1)(e)". The purpose and function of s 32 is to impose specific good faith obligations on parties to collective bargaining. It may also be said directly that a party who asserts that information should be treated as confidential must do so in good faith as part of the general obligation under s 4.

[46] That logical conclusion must be weighed against the fact that, if the Authority has jurisdiction to determine whether s 34(3)(b) has been validly invoked, that would overlap the role of the independent reviewer under s 34(5). We are aware from the helpful analysis of the history of these provisions provided by Mr Cleary, that they include significant changes to the original bill made during the select committee process. As we have observed previously, such revision can readily result in unintended gaps or overlaps in the final form of the legislation. We see this as one of those uncomfortable anomalies and do not regard the apparent conflict with s 34(5) as reason to depart from the otherwise straightforward application of the provisions defining the Authority's jurisdiction.

[47] We conclude that the Authority has jurisdiction to determine whether a party has validly invoked s 34(3)(b) of the Act. That jurisdiction may be exercised either in the course of proceedings otherwise properly before it or as a standalone employment relationship problem.

What happens if the parties cannot mutually agree on an independent reviewer?

[48] This question arises out of the requirement in s 34(4) that "[a] person must not act as an independent reviewer unless appointed by mutual agreement of the union and employer."

[49] The Act provides no method for resolving disagreement about who should be appointed as an independent reviewer. Neither the Authority nor the Court is given power to make an appointment and we see no valid basis on which to imply this.

[50] It may be suggested that a way out of such an impasse is for the Authority to perform the functions of an independent reviewer in the absence of one being properly appointed, but we reject that suggestion. Section 34(4) contains a clear requirement that any independent reviewer must be appointed by agreement of the parties. That statutory requirement cannot be overridden or ignored by the Authority assuming the role without the agreement of the parties.

[51] Even if the parties were to agree that the Authority or one of its members be appointed as an independent reviewer, we doubt that the Authority has jurisdiction to perform the functions required of an independent reviewer by s 34(5). One of those functions is to decide the extent to which information which is to be treated as confidential supports or substantiates the claim made and to answer questions from the parties. This is an arbitral role which is not subject to the obligation of good faith imposed by s 4 of the Act and which is excluded from the Authority's jurisdiction by s 161(2).

[52] It seems to us that this issue reflects another gap in the legislation which ought to be filled by Parliament. We urge the legislature to address this issue because, as the legislation stands, it has the potential to allow one party to either delay the bargaining process indefinitely or to defeat the purpose of s 32(1)(e).

Application to the facts of this case

[53] As the collective bargaining in which this case arose ended some time ago, there is no need for us to give a binding decision.

[54] If we had to decide the outcome, however, we would have upheld the challenge on the basis that, by the time the matter came before the Court, the DHBs had withdrawn the claim made in the document tabled on 29 April 2008. As a result, the RDA's right to request information in relation to that claim and the DHBs' obligation to provide it had lapsed. It follows that we would not have sustained the compliance order made by the Authority.

[55] As to the other claims made by the RDA in its defence to the challenge and in its cross challenge:

a) We would have found that the DHBs breached their obligation of good faith by failing to either provide information to the RDA or to an independent reviewer to support or substantiate the claim made in the offer tabled on 29 April 2008.

b) We have found that it was within the jurisdiction of the Authority to determine whether any assertion by the DHBs that the information should be treated as confidential information was reasonable.

c) It would not have been possible to decide whether a decision by the DHBs to refer the information to an independent reviewer was reasonable because we find as a fact that the DHBs did not make such a referral.

Conclusion

[56] Pursuant to s 183(2), the determination of the Authority is set aside and this decision now stands in its place.

Costs

[57] Our preliminary view is that this is a test case in which no order for costs ought to be made. If either party wishes to seek an order for costs, counsel should file and serve a memorandum within 30 working days after the date of this decision. The other party will then have 20 working days to provide a memorandum in response. Otherwise, costs are to lie where they fall.

A A Couch
Judge
For the full Court

Judgment signed at 12.30pm on 3 November 2010

SCHEDULE OF PLAINTIFFS

Auckland District Health Board

Bay of Plenty District Health Board

Canterbury District Health Board

Capital and Coast District Health Board

Counties Manakau District Health Board

Hawkes Bay District Health Board

Hutt District Health Board

Lakes District Health Board

Nelson Marlborough District Health Board

Midcentral District Health Board

Northland District Health Board

Otago District Health Board

South Canterbury District Health Board

Southland District Health Board

Tairawhiti District Health Board

Taranaki District Health Board

Waikato District Health Board

Wairarapa District Health Board

Waitemata District Health Board

West Coast District Health Board

Whanganui District Health Board