Employment Court of New Zealand

Southern District Health Board v Glasson [2019] NZEmpC 46 (30 April 2019)

Last Updated: 6 May 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2019] NZEmpC 46
EMPC 382/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SOUTHERN DISTRICT HEALTH BOARD Plaintiff
AND	KERREN GLASSON Defendant

EMPC 109/2018

AND IN THE MATTER	of a proceeding removed in part from the Employment Relations Authority
BETWEEN	KERREN GLASSON Plaintiff
AND	SOUTHERN DISTRICT HEALTH BOARD Defendant

Hearing:	17 – 19 September 2018 (Heard at Invercargill)
Appearances:	S Hornsby-Geluk, counsel for Southern District Health Board B Manning, counsel for Ms Glasson
Judgment:	30 April 2019

JUDGMENT OF JUDGE K G SMITH

[1] Kerren Glasson has been employed by the Southern District Health Board (the DHB) since December 1987. She considers herself to be a cardiac sonographer and

wants the DHB to recognise her as one. The DHB does not accept that she is, or was, employed as a sonographer. It says she has always been employed as a clinical physiologist.

[2] The DHB and Ms Glasson's union are parties to two multi-employer collective agreements, one covering sonographers and the other covering clinical physiologists. Ms Glasson says she is covered by the APEX South of Auckland District Health Board's Sonographers' Collective Agreement. The DHB says her work is within the coverage clause of the Clinical Physiology National Collective Agreement. The difference between being a sonographer and a clinical physiologist is significant professionally and financially.

[3] The Employment Relations Authority decided that Ms Glasson's work was covered by the sonographers' collective agreement.1 Until the Authority's determination, the DHB had been paying Ms Glasson as a clinical physiologist. One outcome of the determination was that the DHB became indebted to her for a shortfall in remuneration but the amount

owed was not quantified. Instead the Authority directed the parties to mediation to attempt to agree on how much was owed.2

[4] The DHB challenged the determination. Subsequently, the Authority removed to the Court all remaining issues including the wage arrears, if any, due to Ms Glasson if she is covered by the sonographers' collective agreement.3

[5] Sonographers and clinical physiologists are highly trained and skilled in the use of ultrasound techniques. This potential overlap between these disciplines is central to this dispute.

Sonographers

[6] Sonographers use ultrasound technology to image organs in the body of a patient. The purpose of an ultrasound study is to provide a patient's treating physician with the results of imaging investigations to aid diagnosis and management. The study

1 *Glasson v Southern District Health Board* [2017] NZERA Christchurch 204.

2 At [116].

3 *Glasson v Southern District Health Board* [2018] NZERA Christchurch 43.

involves the ultrasound examination, interpreting and assessing the images and writing a report to the treating physician.

[7] Ultrasound examinations are highly operator-dependant. The experience and training of the sonographer is critical to obtaining images of the patient's anatomy without missing or obscuring significant pathology. It is also important that the ultrasound image is interpreted and assessed accurately and comprehensively to try to avoid the risk of misdiagnosis.

[8] An ultrasound is dynamic because the sonographer needs to search for abnormalities and focuses or extends the examination depending on the images that are being seen. A sonographer does not record every image taken of a patient. A relatively small portion of what the sonographer has seen is saved. The sonographer therefore has to decide what views to take and record.

[9] A sonographer reports his or her findings and they are linked to the symptoms for which the ultrasound was performed. Even if a study is reviewed later, by a physician, all that can be seen and verified is what the sonographer has saved. In practical terms a significant portion of a sonographer's work is autonomous.

[10] Sonography is a profession regulated under the Health Practitioners Competence Assurance Act 2003 (HPCAA). Sonographers are required by HPCAA to be registered with the New Zealand Medical Radiation Technologists Board (Technologists' Board). They must also hold an annual practicing certificate.

[11] Cardiac sonography is also known as echocardiography and a cardiac sonographer as an echocardiographer.

Clinical physiologist

[12] A clinical physiologist is also highly trained in healthcare specialising in testing, measuring and reporting on patients which can be in the fields of cardiology, respiratory medicine or sleep medicine. They perform a variety of tests such as electrocardiograms, holter monitoring and exercise tolerance tests. They can also perform cardiac sonography.

[13] Clinical physiologists are not regulated under HPCAA.

Ms Glasson's employment history

[14] Ms Glasson is trained and qualified as both a sonographer and a clinical physiologist. She started work at Southland Hospital as a trainee medical technician in December 1987. Today that position would be described as being a provisional clinical physiologist. In her work she undertook a range of clinical physiological procedures under supervision, including cardiac and respiratory procedures. Initially, she did not undertake cardiac ultrasound work.

[15] In January 1990 Ms Glasson became an Associate of the Society of Cardiopulmonary Technology, having passed the required examinations in cardiology and respiratory testing. That meant she was recognised as a medical technician, a position now known as a clinical physiologist. On qualifying she was able to undertake cardiac and respiratory clinical physiological procedures.

[16] Ms Glasson started practical training in cardiac ultrasound work in 1993. She described herself as a trainee

echocardiographer. By the time this work started she had been a medical technician for about three years. She performed adult and paediatric ultrasound analysis and reporting under the supervision of a charge cardiac sonographer.

[17] In April 1994 Ms Glasson was appointed to the position of Senior Medical Technician. A minimum of three years post-qualification clinical experience was required for this position. Specialist training in either cardiac ultrasound or neurophysiology was required. This position was equivalent to being a senior clinical physiologist today.

[18] The duties of this new job included assisting the Charge Medical Technician, as required, and temporarily undertaking the duties of that technician when he or she was absent. Importantly she was to perform the full range of cardiac, respiratory, neurological and other physiological testing. The schedule of duties accompanying this job obliged Ms Glasson to undertake further training and examinations as required. At the time the conditions of appointment for this job were signed she was

performing respiratory physiological procedures independently as well as assisting with the training of junior staff. She had also been undertaking on-the-job-training in cardiac ultrasound for almost a year.

[19] The next step in Ms Glasson's career followed the resignation of a manager in January 1996. That triggered reallocation of certain responsibilities and duties in her department. In a letter dated 15 January 1996 the DHB advised Ms Glasson that she would carry "sole responsibility for the cardiac ultrasound section". She was to take over supervision of cardiac ultrasound and was responsible for deciding which studies needed external review. She was also responsible for staff training. The letter recognised her skills in cardiac ultrasound, procedures and reporting.

[20] Nine years later Ms Glasson signed a new position description with the DHB, for a "Specialist Medical Technologist". Despite the change in title her core responsibilities, and the nature of the work, did not change. The position description recorded that she would be responsible for undertaking a comprehensive range of echocardiographic examinations. She was to provide a comprehensive service, accurate analysis and high quality reports.

[21] This position description listed extensive specifications for the job. They included experience in, and being able to undertake, a full range of adult and paediatric echocardiography and the ability to work "without close supervision and independently" while knowing when to seek advice.

[22] Ms Glasson's last position description was dated 6 August 2009. Its purpose was stated as:

To supervise the provision of an echocardiography service which operates in a safe and professional manner for the welfare of the patient.

[23] The position was still to perform cardiac ultrasound. The performance measures included, as previously, providing accurate and adequate reports. There were five other areas of responsibility in this description requiring the provision of a "robust" cardiac ultrasound service, training, a development programme for cardiac ultrasounds and a quality assurance programme. She was to participate in staff

development. She was to be qualified as a cardiac physiologist and to hold an appropriate post-graduate qualification in echocardiography.

[24] There was an important difference between the 2009 position description and its predecessor. Unlike the previous description this one said registration with the Clinical Physiologists Registration Board (the Physiologists' Board) was essential.

[25] By the time this position description was signed the preponderance of Ms Glasson's work was in cardiac ultrasound. Her departmental manager had confirmed that her core job was the provision and supervision of the hospital's echocardiography service and she was required to supervise a trainee. She was no longer performing respiratory physiological procedures, because of the volume of cardiac ultrasound work.

Further qualifications

[26] In 2005 Ms Glasson began studying for a Diploma in Medical Ultrasound. The diploma is recognised by the Cardiac Society of Australia and New Zealand as an academic qualification leading to registration as a sonographer. She explained that her clinical physiology qualification provided an introduction to basic cardiac sonography but is not a prerequisite for the diploma she now holds. She explained, without contradiction, that a cardiac physiology qualification is not recognised by the Society as an appropriate qualification for cardiac sonography. Ms Glasson was awarded the diploma on 11 November 2007.

[27] The DHB knew Ms Glasson was studying for this diploma. The then manager of the Diagnostic Testing department supported her course of study. She was encouraged to apply for financial assistance from the Southland Hospital Tertiary Fund and received some funding for her course fees.

Registration

[28] Ms Glasson's diploma meant she become eligible to be registered as a medical radiation technologist by the Technologists' Board. She was registered on 18

September 2012 and the scope of her practice was stated as "ultrasound".4 This registration recognised her as a qualified sonographer.

[29] The DHB supported Ms Glasson's application to the Technologists' Board for registration. In June 2012 Lisa Wilson, who had become the head of the Diagnosing Testing department, had written a letter of support. This letter described her employment history, experience in echocardiography, and gave a breakdown of the clinical hours she spent working in this specialty.

[30] The DHB endorsed Ms Glasson's application for registration in the following way:

As a qualified cardiac sonographer [Ms Glasson] competently and independently performs full diagnostic cardiac [ultrasound] examinations on both adult and paediatric patients in a timely and safe manner within the Diagnostic Testing Department under the guidance of staff cardiologists and medical physicians within the Southern DHB.

[31] In this letter Ms Glasson was described by her manager as a senior cardiac sonographer. Not surprisingly, the letter endorsed the quality of her work.

[32] Ms Glasson has maintained her registration with the Technologists' Board. However, she did not immediately obtain an annual practicing certificate from it. Ms Glasson said she came to realise, during the Authority investigation, that to lawfully undertake ultrasound studies she needed a practicing certificate and obtained one. The first practicing certificate she obtained was issued to her on 8 May 2017.

[33] One reason for the delay in obtaining a practicing certificate was because the DHB declined to recognise Ms Glasson as being employed as a sonographer and refused to pay for it. She pays the annual practicing certificate fee personally.

HPCAA and sonography practice

[34] Before considering the issues to be resolved a brief review of the HPCAA is necessary, because of the way in which that Act regulates health practitioners.

4 Issued under s 21 of the HPCAA.

[35] The purpose of the HPCAA is to protect the health and safety of the public by providing mechanisms to ensure health practitioners are competent and fit to practice their professions.5 The legislation was designed to provide for consistent accountability for all health practitioners, that each practitioner is competent to practice within the relevant scope of his or her practice, and by providing the power to restrict activities to particular classes of health practitioner.6

[36] The structure of the HPCAA includes recognition of approved authorities to regulate health professions. Section 5(1) of the HPCAA defines "authority" as a body corporate appointed by or under the Act that is responsible for the registration and oversight of practitioners of a health profession. Health profession is defined as the practice of a profession in respect of which an authority is appointed by or under the Act.7

[37] HPCAA approved authorities are listed in sch 2. The Technologists' Board is in that list as the profession for the practice of medical radiation technology, which includes sonographers.

[38] The functions of the Technologists' Board are specified by s 118 of the HPCAA. It is empowered to prescribe the qualifications required for scopes of practice within the profession, and, among other things, to set standards of clinical competence.8

[39] The Technologists' Board published a notice in the Gazette, as required, of scopes of practice for the medical practitioners it regulates. The notice defined each of the practice areas making up the practice of medical radiation technology.9 The practice of sonography was provided for as follows:

Scope of Practice – Sonographer

Sonographers are responsible for the outcome of the diagnostic ultrasound examination. The outcome of the examination is recorded electronically to allow for consultation with other health and medical practitioners.

5 Section 3(1).

6 Section 3(2)(a)-(f) inclusive.

7 Section 5.

8 Section 118(a), (i) and (m).

9 Relying on s 11.

Sonographers perform a wide range of real-time diagnostic examinations and may at their discretion (and in accordance with clinical and workplace guidelines) extend the examination to include relevant regions and/or sequences not suggested in the referral.

Sonographers' competencies include, but are not limited to, patient care, ultrasound physics and technology, anatomy and physiology identification and assessment, diagnostic interpretation of the ultrasound findings, bioeffects and the use of ultrasound technology, clinical and organisational responsibility for the examination, and quality assurance.

[40] Those statutory requirements can be contrasted with the Physiologists' Board which Ms Glasson's employment agreement requires her to belong to. The Physiologists' Board is not an authority under HPCAA and, therefore, has no statutory power to regulate a profession or to establish competence criteria. While the Physiologists' Board is a voluntary organisation, its existence, and what it plans to be able to regulate, were significant to the DHB.

Request for coverage

[41] On 6 May 2013, several months after she was registered by the Technologists' Board, Ms Glasson asked the DHB to agree that she was covered by the multi- employer collective agreement her union, APEX, had with the DHB (and other District Health Boards) for sonographers. This request was made because she considered the sonographers' collective agreement was more suited to her work and was in keeping with a trend for cardiac sonographers around New Zealand.

[42] Despite having supported Ms Glasson's application for registration the DHB rejected this request. Her manager, Ms Wilson, declined it because the DHB did not consider her "scope of practice or types of duties" had changed significantly enough to warrant a change of collective agreement. Ms Glasson's registration with the Technologists' Board was acknowledged but, as one reason for rejecting her request, the DHB said that it was not a mandatory requirement for her job.

[43] That decision was surprising because Ms Wilson wrote the letter supporting Ms Glasson's application for registration with the Technologists' Board.

The issues

[44] Counsel filed a statement of agreed issues which, with minor adjustments, is summarised as follows:

(a) Is Ms Glasson covered by the multi-employer collective agreement which covers South of Auckland sonographers?
(b) In assessing whether she is covered by the sonographers' collective agreement:
(i) Is she employed as a sonographer; or
(ii) is she "substantially employed" as a sonographer; or
(iii) is she "substantially employed" in the use of ultrasound imaging equipment for medical diagnostic, therapeutic associated purposes?
(c) If she is covered by the sonographers' collective agreement when did she first become covered by it? Specifically, has she been covered:
(i) Since 1 June 2013, the date she contends she was entitled to coverage following her written request on 6 May 2013; or
(ii) since 1 May 2017, the date the DHB contends for on the basis that was when she was first issued with a practicing certificate by the Technologist's Board?
(d) If she is covered by the sonographers' collective agreement, do the remuneration provisions of clause 5 in that agreement apply to her?
(e) If she is covered by the sonographers' collective agreement, is she entitled to back-pay?

(f) If she is entitled to back-pay, what is that entitlement? Is it:
(i) As Ms Glasson contends, Step 8 on the basis that at all material times she has been "a charge" sonographer; or, alternatively,
(ii) initially Step 6, on the basis that she is a "specialist" and then Step 7; or

(iii) as the DHB contends, Step 1 of the scale progressing up one step of the salary scale each year until reaching Step 5?

(g) If Ms Glasson's work is covered by the sonographers' collective agreement, is she entitled to reimbursement of:
(i) The fees paid for her annual practicing certificate from the Technologists' Board?
(ii) The cost of the compulsory medical education undertaken as a condition of her annual practicing certificate from the Technologists' Board?

[45] Each of those issues will be addressed below.

Covered by the Sonographers' agreement?

[46] The first two issues can be answered together. The current sonographers' collective agreement has a term from 1 December 2016 to 30 November 2019. The coverage clause in this agreement is the same as in all the previous sonographers' collective agreements. It reads:

This collective agreement shall apply to all employees of the named employer parties who are employed or engaged to be employed in ultrasound imaging as sonographers or student/trainee sonographers, and any employee substantially employed as a sonographer or student/trainee sonographer but who may from time to time use different titles, and any employee who is substantially employed in the use of ultrasound imaging equipment for medical diagnostic, therapeutic and associated purposes other than registered medical practitioners.

[47] The definition of sonographer has been consistent in each sonographers' collective agreement and reads:

"Sonographer" means an employee who has been registered and passed an examination that is approved by the Medical Radiation Technologists Board (or equivalent) to practice by the Board.

[48] The coverage clause in each of the clinical physiology collective agreements, to which APEX and DHB are parties, has also been consistent. In the collective agreement with a term from 19 December 2016 to 18 December 2019 coverage was provided as follows:

All employees employed as Clinical Physiologists, Clinical Physiology Technicians, ECG Technicians and employees employed as trainees undergoing training as Clinical Physiologists, Clinical Physiology Technicians or ECG Technicians, and any employee employed as above who may from time to time use a different title.

[49] The definition of clinical physiologist in each of the physiologists' collective agreements has also been consistent as well and reads as follows:

Clinical Physiologist means an employee who holds a relevant post-graduate qualification or equivalent and meets the minimum standards as set by the appropriate professional body in the discipline in which the employee practices.

(footnote omitted)

[50] The distinction between sonographers and clinical physiologists emerged as APEX and District Health Boards began settling multi-employer collective agreements differentiating between these practice areas. In 2008 APEX and the DHB were parties to two collective agreements that separated sonographers from clinical physiologists. In February that year a collective agreement was concluded for medical radiation technologists specifically covering ultrasound. In that collective agreement sonographers were provided for. The other collective agreement was signed about 11 months later and applied to clinical physiologists. It did not mention sonographers. That distinction has been maintained ever since.

[51] Both parties accepted that the coverage clause in the sonographers' collective agreement has three limbs:

(a) All employees employed in ultrasound imaging as sonographers;
(b) any employee substantially employed as a sonographer but who may from time to time use different titles; and
(c) any employee who is substantially employed in using ultrasound imaging equipment for medical diagnostic, therapeutic and associated purposes.

[52] Mr Manning, in his submissions for Ms Glasson, said that on analysis the issue of coverage breaks down into two essential parts: what is the work of the employee and which coverage clause covers that work? The emphasis, he said, was on the employee's work because of s 56 of the Employment Relations Act 2000 (the Act). That was because s 56 makes a collective agreement enforceable by the union and employer parties to it and by union member employees whose work comes within the coverage clause. The primary focus was, therefore, on the employee's work; the real nature and content of the job. In that context the employee's individual employment agreement may be relevant but is only one factor. He relied on *Aviation and Maritime Engineers Inc v Air New Zealand Ltd* as saying a job description affected by the coverage clause of

a collective agreement must conform to and, if necessary, yield to the coverage clause.10

[53] The point of these submissions was to focus attention on the content of Ms Glasson's work, because that was consistent with determining the real nature of the relationship between the parties.11 That would also diminish reliance on the job description from 2009.

[54] Mr Manning submitted that interpreting the coverage clause of a collective agreement is an objective assessment, by ascertaining the meaning of the agreement as conveyed to a reasonable person having all the background knowledge which

10 *Aviation and Maritime Engineers Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 172 at [140].

11. By drawing on cases such as *Clark v Northland Hunt Inc* [2006] NZEmpC 119; (2006) 4 NZELR 23 (EmpC) at [25] considering s 6(2) of the Act.

reasonably would have been available to the parties in the situation in which they were in at the time the agreement was made.12

[55] The following factors were said to support Ms Glasson's work falling within the coverage clause of the sonographers' collective agreement by applying that objective assessment:

(a) Ninety per cent of her working time is devoted to ultrasound and has been for more than the last five years. Only 10 per cent of her work time is allocated to other tasks.
(b) She has been in sole charge of the cardiac ultrasound service at Southland Hospital for more than 20 years.
(c) For a considerable time, before May 2013 when she obtained registration with the Technologists' Board, she was the sole qualified cardiac sonographer at the hospital.
(d) She trained in cardiac ultrasound for many years, gaining her diploma in November 2007 and became registered in 2012, as a result of which she was able to perform ultrasound independently.
(e) The Technologists' Board, which is a statutory authority, has recognised her skills as a sonographer.
(f) Her position description is titled Specialist Technologist – Echocardiography, which is synonymous with cardiac sonography.
(g) The purpose of her job, in the position description, includes supervising the echocardiography service.

12 From *New Zealand Air Line Pilots Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 applying *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

(h) The details of the position description state areas of responsibility directed towards ultrasound work.

[56] The DHB's case was that Ms Glasson's work fell within the coverage of the clinical physiologists' collective agreement because:

(a) Her job title, Specialist Technologist – Echocardiography, was for a cardiac physiologist position.
(b) The position description required Ms Glasson to be qualified as a cardiac physiologist and to be registered with the Physiologists' Board.
(c) Echocardiography is a function that can be undertaken lawfully by a cardiac physiologist and there is no requirement for that work to be performed by a person registered under HPCAA.
(d) While Ms Glasson's focus is largely on echocardiography, she continues to undertake other cardiac physiologist responsibilities and has done so since her last position description was signed in 2009.
(e) It made a conscious decision to employ Ms Glasson as a cardiac physiologist on the basis that it had flexibility to be able to offer a range of cardiac physiologist services which she can provide. As a corollary to that point, it said that Ms Glasson was not employed as a sonographer and her duties have never been limited to sonography.
(f) The 2009 position description expressly states that the remuneration would be paid according to a collective employment agreement which, at that time, covered the work of cardiopulmonary technologists, scientists and technicians. That collective agreement had been replaced by the clinical physiologists' collective agreement. The DHB said that represented a "mutual intention" to recognise Ms Glasson as a clinical physiologist.

(g) Ms Glasson was repeatedly confirmed by her union as being covered by the physiologists' collective agreement, most recently in 2012 and 2015.

[57] The DHB rejected what it perceived to be an argument that Ms Glasson claimed the HPCAA required her to be registered with the Technologists' Board and to hold an annual practicing certificate issued by it. The thrust of this submission was that there is nothing in the HPCAA preventing trained clinical physiologists from performing echocardiography. The second part of this submission was to reject what it considered to be her claim that, without being registered, she could not undertake echocardiography without supervision. The issue of supervision emerged because of a Physiologists' Board publication referring to supervision.

[58] Ms Hornsby-Geluk submitted that since Ms Glasson was not employed as a sonographer the first limb of the coverage clause of the sonographers' collective agreement did not apply. For essentially the same reasons, the DHB argued that Ms Glasson's work did not fall within the remaining two limbs in the sonographers' coverage clause. Further, the DHB said

there was no contractual or statutory requirement for her to be registered with the Technologists' Board. Essentially, the DHB's argument was that the wording of the coverage clause in the sonographers' agreement did not prevent Ms Glasson from being employed by it as a clinical physiologist who was required from time to time to undertake cardiac ultrasound work. Its case was that all of her duties and responsibilities could properly be undertaken relying on her qualifications as a clinical physiologist. Linked with her job description, that was said to be enough to exclude her work from coverage under the sonographers' collective agreement.

[59] As a fall back, the DHB said that, even if Ms Glasson could be said to be "substantially employed" in the use of ultrasound imaging all that would do is give rise to a situation where her work was covered by two collective agreements. In that situation it considered the coverage clause of the physiologists' collective agreement

should apply because that is the only one applying to all her work, not just to one part of it.13

[60] Underlying all of the DHB's submissions was that nothing in Ms Glasson's work had changed since 1996 when she identified professionally with clinical physiology and was covered by a collective agreement applying to that occupation.

[61] To supplement these submissions, the DHB maintained that employing Ms Glasson as a cardiac physiologist provided it with the flexibility necessary for a hospital of its small size and type. That was because, it said, cardiac physiologists can perform more general tasks than a sonographer who would be confined by a scope of practice. That situation was explained by Noelle Bennett, who until recently was the Allied Health Director for the DHB and Charge Radiation Therapist at Dunedin Hospital. She said that there is a need in smaller hospitals for generalist staff who can carry out a variety of tasks. Fitting in with that need for flexibility, she said Ms Glasson has wider skills from her early training. Ms Bennett said that if this capability was lost there would be a compromise for patients. Some of them may have to travel for assessment and treatment that might have been avoided.

[62] That sentiment was shared by Lynda McCutcheon who is the Chief Allied Health Scientific and Technical Officer for the DHB. Ms McCutcheon insisted that Ms Glasson was not employed as a sonographer, because of her position description. She said the DHB in Dunedin and Southland Hospitals employs clinical physiologists to undertake echocardiography work, not sonographers. She went so far as to say that the DHB employs echocardiographers at both hospitals who are issued with annual practicing certificates by the Physiologists' Board. None of them are required to be registered with the Technologists' Board or to have annual practicing certificates issued by it. She said that if each of the DHB's echocardiographers was required to register with the Technologists' Board the department would have to shut.

[63] Simon Donlevy, who is the Service Manager for Medicine, Women and Children's Directorate at Southland Hospital stated a similar view about Ms Glasson. He considered she was not employed as a sonographer and an annual practicing

13 Relying on *Wilson v Dalgety and Co Ltd* [1940] NZLR 323 (SC).

certificate from the Physiologists' Board was the only registration allowing her to perform all the duties that might be required of her.

[64] I accept Mr Manning's submission that what is required is to assess Ms Glasson's work by considering its real nature and then to consider which coverage clause applies by interpreting it objectively.14

[65] The DHB's case is inconsistent with Ms Glasson's work. It relied heavily on the job description, her initial training, and the fact that clinical physiologists can perform ultrasound, to say that her work was not within the sonographers' coverage clause. That approach was too narrow because it concentrated on historical events, such as the now nearly 10-year-old position description, and not on the work actually being performed.

[66] The vast majority of Ms Glasson's work is in performing cardiac ultrasound. Her work is consistent with her training as a sonographer and the requirements of the Technologists' Board. It is consistent with the scope of practice for a sonographer.

[67] Ms Glasson's work is also considered to be sonography by Dr James Pemberton. He is a consultant cardiologist for the DHB based in its Dunedin Hospital. Dr Pemberton is a senior lecturer in medicine at the University of Otago, and his practice is in cardiology. He specialises in echocardiography.

[68] Dr Pemberton is a Fellow of the Cardiac Society that awarded Ms Glasson her diploma. His expert opinion was that, based on his knowledge of her work, she practices as a sonographer. His evidence was consistent with the expert opinion provided by Professor Gillian Whalley, who also considers Ms Glasson to be working as a sonographer. Professor Whalley is a qualified sonographer and an academic in the medical school at the University of Otago. I accept Dr Pemberton and Professor Whalley's assessments of Ms Glasson's work. That can be contrasted with the DHB's witnesses who did not have direct knowledge of her work.

14. Applying *New Zealand Airline Pilots Assoc Inc v Air New Zealand Ltd* and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n

12; and paragraph [56] above.

[69] The DHB was also caught in a contradiction over how it regarded Ms Glasson's work, considering her to be a sonographer when she sought registration but then deciding she was a clinical physiologist. Ms Lisa Wilson managed the Diagnostic Testing department when Ms Glasson applied for registration and still does. Ms Wilson must have been familiar with Ms Glasson's work and was prepared to describe her as a sonographer. Ms Wilson is the current Chair of the Physiologists' Board which may give her an insight into both occupations.

[70] Ms Wilson gave evidence in the Authority but did not give evidence in this hearing. That was surprising given her direct knowledge of Ms Glasson's work. Ms Wilson might have been expected to explain why Ms Glasson was described as a sonographer when seeking registration but was treated as a clinical physiologist when she sought coverage under the sonographers' collective agreement. Ms Wilson was available to give evidence but, according to Ms Bennett, a decision was made for her not to do so because she found giving evidence in the Authority investigation distressing.

[71] The decision not to have Ms Wilson give evidence gives rise to an inference that the Court has not heard what she may have been able to say because that would not have helped the DHB's case. While that inference does not prove Ms Glasson's case it strengthens the weight of her evidence.15

[72] The DHB's justification for its stance, by claiming a need for flexibility gained by Ms Glasson being employed as a clinical physiologist, is also inconsistent with the reality of the situation. The waiting list for cardiac sonography in Invercargill has been growing, recently extending from about six to eight weeks up to twelve weeks, caused partly by an increase in demand. Ms Glasson is as busy as she has ever been performing ultrasound work and the demand seems unlikely to abate.

[73] The coverage clause in the sonographers' collective agreement is drafted widely, capturing agreements where the job is clearly described as sonography, and other situations where, in substance, the work undertaken is sonography. It clearly covers Ms Glasson's work. Ms Glasson's work falls within the first limb of the clause

15 See, for example, *Ithaca (Custodians) Ltd v Perry Corp* [2003] NZCA 358; [2004] 1 NZLR 731 (CA).

because the word "employed" I consider means undertaking the work of a sonographer. Even if that view was wrong, her work is substantially involved in ultrasound, bringing her within both the second and third limbs as well. That can be contrasted with the narrower focus of the clinical physiologists' coverage clause. Ms Glasson no longer performs the work ordinarily undertaken by clinical physiologists and the coverage clause in that agreement cannot apply.

[74] The DHB sought to gain support from the competencies published by the Physiologists' Board. Putting aside that board's lack of regulatory power, and that its publications relied on were marked as drafts, there are passages in the competencies it published suggesting the work of a clinical physiologist performing ultrasound can only be undertaken where it is directly supervised by, for example, a treating cardiologist. This subject was extensively addressed because Professor Whalley had drawn a distinction between sonographers and clinical physiologists based on the former being able to act independently while, she said, the latter had to undertake cardiac ultrasound work under supervision.

[75] Ms Hornsby-Geluk submitted that what was being relied on for Professor Whalley's proposition was a misunderstanding of the Physiologists' Board's publications and was wrong. That was because the competencies referred to were those that were sufficient to obtain registration and not for subsequent work. I disagree. The published material from the Physiologist's Board clearly indicated that the work it referred to required supervision, such as by saying "...supervised pacemaker follow-up and supervised echocardiography (cardiac ultrasound)". If it had been necessary to do so, I would have held that the Physiologists' Board contemplates clinical physiologists undertaking cardiac ultrasound under supervision. That conclusion removes Ms Glasson's work from its ambit and from coverage under the clinical physiologists' collective agreement.

[76] I am satisfied that Ms Glasson's work falls within the coverage clause of the sonographers' collective agreement.

If the defendant is covered by the sonographers' MECA, when did she first become covered?

[77] This issue can be succinctly addressed. In the summary of issues prepared by the parties two scenarios were proposed. They were either coverage ran from 1 June 2013, a date nominated by Ms Glasson following her request to be recognised as covered by the sonographers' collective agreement, or from 1 May 2017 when the first annual practicing certificate was issued.

[78] I consider Ms Glasson's work was within the coverage of the sonographers' collective agreement once she obtained registration. That means she was covered from 1 June 2013. By that date she had perfected all regulatory requirements, had been supported by her employer in seeking registration, and was undertaking the bulk of her work in that profession.

[79] To choose 1 May 2017 would, effectively, reward the DHB for failing to recognise the real nature of her work. To hold that coverage only took effect once the annual practicing certificate was issued would be to allow the DHB to benefit from its own failure, or refusal, to recognise Ms Glasson's qualifications and to meet the costs of the practicing certificate.

Do the remuneration provisions of the sonographers' collective agreement (clause 5) apply?

[80] Clause 5 in the sonographers' collective agreement contains rates of remuneration in a table. The DHB maintained that clause 5 would not apply to Ms Glasson's situation if her work fell within the sonographers' coverage clause only because it was within the second and third limbs mentioned earlier. It said in that situation remuneration would be open to negotiation.

[81] I consider Ms Glasson's work falls within the first limb of the coverage clause. It follows that clause 5 applies to her circumstances. Even if this decision had turned on her work falling within either the second or third limbs, the same result would have been reached. Clause 5 does not differentiate between any of the limbs in the coverage clause and there is no basis to consider that the collective agreement is intended to do anything other than provide comprehensively for remuneration.

Entitlement to back pay, and if so, how much?

[82] There are five salary steps in clause 5 which involve automatic annual increments. Progression beyond Step 5 is dependent on job content, skill shortage, the responsibilities of the position and the employee's level of performance.16

[83] The minimum payable to a charge sonographer is the salary at Step 8 of this pay scale. Ms Glasson's case is that she should be recognised at Step 8, because she is a "charge sonographer" as defined by the agreement.

[84] In the agreement "charge" is defined as an employee appointed to be in charge of a department or staff. Ms Glasson says she qualifies because she was appointed to be in charge of the echocardiography service. She also had continuous responsibility for managing and supervising trainees.

[85] The DHB maintained that Ms Glasson was not entitled to be paid at Step 8 and does not meet the definition of "charge" because she is not in charge of the department. That is because she is a member of the Diagnostic Testing department and reports to the manager of that department.

[86] The DHB's position was that this pay scale assessment (if it applied) should start at Step 1 in the year when Ms Glasson first became covered by the agreement and progress a step up the scale every twelve months until Step 5. That would mean she would have reached Step 5 in 2018.

[87] I consider Ms Glasson is entitled to be remunerated at Step 8. Despite the fact that she is not the administrative head, or manager of the department, the evidence points towards Ms Glasson discharging functions falling within the definition of "charge". The job description makes Ms Glasson responsible for the echocardiography service at Southland Hospital and that much was evident as long ago as January 1996. She is clearly in charge of the echocardiography service because she is required to take responsibility for it. The definition also refers to being in charge of staff. Ms Glasson is in charge of a trainee.

16 Provided by clause 5.5.2.

[88] A brief comment is needed about the remaining arguments over remuneration for completeness. As an alternative Ms Glasson said that if she was not employed at Step 8, Step 6 applied. That step applies to a specialist which term is also defined in clause 5.5.3 of the agreement.

[89] Part of the DHB's argument was that Step 6 could not apply because clause

5.5.3 specifies that the minimum step payable to a specialist is Step 6. Specialist is defined as:

"Specialist" means a sonographer who has qualifications and / or performs a special role (e.g. reporting on work that clinicians act on immediately), or is involved in non-invasive tests (e.g. Treadmill, ABPI, Liver transplant duplex, tertiary level scans) or teaching special skills to qualified sonographers.

[90] Ms Hornsby-Geluk submitted that this definition is not satisfied because:

(a) Ms Glasson does not perform a special role, she undertakes echocardiography. This submission repeated what had been said before, that she was employed as a clinical physiologist;
(b) Ms Glasson does not undertake any non-invasive tests referred to in the definition and is not in any event of a particular specialist nature; and

(c) She does not teach special skills to qualified sonographers.

[91] The definition of specialist is disjunctive. It applies to a sonographer who has qualifications and/or performs a special role. Separately, the definition involves non- invasive tests and, as a further aspect to it, teaching special skills to qualified sonographers.

[92] Had Ms Glasson not fallen within Step 8, I would have held her work was within the first part of the definition of specialist. A plain reading of "specialist" in the context of the agreement refers to someone who performs a special role. That is evident from the words in brackets, referring to reporting on work that clinicians act on independently. Ms Glasson reports directly to clinicians. The DHB did not suggest that those small portions of Ms Glasson's work where she seeks further advice, such

as from Dr Pemberton, mean that she would fall outside of this definition. Seeking a second opinion, or feedback, does not suggest a lack of specialty or a need for supervision.

[93] Counsel filed a joint memorandum recording agreement about several scenarios that might apply if Ms Glasson was entitled to back pay. The memorandum included calculations of back pay prepared by Barry Sharkey, who is the Payroll Manager for the DHB. His evidence was admitted by consent.

[94] Each of these scenarios contemplated an assessment depending on when Ms Glasson became covered by the collective agreement and, from that date, at what step on the salary scale she would be paid. There were six agreed scenarios in combinations of dates from 1 June 2013 to 1 May 2017.

[95] The second scenario, where she became covered by the collective agreement on 1 June 2013 and was entitled to be paid on salary Step 8 from that date, is the one that best matches the circumstances of this case. Applying that scenario, Ms Glasson is entitled to back pay as follows:

(a) $106,993.08 (gross) for the period from 1 June 2013 to 31 August 2018;
(b) $431.42 (gross) for each full week between 31 August 2018 and 2 December 2018;
(c) $404.05 (gross) for each full week from 2 December 2018.

Reimbursement

[96] The parties agreed that if Ms Glasson was covered by the sonographers' agreement Ms Glasson is entitled to recover her costs as pleaded; that is, $675 for the total costs of her annual practicing certificate fees for 2017/2018 and 2018/2019 and

$351.72, which is the cost she has borne for membership of the Australian Sonographer Accreditation Registry.

Conclusion

[97] The DHB has been unsuccessful in its challenge to the Authority's determination and it is dismissed. Ms Glasson is employed by the DHB as a sonographer and her work falls within the coverage clause of the sonographers' collective agreement.

[98] As to the matters removed to the Court by the Authority:

(a) The DHB is indebted to Ms Glasson for the total amount of back pay referred to in paragraph [95] and it is ordered to pay her accordingly.

(b) The DHB is ordered to pay Ms Glasson reimbursement of $675 and

$351.72 referred to in para [96] for the disbursements she has incurred.

[99] The costs of this proceeding are reserved. A preliminary assessment was that they should be assessed on Category 2, Band B basis. If agreement on costs cannot be reached Ms Glasson may file a memorandum within 20 working days. The DHB has a further 20 working days to respond and Ms Glasson another 10 working days to reply.

K G Smith Judge

Judgment signed at 3.30 pm on 30 April 2019