

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 137/10
5273667

BETWEEN

DR JULIA TAYLOR & ORS
First Applicants

NEW ZEALAND RESIDENT
DOCTORS' ASSOCIATION
Second Applicant

A N D

CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: James Crichton

Representatives: Bill Manning and Anna Paton, Counsel for First and
Second Applicant
Penny Shaw, Counsel for Respondent

Investigation Meeting: 22, 23 and 24 March 2010 at Christchurch
and 23 April 2010 at Wellington

Determination: 29 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This application comes before the Authority on behalf of a group of Resident Medical Officers (RMOs) employed by the respondent Board (the Board) who are aggrieved about changes made by the Board to their contractual entitlements for a meal while on duty. In particular, the RMOs are aggrieved about the decision of the Board to withdraw the availability of pre-packaged drinks from the items which RMOs are able to select for their meals while on duty.

[2] All of the first applicants are, as well as being employees of the Board, also members of the New Zealand Resident Doctors' Association, the second applicant, and for the sake of brevity and convenience, I shall usually refer to the applicant party

in this determination as the New Zealand Resident Doctors' Association (RDA) rather than any other nomenclature. Where it is necessary for me to refer to evidence given by individual medical practitioners, I shall simply refer to them by name.

[3] The Board, while acknowledging it has a contractual obligation to provide every RMO with a meal while on duty, claims to be compliant with that provision notwithstanding its acknowledgment that there have been changes implemented in the way in which that obligation is fulfilled. The Board says that it notified its intention to change the regime to the RDA, explained the reasons for it (financial pressure) and then, according to the Board, entered into a period of consultation in respect of the proposed changes which led to a decision emanating from the Board dated 23 November 2009 which implemented the change, which the RDA now protests.

Issues

[4] The Authority must determine essentially whether the Board has complied with its legal obligations in implementing the change to the provision of meals for RMOs. In order to do this appropriately, the following issues need to be addressed:

- (a) What are the relevant contractual provisions?
- (b) What steps did the Board take to make the proposed changes?
- (c) Did those steps fulfil the Board's legal obligations?

What are the relevant contractual provisions?

[5] The central provision in this dispute is a single clause in the National Multi-Employer Collective Agreement (MECA) to which both the Board and the RDA are parties. That relevant provision is clause 15.5 and it reads as follows:

Every RMO (Resident Medical Officer) required to be on duty over a recognised meal period shall be entitled at the employer's expense, to a meal.

[6] The provision has a long history. It is common ground that there has been a provision of this sort for over 50 years in the successive employment agreements and that that provision has been continuously available to junior doctors save for a period following 1987 when there was a long period of litigation over the unilateral cessation of the provision of those meals. It is not germane to the present determination that I

traverse the long history of this provision through its various manifestations in different documents, Ministerial determinations and the like. As Mr Manning helpfully pointed out to the Authority, that history is usefully traversed in the High Court decision of *Mawson v. Auckland Area Health Board* [1991] 3 NZLR 599.

[7] What can be stated unequivocally from the long history of this particular contractual provision is that the junior doctors were protective of their entitlement and acutely sensitive to threatened changes to that entitlement.

What steps did the Board take to make the proposed changes?

[8] The evidence in chief of Dr Deborah Powell provides a useful summary of the sequence of events. Dr Powell notes that the Board provides a handbook to RMOs, which includes reference to meals and an excerpt of which from the 2008/2009 version reads as follows:

*There is a variety of food to choose from, and your meal includes **one** commercially packaged drink, but please keep in mind that these drinks aren't cheap and make up a large part of the cost of your meal.*

[9] Dr Powell notes that there had been a previous engagement between the Board and the RDA, she thinks around 2003, in which it was agreed that RMOs would only take one such pre-packaged drink as part of their meal.

[10] The events leading to the present dispute between the parties properly commenced with a letter dated 11 June 2009 from the Board to the RDA attaching a draft memorandum to RMOs which removed the entitlement to a free pre-packaged drink as part of the meal entitlement, and also introduced a new restriction of a maximum of three items. The RDA promptly protested this change, alleging breach of custom and practice and a failure to consult over a material change in conditions for its members.

[11] By letter dated 22 June 2009, the Board indicated it would postpone the implementation of the decision, would meet with the RDA to discuss the rationale underpinning the decision and would make available to the RDA all Board data that was relevant to the decision.

[12] However, the RDA became concerned around this time that the Board was simply going through the motions and that the proposed meeting between the parties was *mere window dressing around consultation* and that that was not acceptable. An

example of why the RDA took this view may be found in an email dated 30 June 2009 from the Board's Mark Leggett, effectively the Board's lead general manager on this decision, who in this email to Dr Powell said, inter alia:

... happy to meet and discuss your concerns, however, I have every intention of progressing a management decision that will see a simple and appropriate reduction of at least \$250,000 per annum. ... The meals options available to your members are second to none, and the access to pre-packaged drinks is certainly not a necessity, nor is it defined in their agreement as far as I am aware.

[13] Dr Powell said in her evidence that the receipt of that email *made me very concerned* and she instructed RDA's counsel, Mr Manning, to write again to the Board expressing that concern. The response gave her no comfort. Amongst other things, the response from the Board, a letter dated 6 July 2009, says:

... the intention ... is to cease the provision of packaged drinks to RMOs within the month.

[14] Dr Powell accepted my suggestion that the email of 30 June 2009 which I quoted above together with the portion of the letter from the Board dated 6 July 2009 just quoted were, in her view, the *key* communications from the Board in respect of its attitude to the matter.

[15] The Board then attempted to announce the implementation of its decision with effect from 20 July 2009 but that advice to RMOs effectively crossed with the RDA's filing of a statement of problem in the Authority which, amongst other things, had the effect of discouraging the Board from implementing its decision as previously indicated.

[16] During August 2009, the RDA received certain information particularly of a financial nature relating to the meals issue and a meeting eventually took place between the Board and the RDA on 11 September 2009. It is the RDA's position that the Board was simply *going through the motions* at that meeting. Amongst other things, the RDA drew attention to the fact that none of the general managers from the Board were present at that meeting and the RDA considered that there was a *lack of active participation* by the Board representatives.

[17] Dr Powell prepared a summary of the meeting and circulated that summary to the Board as well as to the RDA representatives at the meeting. Her evidence (which I accept) is that there was no response from the Board to that summary which

included an addendum in which Dr Powell clearly expressed her frustration at the 11 September meeting process. Then, on 27 October, the Board generated a further communication informing the RDA that it was proceeding with the changes with effect from 23 November 2009.

[18] In subsequent communication, after a protest from the RDA about the situation, the Board indicated that it had taken into account all of the matters raised by the RDA at the 11 September meeting but was still of a mind to implement the proposed change to the provision of meals. Subsequently, the Board implemented a regime, the effect of which was to render an invoice to RDA members in respect of items purchased by RDA members in excess of the entitlement to meals previously determined by the Board. That regime continues pending resolution of the dispute between the parties.

Did those steps fulfil the Board's legal obligations?

[19] The Board's position can be simply stated. It says that, pursuant to its management prerogative, it was available to it to make changes to the extent to which it funded RMO meals. It points to the fact that the contractual entitlement simply requires the provision of a meal and that the expression *meal* is nowhere defined. It relies on the fact that the changes made by its decision of 23 November 2009 do not in any sense change the basic nature or quality of the service being provided to RMOs.

[20] Further, the Board says that this most recent change is consistent with the historical context in that there have been previous changes to the *free meals* regime of similar character where, in effect, the extent of the free entitlement has been changed.

[21] The Board points out (and I accept) that the evidence from the RMOs who gave evidence before the Authority was clearly that the range of items that could be selected for a meal was sufficient to cover all tastes and dietary requirements and in particular that a meal did not have to include a pre-packaged drink in order to qualify as being a meal.

[22] It is common ground that there is no express provision requiring a meal to include a pre-packaged drink and as a matter of fact, the Board points out that pre-packaged drinks have only actually been available in the marketplace (and therefore in the hospital) since around 2000. Prior to that date, the self-same provision applied to the relationship between the parties but no interpretation of the provision was

required in respect of pre-packaged drinks. The Board says that, by the RDA making an issue of the Board's failure to continue to provide pre-packaged drinks as part of a meal, in effect the RDA is asking the Authority to imply a term that, either the expression *a meal* includes a pre-packaged drink by definition, or, in the alternative, that because pre-packaged drinks have been provided from around 2000 down to 2009, they must continue to be provided in perpetuity. It is suggested that there is real difficulty in asking the Authority to make those judgments because, in effect, the document covering the employment relationship, because it is a MECA, covers other workplaces as well as the Board's.

[23] The Board seeks to encourage the Authority to see this as an application to interpret the provision in the agreement relating to meals and to read it as requiring the provision of a meal or, as I indicated above, to imply into the agreement between the parties a term that pre-packaged drinks were to be included in a meal because they had been provided in the past. The Board relies on the well known legal principles of interpretation of collective agreements to ground its submission that the words in the employment agreement are clear, unambiguous and can have only one meaning. Reliance is placed on the well known dictum of Judge Colgan in *ASTE v. Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at para.[20] where His Honour said:

What matters is not what the parties say they actually intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.

[24] The Authority is also directed to two subsequent observations in the same judgment as follows:

... if the words are clear and can only have one possible meaning that should generally determine the matter.

[25] and:

It is not the Court's task to rewrite an agreement.

[26] Again, in *Galagher v. Watercare* [1994] 1 ERNZ at 511, Judge Colgan said:

I do not think that "custom and practice" can override the express provisions of a contract or even perhaps indeed supplement them. The relevance of previous practice is in the resolution of disputed interpretation of a contract.

[27] The Board submits there is no disputed interpretation in the present case.

[28] The Board also urges on the Authority the proposition that the effect of what the RDA is claiming is to elevate what amounts to an administrative guideline about the extent of the meal provision to a condition of the employment which may never be changed. My attention is drawn to the line of decisions which draw a clear distinction between guidelines, policies and procedures on the one hand, and terms and conditions of employment on the other. The Board seeks to have the Authority accept that, in the present case, the Board's agreement to provide a pre-packaged drink for a period in time cannot be set in stone and must be able to be amended by administrative action.

[29] The Board also contends that it is not required, in the particular circumstances of this case, to consult with the RDA about the changes it was wishing to make to the meal provision. In its submission to the Authority, the Board claims that the RDA does not rely upon a contractual provision to require consultation but calls in aid the effect of s.4 of the Employment Relations Act 2000. The Board does not accept that the obligation of good faith required by s.4 mandates consultation in the present case, but notwithstanding that, the Board claims to have been *active and constructive, responsive and communicative* and not to have done anything to *mislead or deceive*. In essence, the Board says that a proper construction of the obligations of good faith in the statute is to require consultation only where continuing employment is affected. That of course would usually be in redundancy cases. There is one decision which suggests a wider ambit for consultation and that is the decision of Judge Shaw in *OCS Ltd v. Service & Food Workers' Union* (31 August 2006, WC15/06). However, as Ms Shaw, counsel for the Board notes, that decision turns not just on the s.4 provision but also on a contractual provision which is said to be absent in the present case.

[30] Arguing in the alternative, the Board then says that, if it found that consultation is required, then the factual matrix supports the conviction that consultation in fact has taken place.

[31] The RDA sees matters somewhat differently. In the RDA's view, there is an unqualified provision to provide RMOs with a meal while working. The RDA says that *structural* limitations of the sort proposed by the Board can only be effected by agreement. The RDA says that by arguing that the provision now in place (that is since the changes made on 23 November 2009), still constitute a meal, the Board is missing the point. This is because the issue is not whether the new arrangements

constitute a meal or not, but rather whether the Board has the legal ability to limit what RMOs choose to take for a meal. The RDA differentiates the sort of *structural* limitation to meal provisioning with the kind of day-to-day operational changes which are a function of seasonal variations, dietary fashions and the like. The RDA says that the parties to the MECA must always have anticipated that would be the position and there can be, and it is said has not been, any criticism of the Board by the RDA for making those sorts of changes on an administrative basis.

[32] The RDA takes issue with the Board's contention that there have been historical changes to the meal provision which are analogous to the current change and which have been effected not just by the Board but also by other employers covered by the MECA and critically, without consultation or agreement of the RDA. While that is the Board's position, the RDA vehemently contests that view, both in respect of previous actions of the Board and in respect of examples from other boards covered by this MECA.

[33] The Authority prefers the evidence of the RDA on this point. I am not satisfied that there is any evidence that there has been any change to the extent of the meals entitlement, analogous to the change implemented on 23 November 2009 by the Board, which was not agreed to by the RDA. It seems to me to follow that, whether the distinction drawn by the RDA between operational and structural changes to the provision is accepted or not, the factual position, I am satisfied, is that there have been no analogous changes to the meals provision without prior agreement between the parties.

[34] That being the position, it seems to the Authority to follow that the process that was used previously ought to be used in this case, that is to say, that there ought to be a process of engagement between the parties with a view to reaching acceptable common ground. In a sense, the Board, by its actions, had adopted a *positional* stance in its bargaining. It decided that, in order to save \$250,000 of revenue which it wanted to spend on patient care (an entirely laudable motive), it should remove pre-packaged drinks from the meal provision for RMOs and it proceeded to notify that change. Had the Board, rather than identify a particular means of saving money, simply engaged with the RDA on the footing that it needed to save a significant amount of money, then the parties might well have negotiated an arrangement which met both their needs.

[35] Given the Authority's acceptance that the fundamental process adopted by the Board was flawed, what might the Board have done? As the RDA points out, the Board could have negotiated on the issue during the negotiation for the collective agreement. It is common ground that this issue has been of concern to the Board for some time and certainly before the MECA was settled in September 2008. By not seeking to address its concerns about the cost of RMO meals in that negotiation forum, I am satisfied the Board missed an opportunity which it could not subsequently remedy by executive fiat. I accept the RDA submission that the situation the Board then found itself in was analogous to the situation that His Honour Judge Colgan (as he then was) was commenting on in the case of *Northland Cooperative Dairy Co v. New Zealand Workers' Union* [1995] 2 ERNZ when the learned Judge declined to compel milk tanker drivers to work overtime and referred to that application as an attempt to create *a regime which was neither contemplated nor addressed* when the collective agreement was settled.

[36] The Board maintained that the limitations on meal provisioning was at *a low level* and its lead general manager, Mr Leggett, referred to the limitation on pre-packaged drinks particularly as being *the most benign* of the solutions available, particularly when he argued that much of the pre-packaged drink purchased by RMOs was bottled water and Christchurch had, by all accounts, the best natural water in the world. The RDA says that this was not a low level change at all because, inter alia, the sheer magnitude of the savings impelled that conclusion. I think the more important point frankly is the long history of this provision and the disputation around it. I am satisfied that the reasonably knowledgeable observer, looking dispassionately at the history of the relationship between these parties and the arguments about this particular provision, would think that any fundamental change (and the removal of the ability to have a pre-packaged drink when one had previously been available must be a significant change) would conclude that a good and fair employer would engage with the representatives of the workforce concerned. The evidence satisfies the Authority that the relationship between the parties, while robust, was communicative and wholesome and there was no reason to think that a genuine engagement between the parties would not have resulted in some agreement which would have met some of the Board's needs without losing the support of a key workforce group.

[37] I have already concluded that the Board ought to have engaged with the RDA in respect of this significant change in the provision of meals because such significant

changes had always been the subject of negotiation in the past. It would have been plain to any reasonable observer that the provision of meals in the MECA was a key element in the sense of wellbeing for RMOs. It was difficult not to conclude that any change to that provision was, despite the Board's protestations, a fundamental change to the terms and conditions of RMOs' employment. In arguing, as the Board does, that the definition of a meal does not, of necessity, include a pre-packaged drink is to miss the point that this particular provision is important to a significant and important group of workers, and changes to it are likely to be controversial. It follows that a good and fair employer, acting in accord with the good faith obligation (of which more later) would not seek to impose changes but rather would wish to talk about those proposed changes first.

[38] The Board claims that the RDA is inviting the Authority to either vary the meals provision in the agreement or imply a fresh term to that agreement. Both of those submissions are, in my judgment, misplaced. The RDA is not seeking either of those interpretations; the RDA simply says that a fundamental change to the meals provision requires genuine consultation and agreement. That application, if accepted by the Authority, does not require any change to the nature and extent of the subject provision, nor does it require any imputation of new terms. Similarly, custom and practice is called in aid by the RDA not to assist in arguing for particular interpretations of the contract, but rather as support for the principle that significant changes to a key condition of employment cannot be imposed on one party by the other. In *Gallagher v. Water Care* (supra), Judge Colgan was referring to a situation where custom and practice was called in aid to support a change in the meaning of an express term of a contract.

[39] What then does the good faith principle require? The Board says that the good faith obligation in s.4 of the Act effectively relates only to redundancy cases. The Board also says that the RDA is not seeking to rely on any contractual provision to assist its application. That latter submission is misplaced. The RDA relies upon the principles of partnership which are fully set out in the MECA at Schedule 5. Some examples of those principles include:

- *They [the RDA and the Boards] shall endeavour to improve the relationship, decision-making and cooperation between the parties.*

- *The relationship is to be characterised by constructive engagement based on honesty, openness, respect and trust.*
- *Communication shall be effective and timely.*

[40] Those principles, and others I have not highlighted, are to inform the relationship between the parties. In the Authority's opinion, it is difficult to see how any of those principles I have highlighted cannot be seen as being breached or abrogated or, at the very least, compromised by the Board's unilateral decision.

[41] Furthermore, even if the Board is right that s.4 of the statute is fundamentally concerned with redundancy situations, that is plainly not the position in respect of s.100(d) of the statute and the code of good faith for the public health sector which is found in Schedule 1B of the Act. That schedule, and particularly clauses 2, 4 and 5 create similar obligations in statutory form to the principles of partnership attached to the MECA. For instance, the purpose of the code is described as *to promote productive employment relationships in the public health sector* and the parties are enjoined to *engage constructively* and *participate fully and effectively* in their employment relationship. Further, the parties in that employment relationship must behave openly and with courtesy, have clear lines of communication with each other, provide information in a timely manner and so on. Last but by no means least, clause 5 requires the Board to be a good employer.

[42] It seems to me axiomatic from the foregoing analysis that the Board has an absolute obligation to engage assertively, openly and fully with the RDA and I am satisfied, on the facts before the Authority, that that simply did not happen. There are a number of examples of the deficits that can be identified in the Board's conduct. The first is that it is absolutely plain from the paper trail that the Board had no intention of engaging with the RDA on a consultation process until it was, in effect, *found out*. I draw this conclusion from the lead general manager's two key communications which I quoted in paras.[12]and [13] of this determination. Those communications make it absolutely clear that the Board intended to make the change, whether the RDA supported it or not. I agree with the RDA that it was right to conclude that the Board had no real intention of engaging with the RDA and accepting any changes that the RDA might advance.

[43] I also have to say that I think the meeting the Board reluctantly agreed to have with the RDA on 11 September 2009 was, as the RDA claimed, a sham. The lead

general manager was not present and the RDA had no prior notification that he would not be there. His absence was not a deliberate attempt to slight the RDA but nonetheless he was absent and the RDA was unaware that he would not be present until it attended at the meeting. Furthermore, the piece of research which led the Board to conclude that the sensible course of action was to remove pre-packaged drinks was not provided to the RDA. The Board provided some information to the RDA once it became clear to the Board that it had to engage in some consultation, but the information provided was not complete enough to give the RDA a full picture of what was in contemplation. The most crucial omission was the Board's failure to provide the research paper which led to the Board concluding that it ought to remove pre-packaged drinks. That information, if provided to the RDA, would have given it a genuine window into the Board's thinking and would have enabled it to meaningfully participate in the consultation process. In addition, the Board did not provide the RDA with material information about the nature of the contract between the Board and its food provider at the hospital. In particular, the RDA was not aware of the fact that the contract with the food provider had just been renewed and its submissions were, as a consequence of that omission, simply *barking up the wrong tree*, in the memorable words of Mr Leggett, the Board's lead general manager.

[44] I am satisfied then that a good employer, which the Board is required to be, would not have unilaterally sought to change a fundamental provision such as the meals provision but would in fact have negotiated with the RDA in good faith, having provided the RDA with all of the information that was available to the Board. That simply did not happen, and as a consequence I conclude that the Board has failed to fulfil its legal obligations in this matter.

Determination

[45] It follows from the foregoing analysis that the applicant parties are entitled to the orders they seek. I issue the following declarations to resolve this employment relationship problem:

- (a) There will be a declaration that the Board has breached its obligations under the good faith obligations of the Employment Relations Act 2000 as those obligations are set out variously in s.4, s.100 and Schedule 1B and like obligations in Schedule 5 of the MECA;

- (b) The Authority orders the Board to comply with its obligations under those abovementioned provisions by forthwith engaging with the RDA in a process of informed and meaningful consultation in accordance with its obligations according to law.

[46] There was a counterclaim filed in this matter which it was agreed during the course of the investigation meeting should be set aside rather than addressed. Accordingly, at the request of both parties, I make no directions or orders in relation to the counterclaim. I leave that for the parties to address by negotiation. Should that be unsuccessful, leave is reserved for either party to bring the matter on for hearing in the Authority.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority