IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 307/09
5272781

	BETWEEN	WAITEMATA DISTRICT HEALTH BOARD Applicant
	AND	NEW ZEALAND NURSES ORGANISATION Respondent

Member of Authority:	Vicki Campbell
Representatives:	Anthony Russell for Applicant Nicola Bush for Respondent
Investigation Meeting:	25 August 2009
Determination:	28 August 2009

DETERMINATION OF THE AUTHORITY

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[1] Waitemata District Health Board ("WDHB") seeks to introduce a new roster for caseload midwives (known as Know Your Midwife ("KYM") Midwives) employed at North Shore Hospital ("NSH") by 1 September 2009. The WDHB has applied to the Authority for a determination to that effect. The New Zealand Nurses Organisation ("NZNO") opposes the introduction of the new roster.

[2] The issue is whether the MECA allows the WHDHB to impose a new roster on the KYM midwives or not.

The facts

[3] The concept of caseload midwifery was first promoted in the UK in the 1980's. The concept behind the model of care is that each woman selects her own midwife who then provides care for pregnancy, birth and the postnatal period. This is known as the continuity of care model.

[4] In New Zealand the Nurses Amendment Act 1990 changed the status of Midwifery and it became a profession separate from Nursing. Further, changes to the funding of maternity care means that DHB's are now required to support and promote the continuity of care model.

[5] The WDHB currently employs 7 caseload midwives at NSH. This team of midwives are known as the KYM team. The midwives work in a continuity of care model of midwifery practice and as such, are the Lead Maternity Carer ("LMC") for the women who select them in the North Shore area.

[6] The terms and conditions of employment of the caseload midwives is currently governed by the Nursing and Midwifery Multi-Employer Collective Agreement ("MECA") dated 1 April 2007 to 31 March 2010.

[7] Clause 10 of the MECA states:

> Hours of work for caseload midwives should not exceed 160 hours in any 4 week period or exceed 100 in any 2 week period.
>
> The caseload team is to organize their roster to allow midwives four periods of 24 hours off in every 2 week period with cover provided by an appropriate team member.
>
> These hours are not to be taken as 4 single days off unless this arrangement is self-rostered by the midwife concerned and agreed to by the employer.
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> Midwives may elect to be on call for births during their time off.
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> Caseload midwives will not be required to work more than 12 hours but may choose to do so at their discretion having regard for professional and/or clinical safety.
>
> The employer would not expect midwives to work more than 16 consecutive hours or 24 hours intermittently without having an 8 hour break.
>
> There are no standard hours of work. Caseload midwives are expected to organize their working hours to ensure provision of a continuous 24 hour midwifery service within the above limits on standard hours.
>
> Note: Overtime payments do not apply, see clause 8.0.1.
>
> Midwives will not be required nor will they elect to practice continually for any length of time that they consider professionally and/or clinically unsafe. The determination of professional and/or clinical safety will be determined by the midwives affected and the employer.

[8] The current on-call arrangements operate by means of a roster prepared by the KYM team at NSH. The midwives work in partnership with another midwife and days off per fortnight are rostered in the partnership as follows:

Midwife 1:

Off 1800 hours Monday – 0800 hours Wednesday

Off 1800 hours Friday – 0800 hours Monday

Off 1800 hours Wednesday – 0800 hours Friday

Midwife 2:

Off 1800 hours Wednesday – 0800 hours Friday

Off 1800 hours Monday – 0800 hours Wednesday

Off 1800 hours Friday – 0800 hours Monday

[9] WDHB considers the current roster creates gaps in the continuity of care model. This gap occurs when a caseload midwife is on a rostered day off or on annual or sick leave. This means that her partner works alone. Therefore, there is effectively no cover for the lone midwife. Traditionally the birthing suite midwives at NSH have provided cover in that situation. At the investigation meeting Ms Judith Bone, midwife manager of the KYM team, confirmed that midwives employed by WDHB to work specifically in the birthing unit were not caseload midwives.

[10] WDHB considers the current roster does not meet the requirements of the MECA and has therefore proposed the introduction of a new roster which would have two partnerships working alongside each other which would provide for a team of four to cover and support each other.

[11] WDHB considers that the current roster does not fulfil the requirements that the KYM team provide a continuous 24 hour midwifery service; that teams of two is insufficient to provide the 24 hours cover; and that the KYM team rely on the birthing suite staff to provide cover when this back-up should be provided by the KYM team themselves.

[12] The NZNO opposes the introduction of the new roster. The NZNO says the current roster has been operating for a period of approximately 14 years (including a short period when a new roster was trialled but not proceeded with), and that it should be allowed to remain in place.

[13] NZNO also says the current roster is a term and condition of the KYM Midwives terms and conditions of employment and thus cannot be unilaterally altered by the WDHB.

The principles of construction

[14] The principles to be applied in interpreting collective agreements were summarised by a full Court in the *New Zealand Tramways*[1] case:

> The starting-point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transactions…

[15] I also recognise that:

> …employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted into existing and long-standing provisions.[2]

[16] These principles apply against the background of s.101(d) of the Employment Relations Act 2000 which provides that one of the objects of Part 9 of the Act is to:

> Ensure that the role of the Authority and the Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment.

[17] I have considered carefully the submissions and evidence from both parties. I have concluded that the WDHB is not able to implement its new roster system. This would be contrary to the plain meaning of the words of clause 10 of the MECA which specifically allows for the KYM team to set their own roster subject to the limits set down with regard to standard hours.

[18] However, the clause also places a positive obligation on the KYM team, itself, to organise their working hours to ensure provision of a continuous 24 hour midwifery service with cover provided by an appropriate team member. There is nothing in the

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[1] *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd* [2006] ERNZ 1005 at para [16].
[2] *New Zealand Merchant Service Guild IUOW Inc v Interisland Line A Division of Tranz Rail Ltd* [2003] 1 ERNZ 510 at 513-4.

clause which requires the DHB to provide cover from outside the KYM team where cover can not be provided from within the team.

[19] That must be the starting point. While it is acknowledged by the DHB that where no cover can be provided it has and will continue to provide necessary cover from within the facility midwives team, however, this is not their priority. It is for the caseload team in the first instance to provide cover for its own midwives and its roster must meet that obligation.

Health and safety

[20] In his submissions for the applicant, Mr Russell drew my attention to the *Safe Staffing Healthy Work Places Committee of Enquiry 2006/2007 Report Recommendations* which has been included as Appendix 1(b) to the MECA. The Appendix sets out a process to be implemented when a midwife considers that she has reached the limits of safe practice. The provisions include an obligation on both the DHB and the NZNO to develop an agreed process to support midwives and to guide managers in the event that a caseload is deemed unsafe.

[21] KYM midwives are not independent contractors, they are employees. While the WDHB retains the overriding responsibility for health and safety including monitoring practices to ensure health and safety obligations are met, the Health and Safety in Employment Act 1993 also places an obligation on employees to ensure they do not endanger themselves or any other person while at work.

[22] Consistent with that theme, Appendix 1(b) of the MECA at clause 5 states:

> When a nurse or midwife providing direct care considers their workload to have reached the limits of safe practice, they will immediately utilise current (and recommended) processes to preserve standards of care while meeting throughput requirements.

[23] Further clause 10 of the MECA states:

> Midwives will not be required nor will they elect to practice continually for any length of time that they consider professionally and/or clinically unsafe. The determination of professional and/or clinical safety will be determined by the midwives affected and the employer.

[24] I have concluded that these provisions allow, in the first instance, for the midwife to determine she has reached the limits of safe practice, but that having reached that decision the midwife must involve the DHB immediately. From that

point the DHB can agree with the midwife that her workload is unsafe and pursuant to Appendix 1 (b) the processes agreed between the DHB and the NZNO to support the midwife will be put into operation.

Additional comments

[25] There are two other things I would like to comment on. Firstly, Ms Bone told the Authority of steps she had taken to monitor the workload of the KYM midwives so that she could identify any need for support and recognise any potential for burnout. To gather that information Ms Bone requested each midwife to keep a log of her hours.

[26] Ms Bone provided the Authority with the results of the information gathered during a three month period. The information is restricted to the three months due to the KYM midwives being reluctant to complete the logs. The limited information available does demonstrate that workloads between midwives differs as does the number of hours each midwife works, with at least three working in excess of 60 hours in a week at least once during the three month period.

[27] At the investigation meeting Ms Mary Casey, a KYM team member, told me that midwives may have a heavy workload in a particular month if all four women under her care deliver at around the same time, however, that means that the rest of the month is free of deliveries and therefore the workload decreases significantly.

[28] An employer has the right to provide instructions to its employees that must be complied with, provided they are lawful and reasonable. Given that the midwives are responsible for setting their own hours of work, an instruction to complete a log of actual hours worked seems a reasonable and practicable requirement where an employer is seeking to ensure workloads do not have the potential to lead to harm in the workplace.

[29] Secondly, in submissions Ms Bush took some pains to persuade me that the provision in clause 10 requiring each midwife to have at least four periods of 24 hours off should be interpreted to require the 24 hours to run from midnight to midnight.

[30] Ms Bush submits that given there is no specification as to when the 24 hour period is to run from, the use of the word “day” in the third paragraph should be used to aid interpretation of the reference to 24 hours.

[31] I consider the clause to mean that a midwife is entitled to at least four periods of 24 hours off each fortnight. 24 hours means 24 hours. The third paragraph is a qualifier in that it prohibits all of those 24 hours being taken off as a single day. It seems to me that the reason the parties have not specified when the 24 hours starts and ends, is because it is up to the KYM team to determine the roster including the 24 hour off duty periods. If the MECA had provided expressly when the 24 hours started and ended, then the ability of the KYM team to establish a roster would be limited by that requirement. To require the 24 hours to mean a night and a day is stretching the meaning of 24 hours beyond its natural and ordinary meaning in my view.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. In circumstances such as this where the matter has been a dispute over the application, interpretation or operation of a MECA costs would usually lie where they fall. However, the parties are encouraged to resolve the question of costs between them. IF they fail to reach and agreement the NZNO may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority