IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 49
EMPC 142/2017

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	DR TIMOTHY MATHEWS Plaintiff
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Defendant

Hearing:	20 – 21 November 2018, submissions filed on 15, 22 and 27 February 2019 (Heard at Auckland)
Court:	Judge B A Corkill Judge J C Holden Judge M E Perkins
Appearances:	P Cranney, counsel for plaintiff M Beech, C Goodspeed and T Carlisle, counsel for defendant
Judgment:	2 May 2019

JUDGMENT OF THE FULL COURT

Introduction

[1] At issue is whether Dr Timothy Mathews, a long-serving part-time employee of the Bay of Plenty District Health Board (the DHB), was contractually entitled to a gratuity when he left the DHB after some 26 years of service to the DHB and its predecessors.

[2] He says that a proper interpretation of a retiring gratuity provision in the individual employment contract (IEC) he signed in early 1993 leads to this conclusion.

[3] The DHB says the relevant clause allowed only for the possibility of a retiring payment being made under such policy as the employer may have adopted at the time of retirement. It paid Dr Mathews $2,000 under a policy for ex gratia payments on retirement, which was in place when Dr Mathews ceased employment with the DHB. It also says that, because he continued to work thereafter in his private practice, he should have been regarded as having resigned rather than retired; and this would have meant he had no entitlement to a retirement payment of any kind.

[4] The case came before the Court after being removed to it by the Employment Relations Authority (the Authority).[1] It was originally to have been heard together with a second similar claim, *New Zealand Nurses Organisation v Waikato District Health Board*.[2] In the event, procedural difficulties meant that the two proceedings had to be heard separately, with the *NZNO* case being heard first in late 2018. Because of the importance of the issues, a full Court heard both cases.

Chronology

Dr Mathews' initial employment arrangements

[5] In April 1987, Dr Mathews commenced work at the Rotorua Hospital as a part-time Ear, Nose and Throat (ENT) Surgeon. He emigrated from South Africa to take up this role. At the same time, he commenced private practice so as to make up his hours to full-time.

[6] At the time of Dr Mathews' employment, Rotorua Hospital was part of the Waikato Hospital Board. However, with effect from 1 June 1989, the Rotorua, Tauranga and Whakatane Hospitals were constituted as the Bay of Plenty Area Health Board (the AHB), under the Area Health Boards Act 1983. Thus, on that date, Dr Mathews became an employee of that entity.[3]

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1 *Bay of Plenty District Health Board v Mathews* [2017] NZERA Auckland 185.
2 *New Zealand Nurses Organisation v Waikato District Health Board* [2018] NZEmpC 47.
3 Health Service Personnel Act 1983, s 47.

[7] Prior to 1 July 1988, Dr Mathews' employment conditions were mainly fixed by the Minister of Health.[4] However, some were not, as they were regulated by statute and regulation. The provision of a retiring gratuity was one such condition.[5]

[8] After 1 July 1988, Dr Mathews' terms and conditions were covered by awards for senior medical and dental officers. The first three contained provisions for retirement gratuities, which were in a similar form to those which had applied under the earlier statutory regime.[6]

[9] Over the period to which these awards applied (1988 to 1992), bargaining between relevant parties led to an understanding that awards would provide minimum conditions of employment, underpinned by IECs.[7]

The provisions of the 1991 Award

[10] A key document in this proceeding is the Award which took effect on 1 July 1991, its term ceasing on 30 June 1992 (the 1991 Award).

[11] It contained a retiring gratuity provision in language which was identical to that used in the retiring gratuity provisions of the earlier awards. It relevantly stated:

> **8 RETIRING GRATUITIES**
>
> A The General Manager may pay a retiring gratuity to staff retiring from the board who have had no less than 10 years' service with the employing board, with that board and one or more other boards and with one or more of the following services: The Public Service, the Post Office, New Zealand Railways or any university in New Zealand.
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> B For the purpose of establishing eligibility for a gratuity, total board service may be aggregated, whether this be part-time or whole-time, or a combination of both at different periods. Part-time service is not to be converted to its whole-time equivalent for the purpose of establishing eligibility.

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4 For example, Health Service Determination Number M10 – Senior Medical Officers, 5 June 1987.

5 Until that date, retiring gratuities were governed by Hospitals Act 1957, s 52A, and the Hospital Employees Gratuities Regulations 1964, then Health Service Personnel Act 1983, s 65(2).

6 New Zealand Area Health Boards' Senior Medical Officers Award dated 29 September 1988, New Zealand Area Health Boards' Senior Medical Officers Award dated 7 August 1989 and New Zealand Area Health Boards' Senior Medical and Dental Officers Award dated 6 March 1990.

7 New Zealand Area Health Boards' Senior Medical and Dental Officers Award, registered on 11 July 1991.

C Where part-time service is involved the gratuity should be calculated to reflect this. The number of tenths per week employed during the years of service is calculated as a percentage of the number of tenths represented by a full week and this percentage is applied to the rate of pay established for gratuity purposes.

D Gratuities may be paid to the spouse or if no surviving spouse, the dependent child(ren) or the estate of employees who died before retirement or who died after retirement but before receiving a gratuity. Spouse is defined as a person with whom a marriage contract has been made or who is in a de facto relationship.

E A General Manager may also grant half the normal entitlements to those employees resigning after not less than 10 years' service to take up other employment.

F The calculation of a gratuity entitlement shall be in accordance with the scale detailed below, provided that the amount of any gratuity previously received in respect of service taken into account in the calculation shall be deducted.

G For the purposes of calculating the amount of gratuity which a board may pay the rate of pay on retirement shall be the basic rates of salary or wages.

SCALE OF MAXIMUM GRATUITIES

Period of Total Service	**Maximum Gratuity**
Not less than 10 years and less than 11 years	31 days pay
...	
Not less than 26 years and less than 27 years	98 days pay
...	
Not less than 40 years	183 days pay

NOTE – These are consecutive rather than working days.[8]

Dr Mathews' application for ENT position at Tauranga Hospital

[12] In 1992, Dr Mathews applied for a position in the ENT team at Tauranga Hospital. Technically, he would be transferred within the AHB, as both the Rotorua and Tauranga hospitals were operated by that entity. This was a part-time position (four tenths), which meant he needed to maintain a private practice in order to work full-time.

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[8] Three only of the bands of the scale are reproduced: the first band, the band which is relevant to Dr Mathews' cessation of employment, and the final band.

[13] In his application of 10 June 1992, Dr Mathews stated that if he was successful, he would need to provide at least three months' notice to Rotorua Hospital, and to allow him to rearrange his practice. In subsequent correspondence with Mr Robin Milne, then Operations Director at the Western Health District of the AHB, he requested financial assistance for removal expenses to facilitate his "transfer". This was agreed.

Dr Mathews' individual contract of service

[14] On 1 January 1993, Dr Mathews and Mr Milne, who by this time was the interim Chief Executive of the Western Health District, signed an IEC which was stated to be underpinned by the 1991 Award. Clause 1.1 of the document stated that Dr Mathews was to be employed as a "Specialist Otolaryngologist by the Bay of Plenty Area Health Board, Western Health District, with location of work at Tauranga Hospital". In his evidence, Mr Milne correctly confirmed the employer was the AHB.

[15] It should also be noted that the IEC referred variously to employer obligations being discharged by "the District General Manager", and "the Board", being of course a reference to the AHB.

[16] Clause 7 dealt with retirement. It included this provision:

> 7.3 On retirement the Employee may receive a gratuity payment in accordance with the Board's gratuity policy.

[17] Clause 17.1 relevantly provided:

> 17.1 The District General Manager and the Employee acknowledge the relationship between this contract and the New Zealand Area Health Boards Senior Medical Officers Award (document 2015) and its Memorandum. So long as it prevails its provisions are required to be followed according to their tenor.
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> ...
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> 17.4 This Contract, together with its Schedules, constitutes the full and entire Agreement between the District General Manager and the Employee, and supersedes all previous negotiations, communications and commitments whether written or oral, with respect to the matters it contains.

> 17.5 No modification, variation or waiver of this Contract or any of its terms shall be effective or binding on either of the parties unless made in writing and signed by both parties.

[18] Finally, we refer to a statement which appeared on the front page of the contract, as follows:

> The parties attention is drawn to the NZ Area Health boards Senior Medical and Dental Officers Award (Document: 2015) which remains in force until June 1992 and which underpins this ***individual contract*** of employment and provides minimum employment conditions for senior medical and dental officers.

The 1993 health reforms

[19] In 1993, a series of statutes reconfigured the health sector. The 14 AHBs were reconstituted as 23 Crown Health Enterprises (CHEs). Four Regional Health Authorities were established to purchase services from a range of providers such as the CHEs in a competitive health market. The CHEs were to be run on a commercial basis, subject to governance by Boards.[9] These arrangements took effect from 1 July 1993.

[20] The three health districts of the former AHB became three separate CHEs, being Western Bay Health Ltd (WBHL), which included the Tauranga Hospital; East Bay Health Ltd (EBHL), which included Whakatane Hospital; and Lakeland Health Ltd (LHL), which included Rotorua Hospital.

[21] Under the statutory provisions which effected these arrangements, Dr Mathews was transitioned to become an employee of WBHL.

[22] The evidence suggests that the periods leading up to and following these reforms involved considerable change, as the health sector moved to a more commercial model, including enhanced accountability with regard to fiscal matters. This resulted in a significant variation of employment conditions for employees engaged by the 23 CHEs.

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[9] Health and Disability Services Act 1993; Health Reforms (Transitional Provisions) Act 1993; Health Sector (Transfers) Act 1993; and Health Reforms (Transfer of Assets and Liabilities) Order 1993.

[23] Mr Milne was the Chief Executive of WBHL from 1993 until he resigned in 1997. He took the view that the CHEs should place less emphasis on terms defined in awards and more emphasis on IECs that rewarded positive performance. He also said the intention was to "manage the relationship rather than the fine line of contract."

[24] Mr Milne introduced a range of documents to support these objectives. First, there was "The Western Bay Health Employment Partnership Package" document. Its stated objective was to foster "a climate of professional cooperation", rather than adherence to contractual documents.

[25] This was backed up by a "Foundation Document", (also called a "Standard Individual Contract of Service").

[26] Then there was an underpinning document, which set out minimum core terms, conditions and rights of employment for senior medical and dental officers, entered into between Mr Milne and Mr Ian Powell, the Executive Director of the Association of Salaried Medical Specialists (ASMS). ASMS represented affected employees.

[27] Dr Mathews signed the first of these documents on 31 December 1996. It contained no reference to retiring gratuities. He did not need to sign a foundation document, since his individual contract of service continued to apply. The underpinning document applied to him once he became a member of ASMS, on 1 July 1997. That document contained no provision for retiring gratuities.

The payment of retiring gratuities in practice

[28] Mr Milne said there was no written policy on retiring gratuities; however, he said a practice as to how they would be dealt with was developed by the CE who preceded him, Mr Lester Levy.

[29] The practice was that Senior Medical Officers' (SMOs) retiring gratuities could be paid, but only on an ex gratia and fully discretionary basis, as determined on a case by case basis.

[30] When he became interim CEO of the AHB, Mr Milne maintained the practice. This was from late 1992 onwards.

[31] After WHBL became the employer of SMOs, its Board was asked to consider a change of accounting policies in respect of provision for gratuities. It was proposed that the level of accruals which existed as at 30 June 1994 would be frozen on the basis that SMOs would no longer receive retirement gratuities, and that the provision would be redefined more generally to include other termination and restructuring payments to staff. Mr Milne told the Court that this proposal was discussed and accepted at a Board meeting on 31 January 1995.

[32] Some years later, Ms Lynda Wallace, who had been employed with the various entities from August 1992, researched and summarised the position in a memorandum entitled "Ex Gratia and Gratuities". The document was dated 24 March 2010. In describing the relevant background, she said:

> Tauranga staff (formerly Western Bay): until the late 1980s Tauranga staff did receive gratuities but when Lester Levy became CEO he chose to exercise his right to apply discretion and ceased paying gratuities. This was challenged by several unions and in 1995 (under CEO Robin Milne) a policy was put in place to pay an ex gratia rather than a gratuity provided certain criteria were met. Inherent in that change was a decision not to pay according to the formula in the collective agreements (except in the case of redundancy) but to have the majority of payments be between $1,500 and $5,000. In this range the higher payments reflected special circumstances – eg. retiring for health reasons.

[33] We accept that this is an accurate summary of the relevant history.

Collective contracts/agreements, 1997 - 2011

[34] Under the Health and Disability Services Amendment Act 1998, the 23 CHEs were reconfigured as 24 not-for-profit Crown-owned companies and renamed Hospital and Health Services (HHS). For the purposes of that statutory regime, WHBL and EBHL amalgamated to form Pacific Health Ltd (Pacific Health). It had responsibility for the provision of Public Health and Disability Services in the wider Tauranga and Whakatane areas, including managing and operating both Tauranga and Whakatane Hospitals, and became the employer of those who had worked for the preceding entities.

[35] On 10 May 2000, Pacific Health and ASMS signed a collective employment contract, for the period 6 December 1999 to 30 June 2001. It included an application clause, in similar terms to the collective employment contract which had previously been entered into between WBHL and ASMS.[10]

[36] On 1 January 2001, the New Zealand Public Health and Disability Act 2000 took effect. Twenty-one District Health Boards were thereby formed, one of which is the DHB. Employees of HHSs were transitioned accordingly.

[37] A collective agreement was entered between it and ASMS for the period 1 July 2001 to 30 June 2002,[11] and for the period 1 July 2002 to 31 March 2004.[12]

[38] These collective employment agreements (CEAs) did not contain any reference to retirement gratuities, although application clauses made it clear that these documents provided minimum terms and conditions which underpinned any additional terms and conditions which may have been agreed on for individual or group purposes.

[39] Then followed a series of multi-employer collective agreements (MECAs), from 2003 to 2006,[13] from 2007 to 2010,[14] and from 2011 to 2013.[15]

[40] These documents all contained three relevant provisions. First, each MECA recorded core terms and conditions which underpinned any other arrangements for individuals or groups. Second, the continued application of pre-existing individual employment contracts/agreements was confirmed. Third, gratuity provisions stated that current grand-parented entitlements in affected DHBs would continue to apply or would be grand-parented to employees who were employed from 23 December 2004.

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10 Above at [26].

11 Bay of Plenty District Health Board Senior Medical and Dental Officers Collective Agreement, dated 17 December 2001.

12 Bay of Plenty District Health Board Senior Medical and Dental Officers Collective Agreement, dated 30 March 2003.

13 New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement, dated 23 December 2004.

14 New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement, dated 1 July 2007.

15 New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement, dated 20 December 2011.

Dr Mathews cessation of employment with the DHB

[41] In 2013, Dr Mathews decided to cease working for the DHB. On 30 August 2013, he wrote to it, stating:

> In accordance with cl 4.1 of my contract, I hereby give three months notice of my retirement from the B.O.P DHB. My final working day will be 30.11.13.

[42] At the same time, he asked for a copy of the DHB's gratuity policy. He said he did this believing he was entitled to a gratuity payment on retirement.

[43] From March 2013, the DHB had established two relevant policies – one was described as "Leaving – Ex Gratia Payments", and the other was described as "Leaving – Gratuities".

[44] The first emphasised that all staff who were retiring could apply for an ex gratia payment, which would be paid at the sole discretion of the Chief Executive Officer. This was the policy which was forwarded to Dr Mathews in answer to his request.

[45] The second stated that, upon retirement, a gratuity may be paid to staff, where allowed for in the employee's employment agreement.

[46] On 3 November 2013, Dr Mathews applied for an ex gratia payment, outlining his work record. He referred to the fact that he had started work at Rotorua Hospital in March 1987 and transferred to Tauranga Hospital in 1993 "under the same management based in Te Puke at the time", which we infer was a reference to the fact that both hospitals were under the management of the AHB. He went on to describe contributions he had made over and above his contractual obligations to support his request.

[47] On 9 January 2014, the CEO of the DHB confirmed that an ex gratia payment of $2,000 would be paid by the DHB in recognition of Dr Mathews' service and contribution to the organisation. It was stated that ex gratia payments were the exception rather than the rule, and very few staff received them.

The issues

[48] Distilling the pleadings, evidence and submissions, we consider the following issues arise for determination:

a) What, if any, contractual entitlement to a retiring gratuity was included in Dr Mathews' IEC?

b) Was any such entitlement varied or extinguished?

c) Was the retirement gratuity discretionary?

d) Did Dr Mathews retire or resign?

e) What was required of the DHB?

[49] We will outline the detailed submissions of counsel, where appropriate.

Interpretation principles

[50] There was no controversary between the parties as to the applicable principles regarding the interpretation of contractual terms.

[51] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the Supreme Court summarised the position as follows:[16]

> ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted

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16 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63] (footnotes omitted).

> to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
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> ...
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> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[52] In *Vector Gas v Bay of Plenty Energy Ltd*, it was confirmed that extrinsic evidence of post-contract conduct is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively the meaning parties intended their words to bear.[17]

[53] The Supreme Court has confirmed that these principles apply to employment agreements.[18] We are accordingly guided by them.

What, if any, contractual entitlement to a retiring gratuity was included in Dr Mathews' IEC?

Counsel's submissions

[54] As noted earlier, cl 7.3 of Dr Mathews' IEC stated that "the Employee may receive a gratuity payment in accordance with the Board's gratuity policy".

[55] Counsel for the DHB, Mrs Goodspeed, argued that "the Boards' gratuity policy" was that which would apply at the date of termination. She said this was because of:

a) The express reference to the entitlement being determined "On retirement".

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17 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [31].

18 *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [71]; and *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [38].

b) The language of cl 7.3 did not contractually entrench a policy existing at a particular point in time, noting that, if this had been intended, different language would have been used.

c) The AHB had no written policy at the time, only unwritten practice.

d) Other clauses in the IEC expressly clarified when current policies were to apply.[19]

e) The inclusion of the word "may" indicated a discretion to change policy from time to time, and to determine not to pay a gratuity or pay a different amount from what may have been provided in any policy.

f) Since the entitlement was discretionary, the employer could determine the payment amount, rather than it being prescribed by a set method or scale.

[56] Counsel for Dr Mathews, Mr Cranney, initially argued that the 1991 Award applied in its terms because of the express references contained in the IEC to that document. Later, he submitted:

a) The policy of the Board, as referred to in cl 7.3, was that which applied on 1 January 1993.

b) This was as recorded in cl 8 of the 1991 Award.

c) Clause 7.3 was to be contrasted with other provisions in the IEC where reference is expressly made to policies prevailing at the time of the triggering event.[20]

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19 Reference was made to cls 5.4(a), 8.3 and 8.5 of the IEC.
20 Clause 18.4.

d) The policy which the DHB introduced in 2013, the "Leaving – Gratuities" policy, operated to apply the entitlement allowed for in Dr Mathews' IEC.[21]

Analysis

[57] There are several points which may be made as to the plain and ordinary meaning of the words used in cl 7.3.

[58] First, the words "On retirement" are a reference to the date when the employee may receive a gratuity payment. In our view, they do not refer to the date of the Board's gratuity policy.

[59] Second, the policy is that of "the Board"; that is, the AHB. As already noted, the IEC referred in other clauses to "the District General Manager". In cl 7.3, the parties chose to refer to the former and not to the latter.

[60] Third, we have considered the issue concerning the date of the Board's policy as used in cl 7.3, and as used in other clauses of the IEC. In our view, those comparisons are not particularly helpful. Clause 5.4(a) has an express reference to policies currently applying, that is, at the date of the IEC; cl 18.4 contains a reference to a policy prevailing at the time of the subject event. These provisions do not shed light on the parties' intentions when there is no indication one way or the other, as in cl 7.3.

[61] This issue is one which may be resolved by considering the background knowledge which could reasonably be regarded as having been available to the parties in the situation they were in during the time of the contract. Retirement gratuity provisions had been included in employees' terms and conditions in the same terms on many previous occasions. The AHB had been bound by the awards containing these provisions, as well as the earlier statutory provisions.

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[21] Above at [43]-[45].

[62] The most recent description of these obligations was contained in the 1991 Award, which expired on 30 June 1992.

[63] There is no evidence to suggest that the Board then adopted a different policy, and that this occurred before Dr Mathews entered into his IEC with the AHB on 1 January 1993. In particular, there is no evidence either to indicate that the practice adopted by Mr Levy and Mr Milne as to gratuity payments had been promulgated by the AHB, or that it could in some other way be regarded as constituting its policy.

[64] Having regard to the context within which the IEC was signed by Dr Mathews and the Board with effect from 1 January 1993, the irresistible inference is that the "Board's policy" as referred to in cl 7.3 was the longstanding arrangement by which the Board had been bound.

[65] We do not accept Mrs Goodspeed's submission that the presence of the word "may" in cl 7.3 of the IEC points to a conclusion that the employer was free to implement a policy which would be effective at a subsequent date of retirement. As we will explain more fully later, the word "may" as used in this clause, and in cl 8 of the 1991 Award, is a word conveying the concept of authorisation rather than simply allowing a discretion. The same word is used in both clauses, confirming a link between the two.

[66] There was some debate as to whether the 1991 Award applied in its terms because of the contents of the note endorsed on the front page of the IEC, and because of cl 17.1. Both references appear to suggest that the 1991 Award would only apply until June 1992 as indicated on the front page of the document; or for as long as it prevailed: cl 17.1 of the document.[22]

[67] Mr Milne appeared to suggest that the inclusion of these references was a mistake, caused by the fact that a templated form of document was used for Dr Mathews' IEC.

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[22] Above at [14]-[18].

[68] Our analysis does not rest on these references in the IEC; rather, as we have made clear, cl 7.3 contains a discrete reference to the Board's policy on retirement gratuities; cl 8 of the 1991 Award described that policy.

[69] Although it was not argued to the contrary in this case, we observe that case law is clear that reference to a policy in an employment contract or agreement causes the terms of that policy to be a binding part of the contract or agreement.[23] Accordingly, we are satisfied that the parties intended by their reference in cl 7.3 to create a binding obligation.

[70] Post-contract evidence confirms our conclusion. There was no alteration of policy until well after Dr Mathews entered into his IEC. Ms Wallace referred to the fact it was not until 1995 that Mr Milne introduced a policy to make ex gratia payments rather than a retiring gratuity, providing certain criteria were met. This coincided with the change of accounting policies with regard to gratuities as adopted on 31 January 1995.[24] That these events took place in 1995 strongly suggests that the AHBs had not adopted a policy to replace cl 8 of the 1991 Award prior to 1993.

[71] A related point concerns the steps taken by EBHL. As mentioned earlier, this entity took over the operation of Whakatane Hospital, formerly part of the AHB. On 25 August 1994, it adopted a retiring gratuities policy. Although that policy was not identical to cl 8 of the 1991 Award, which we find would have applied previously to its employees since there was no evidence of the contrary, it was clearly a modification of that clause. In the absence of any evidence to the contrary, it is apparent that cl 8 of the 1991 Award constituted the status quo policy of the AHB.

Was any such entitlement varied or extinguished?

[72] Clause 17.5 of Dr Mathews' IEC provided that no modification variation or waiver could be effective or binding on either party, "unless made in writing and signed by both parties". This replicated the common law position that, whether a

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23 *Ruddlesden v Unysis New Zealand Ltd* [2004] 2 ERNZ 163 (EmpC); leave to appeal declined in *Unysis New Zealand Ltd v Ruddlesden* [2004] 2 ERNZ 301 (CA); *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480 at [73].

24 Above at [31] and [32].

variation takes the form of an alteration to an existing term or condition or the imposition of a new term, the genuine consent of both parties is required.[25]

[73] There is no evidence that Dr Mathews expressly agreed to a variation of cl 7.3; or that there was any other binding collective employment contract or agreement which did so. Earlier in this judgment, reference was made to the various subsequent documents governing his employment relationship, all of which stated that they set out minimum core terms which underpinned individual employment arrangements.[26]

[74] We make particular reference to the "underpinning document" of 30 April 1996, which ultimately applied to Dr Mathews.[27] Clause 1.1, which dealt with the application of the document, stated:

> This Agreement is pursuant to section 20 of the Employment Contracts Act and sets out minimum core terms, conditions and rights of employment for senior medical and dental officers employed by the Western Bay Health Ltd (a duly registered company incorporated as Western Bay Health). It establishes minimum terms, conditions and rights of employment which underpin and is incorporated into each employee's individual employment contract. Each employee is entitled and encouraged to take up an individual employment contract in accordance with this Agreement. The Agreement replaces the New Zealand Area Health Boards Senior Medical and Dental Officers Award.

[75] There are two points to be made about this clause. First, it was clear that the document created minimum rights, a statement which was repeated twice. We find that in this provision the parties intended that any enhanced rights – such as those contained in an existing IEC – would remain effective. That was the case in respect of cl 7.3 of Dr Mathews' IEC.

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25 *United Food & Chemical Workers Union of New Zealand v Talley* [1992] 3 ERNZ 423 (EmpC) at 439; and *Foo v Pacific Plastic Recyclers Ltd* [2002] 2 ERNZ 273 (EmpC) at [41].

26 Western Bay Health Senior Medical Staff Agreement 1996-1997, cl 1.1; Western Bay Health Senior Medical Staff Collective Employment Contract 1997-1999, cl 1.1; Pacific Health Senior Medical and Dental Officers Collective Employment Contract 1999-2001, cl 1.1; Bay of Plenty District Health Board – Senior Medical and Dental Officers Collective Agreement 2001-2002, cl 1.1; Bay of Plenty District Health Board – Senior Medical and Dental Officers Collective Agreement 2002-2004, cl 1.1; New Zealand District Health Boards – Senior Medical and Dental Officers Collective Agreement 2003-2006, cl 2.3; New Zealand District Health Boards – Senior Medical and Dental Officers Collective Agreement 2007-2010, cl 2.3; New Zealand District Health Boards – Senior Medical and Dental Officers Collective Agreement 2011-2013, cl 3.3.

27 Above at [27].

[76] Second, the reference to the fact that the underpinning agreement replaced the 1991 Award did not affect the position as to Dr Mathews' retiring gratuity provisions, since the effect of cl 7.3 was to enshrine cl 8 of the 1991 Award as the applicable gratuity provision.

[77] Thereafter, the multiple collective employment contracts and collective employment agreements made express reference to the fact that each such document was setting out only minimum core terms which underpinned individual employment arrangements.

[78] In those documents that applied after the enactment of the Employment Relations Act 2000 (the Act), there were express statements that IECs negotiated under the Employment Contracts Act 1991 were deemed to contain additional terms and conditions of employment for the purposes of s 61 of the Act.

[79] The retiring gratuity provisions of Dr Mathews' IEC accordingly continued. They were not varied or extinguished.

Was the retirement gratuity discretionary?

[80] We turn to consider the effect of cl 8 in the 1991 Award.

[81] The first question relates to the use of the word "may" in cl 8A. Mrs Goodspeed submitted that the use of this word meant the power bestowed by the clause was fully discretionary. Mr Cranney submitted that the word was empowering rather than discretionary; it was to be understood in light of the subject matter of the clause.

[82] The clause considered by the Court in *NZNO* was similarly worded.[28] In our judgment in that case, we noted the apparent use of discretionary language, but also said that the scope of any discretion was not then before the Court.[29] In the present case, the discretionary language is squarely before us, and we have now had the benefit of argument.

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28 *New Zealand Nurses Organisation v Waikato District Health Board*, above n 2.
29 At [102].

[83] Much has been written on this topic. Recently, the Supreme Court in *B v Waitemata District Health Board* gave this succinct summary as to its potential meaning:[30]

> [31] The word "may" is usually permissive or empowering. However, in some situations read in context, "may" means "must". Richardson P, delivering a judgment of the Court of Appeal in *Tyler v Attorney-General*, endorsed the observation of Windeyer J in *Finance Facilities Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* who stated that the general position is that "[w]hile Parliament uses the English language the word "may" in a statute means "may". *Windeyer J also observed, in some circumstances, the permitted power must be exercised, and that will be dictated by "the particular context of words and ... circumstances in which the power is to be exercised – so that in those events the word "may" means "must"".*

[84] In support of this summary, the Supreme Court cited leading cases where these principles were explored with regard to statutes[31] and contracts.[32]

[85] It is also worth setting out the following passage from Windeyer J's judgment in *Finance Facilities*, to which the Supreme Court had referred:[33]

> Used of a person having an official position, it is a word of permission, an authority to do something which otherwise he could not lawfully do. If the scope of the permission be not circumscribed by context or circumstances it enables the doing, or abstaining from doing, at discretion, of the thing so authorised. But the discretion must be exercised bona fide, having regard to the policy and purpose of the statute conferring the authority and the duties of the officer to whom it was given: it may not be exercised for the promotion of some end foreign to that policy and purpose or those duties.

[86] Windeyer J then referred to a number of illustrative cases where the particular context of words and circumstances made the word "may" not only an empowering word, but indicated circumstances in which the power was to be exercised. He referred to the statement of Jervis CJ in *Macdougall v Paterson* who observed, "The word 'may' is merely used to confer the authority: and the authority *must* be exercised, if the circumstances are such as to call for its exercise."[34]

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30 *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 (footnotes omitted) (emphasis added).

31 For example, *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 (HL) at 222-223.

32 For example, *Morgan v BNP Paribas Equities (Australia) Ltd* [2006] NSWCA 197, [2006] 1 BFRA 639.

33 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134.

34 *Macdougall v Paterson* (1851) 11 CB 755 at 766, 138 ER 672 at 677 (emphasis added).

[87] In light of these statements, we find that the use of the word "may" in cl 8A did not bestow an unfettered discretion. The power was proscribed by the provisions which followed.

[88] In cl 8, the parties set out an elaborate set of precise provisions, as well as a carefully framed calculation methodology. Those detailed provisions establish the parameters for eligibility for retiring gratuities, whether in whole or in part.

[89] Maximum gratuity payments are referred to. We do not consider that this implies a discretion to grant any sum, from zero to the maximum. That is because the clause expressly contemplates situations where the payment would be less than the maximum as a result of the application of such factors as part-time service (cl 8C), or because the employee is taking up other employment (cl 8E), or because a gratuity had previously been received (cl 8F). Further, the qualifying words of service are expressed in 12-month bands, with the word "maximum" emphasising there is to be no additional payment for part years; and that the banding system does not continue beyond 40 years' of service.

[90] This interpretation of the empowering provision in cl 8 is informed by its purpose. The focus of the clause relates to qualifying long-service. The employee must have worked for no less than 10 years; the amount of the payment from retirement is dependent on the length of service.

[91] Mr Powell told the Court that the concept of "retiring gratuity" had always been a payment made to recognise long-service, usually with a public-sector employer.

[92] It is inherently unlikely that where an employee qualified in terms of length of service, the parties intended that such a payment could, all other things being equal, be withheld in some circumstances and paid in others. To do so would not recognise the purpose of the provision and would create obvious anomalies. This factor reinforces our conclusion that cl 8A authorised the employer to make the retiring gratuity payment to a qualifying employee according to the provisions which followed.

[93] Mr Cranney submitted that we should consider authorities where the courts have referred to an obligation on a decisionmaker to exercise a contractual discretion in good faith, and not arbitrarily or capriciously. In support of that submission, he referred to the judgment in the United Kingdom Supreme Court judgment of *Braganza v BP Shipping Ltd*.[35]

[94] In the New Zealand employment context, the obligation to act in good faith, as described in s 4 of the Act, applies to the exercise of powers such as those found in cl 8. This obligation to exercise a discretion in good faith was reinforced for common law purposes in the dicta of Windeyer J, in *Finance Facilities*, to which we referred earlier.[36]

[95] That said, the real issue in the present case does not in our view involve an employer dealing with a retiring gratuity issue contrary to its good faith obligations. If cl 8 applies to Dr Mathews' circumstances, then the DHB acted in error by following a policy that did not recognise Dr Mathews' binding contractual terms. It did not do so through want of good faith, but because the legal position was not correctly understood.

Did Dr Mathews retire or resign?

[96] For Dr Mathews, it is asserted that his cessation of employment was a retirement within the meaning of cl 8. The DHB contends that he resigned, that he did not cease his professional work because he maintained his private practice, and accordingly any policy referring to retirement could not apply to him.

[97] Mr Cranney urged the Court to adopt an interpretation of the word "retirement" as it appears in cl 8A where, in effect, the focus would be on "retiring from the *Board*" rather than "*retiring* from the Board". To support this submission, he relied on cases which considered the early statutory provisions which emphasised there was a focus

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35 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661; see also *British Telecommunications PLC v Telefonica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All ER 907 at [37].

36 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation,* above n 33.

on retirement from the particular entity, rather than retirement from work per se: *Waimairi County v Rutherford* [37] and *Fenney v Auckland Regional Council*.[38]

[98] Mrs Goodspeed submitted that the Court should follow the findings it made when considering a similar, but not identical, provision in the *NZNO* case.[39]

[99] There are several statements in the *NZNO* case to which reference should be made regarding the correct meaning of retirement. On this topic, the Court said:[40]

> [80] It is not in dispute that there are narrower and wider meanings, as these [*Waimairi County* and *Feeney*] and other cases have recognised. The meaning must depend on what the parties intended in the particular circumstances. In this case there is no evidence that the parties regarded the ... legislative history or the judgments discussing it as being a relevant aspect of context when agreeing any of the contracts or agreements which are in evidence before the Court.
>
> [81] Rather, the evidence shows that after s 52A was repealed in 1988, the parties (or their predecessors) when entering into the relevant awards, contracts and agreements, considered that "retiring" and "resigning" have different meanings and applied in different circumstances.

[100] In the *NZNO* case, a clause had been removed which was similar in content to cl 8E of the 1991 Award. It related to the position where a longstanding employee resigned to take up other work; in those circumstances, there was an entitlement to a resignation gratuity, equivalent to 50 per cent of a retirement gratuity. There was an obvious distinction between "retirement" and "resignation". The Court found the parties intended when the clause was removed, that the word retirement would continue to have the same meaning as before.

[101] In cl 8 of the 1991 Award, there is no such difficulty because these two different concepts were each the subject of material subclauses when Dr Mathews signed the IEC. In the case of retirement, the employee was entitled to a payment in accordance with the table. In the case of resignation after not less than 10 years' service to take up other employment, half that normal payment was available. Thus, the two different concepts of cessation of employment were expressly engaged.

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37 *Waimairi County v Rutherford* [1948] NZLR 300 (SC) at [305].
38 *Feeney v Auckland Regional Council* EmpC Auckland AEC53/93, 22 October 1993 at 18-19.
39 *New Zealand Nurses' Organisation v Waikato District Health Board,* above n 2.
40 (Footnotes omitted).

[102] In light of that distinction, we stated in *NZNO*:

> [107] In the present context, the evidence demonstrates that the parties' common understanding of the meaning of "retire" is that it is something more than simply moving on from WDHB. In our view, the clause means that a departing employee is "retiring" for the purposes of the retiring gratuity clause if, at the time of departing WDHB, he or she is not, and has no intention of, taking up on an ongoing basis further regular paid work, whatever the employment status of the worker ...

[103] However, the Court in that instance was dealing with the circumstances of a departing employee, who replaced the full-time work she had formerly undertaken with the Waikato DHB with other work.

[104] The circumstances in the present case are different. Dr Mathews had worked part-time for the DHB or its forebears. He ceased that employment. Moreover, his evidence was that he did not take up further work to replace the work he had formerly undertaken with the DHB. He was clear that he continued his former private practice but did not increase the extent of that practice. This was to permit him to enjoy more personal and family time.

[105] Clause 8C of the 1991 Award clearly allowed for this particular situation. It referred to the fact, that where part-time service was involved, the gratuity should be calculated to reflect this. It stated that the number of tenths per week employed during the years of service would be calculated as a percentage of the number of tenths represented by a full week; this percentage would apply to the rate of pay established for gratuity purposes.

[106] We conclude that the parties, when agreeing to these provisions, allowed for the possibility of a long-serving employee retiring from a part-time role and ceasing the extent of that work commitment; in those circumstances, the employee would be entitled to a retiring gratuity duly apportioned.

[107] Such a conclusion is unsurprising given Mr Powell's evidence that it was normal for DHB-employed doctors to continue in private practice after leaving the hospital service.

[108] Accordingly, on the facts of this particular case, we are satisfied that Dr Mathews' circumstances were contemplated by the provisions of cl 8C. He retired from his work with the DHB, did not replace it with substitute work, and continued with his pre-existing private practice.

[109] This conclusion is reinforced by comparing cl 8C with cl 8E. An employee was entitled to a resignation gratuity if resigning after more than 10 years' service "to take up other employment". These qualifying words were not used in cl 8C; and in any event, Dr Mathews did not resign to take up other employment.

What was required of the DHB?

[110] The final question relates to the DHB's consideration of Dr Mathews' decision to cease work with that organisation. In his notice of cessation of work, Dr Mathews gave three months' notice of retirement. Internal documents recorded his reason for resignation as being "retirement".

[111] The DHB then considered his request for an ex gratia payment under the "Leaving – Ex Gratia Payments" policy, which stipulated that the employee had to be "retiring" rather than "resigning". The ultimate letter sent by the CEO to Dr Mathews which confirmed the ex gratia payment of $2,000 extended good wishes to Dr Mathews for his "retirement".

[112] There is no doubt it was understood that Dr Mathews intended to retire from the DHB. His request for an ex gratia payment was treated by the DHB under a policy which emphasised the employee had to be retiring, not resigning, and must have had no less than 15 years' continuous service and had to have contributed to their service over and beyond the jobs they were employed to do.

[113] It was at this point that the DHB erred. It ought to have applied the "Leaving – Gratuities Payments" policy which required it to pay a gratuity, "where allowed for in the employee's employment agreement". This was the case unless an entitlement had previously been granted or had previously been paid in a "buy-out" process. The proviso did not apply to Dr Mathews. It appears that Dr Mathews was not provided with a copy of this policy. He was provided with a copy of the policy relating to ex

gratia payments, and understandably applied for a gratuity under it. We conclude the DHB should have applied Dr Mathews' position under the provisions of his IEC and the 1991 Award.

Disposition

[114] In light of the foregoing conclusions, we are satisfied that, on the basis of cl 7.3 of Dr Mathews' IEC, and cl 8 of the 1991 Award which was incorporated to his IEC, his cessation of work from the DHB on 30 November 2013 was a retirement.

[115] We further consider that the correct retirement gratuity in those circumstances is based on the gratuity for not less than 26 years and less than 27 years, 98 days' pay, reduced as required under cl 8C, giving a result of 39.2 days' pay.

[116] We assume the parties will now be able to undertake the correct calculations and adjustments. If, however, issues as to correct payment have not been resolved within four weeks, we reserve leave to either party to apply for any necessary directions.

[117] We reserve costs. These should follow the event. Counsel should discuss the issue directly in the first instance. If agreement is unable to be reached, any necessary application should be made within 21 days, and a response given within 21 days thereafter.

B A Corkill
for the full Court

Judgment signed at 1.00 pm on 2 May 2019