IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 166
EMPC 155/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Plaintiff
AND	AUCKLAND DISTRICT HEALTH BOARD First Defendant
AND	WAITEMATA DISTRICT HEALTH BOARD Second Defendant
AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Third Defendant
AND	SPECIALITY TRAINEES OF NEW ZEALAND INCORPORATED Intervener

EMPC 55/2020

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Plaintiff
AND	THE 20 DISTRICT HEALTH BOARDS OF NEW ZEALAND First to Twentieth Defendants
AND	SPECIALITY TRAINEES OF NEW ZEALAND INCORPORATED Intervener

Hearing:	7-9 July 2020 (Heard at Auckland)
Court:	Judge B A Corkill Judge K G Smith Judge J C Holden
Appearances:	B Manning, counsel for New Zealand Resident Doctors Association with G Bowker in attendance S Hornsby-Geluk and B Locke, counsel for the 20 District Health Boards A Keir, counsel for Speciality Trainees of New Zealand Inc as Intervener
Judgment:	14 October 2020

JUDGMENT OF THE FULL COURT

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[1] This judgment deals with two questions that have arisen regarding s 62 of the Employment Relations Act 2000 (the Act) and how it applies to Resident Medical Officers (RMOs) employed by District Health Boards established under the New Zealand Public Health and Disability Act 2000 (DHBs):

(a) Are RMOs "new employees" for the purposes of s 62(3) of the Act when, as part of their training, they move from one DHB in the Auckland region to another DHB in that region? (the first question)[1]

(b) What is the work an RMO "will be performing" for a DHB for the purposes of s 62(4) of the Act? (the second question)[2]

[2] In the statement of claim for the first question, a declaration was sought in the alternative that the DHBs to which the RMOs are rotated are obliged to comply with the terms and conditions of the RMOs' employment that applied immediately before the rotation, to the extent such terms and conditions are more favourable to such RMOs than the terms of the collective agreement which would apply by virtue of s 62. In the

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1 This is the question that arises in EMPC 155/2019.
2 This is the question that arises in EMPC 55/2020.

statement of claim for the second question, a declaration was sought that, in the case of the Auckland region and the Wellington region, the DHBs in the particular region *jointly* are the "employer" for the purposes of s 62(4). Neither of these issues were pursued at the hearing.

[3] Section 62 applies to new employees who are not a member of a union that is a party to a collective agreement with the employer. Relevantly it provides:

> **62 Terms and conditions for first 30 days of employment of new employee who is not member of union**
>
> (1) This section—
>
> (a) applies to a new employee who—
>
> (i) is not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and
>
> (ii) enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee; …
>
> …
>
> (3) For the first 30 days after the new employee commences employment with the employer, the employee's terms and conditions of employment comprise—
>
> (a) the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union (other than any bargaining fee payable under Part 6B); and
>
> (b) any additional terms and conditions mutually agreed to by the employee and employer that are no less favourable to the employee than the terms and conditions in the collective agreement.
>
> (4) If the work to be done by the new employee is covered by more than 1 collective agreement, subsection (3)(a) applies to the collective agreement that binds the greatest number of the employer's employees in relation to the work the employee will be performing.
>
> …

[4] As explained in this judgment:

(a) RMOs are "new employees" for the purposes of s 62(3) of the Act when, as part of their training, they move from one DHB in the Auckland region to another DHB in that region.

(b) The work an RMO "will be performing" for a DHB for the purposes of s 62(4) of the Act is properly broken down into house officers, senior house officers and dental house officers, each as a group but, for registrars, is determined by reference to the speciality of the relevant professional college.

RMOs rotate between DHBs

[5] The New Zealand Resident Doctors Association (the NZRDA) is a union registered under the Act. It has represented RMOs employed across all 20 DHBs for many years.

[6] The defendants in relation to the first question are the DHBs that operate in the Auckland region (the Auckland DHBs).

[7] The defendants in relation to the second question are all 20 DHBs in New Zealand (the New Zealand DHBs).

[8] Speciality Trainees of New Zealand Inc (SToNZ) was granted intervener status for the hearing. SToNZ is another union that represents RMOs employed by DHBs. It was incorporated in March 2018.

[9] RMOs are trained and supervised under an apprenticeship model. After graduation from medical school, RMOs will be house officers for at least two years. After completing the house officer phase, an RMO will apply for a position as a registrar. Generally, the aim of an RMO is to develop a career as a vocational specialist.

[10] As they move through their training, RMOs rotate between different DHBs. In the Auckland area, the Auckland DHBs use the Northern Regional Alliance (NRA) as their agent for managing the recruitment and rotation of RMOs. The placement of RMOs within the DHBs is undertaken by another organisation, Advanced Choice of Employment Programme (ACE), which is the agent of all 20 DHBs. Trainee interns (who are in their final year at medical school) identify positions of interest to them and

register their employment preferences with ACE, which then matches trainee interns with DHBs. In the Auckland region, once the trainee interns have been matched by ACE to one of the three DHBs, the NRA takes over the administration of their employment and rotation. It is the NRA that sends RMOs an offer of appointment, made on behalf of all the Auckland DHBs.

[11] Rotations between the Auckland DHBs for house officers occur quarterly and for registrars on a six month basis.

[12] The offer of a position with a DHB involves a job description, essentially consistent with each RMO's training, colloquially called a "run". Run descriptions are agreed between the DHB and each union. There are hundreds of run descriptions across the New Zealand DHBs.

[13] As RMOs approach the end of their time as house officers, they look to enter a speciality. To achieve this, they apply for admission to a training programme with a relevant medical or surgical college under which training in that speciality occurs. There are 12 such colleges that overall represent different specialities. Within the colleges themselves, there is a further differentiation of disciplines. A person who wishes to specialise in orthopaedics, for example, needs to be admitted to the Orthopaedic Training Programme offered by the Royal Australasian College of Surgeons.

[14] Once an RMO joins a college, they feel very much aligned to that college; the college becomes the RMO's "tribe". While there is some overlap between the work performed by registrars in the different colleges, the various vocational pathways require particular skills and working requirements so that there is a divergence as between the various colleges.

Bargaining for a NZRDA MECA becomes protracted

[15] On 30 December 2017, the NZRDA initiated bargaining for a new Multi-Employer Collective Agreement (MECA). Its then current MECA was due to expire on 28 February 2018.

[16] One of the key claims the NZRDA was making was its "safer hours" claim. This was a claim for changed roster limits so that RMOs were only able to be rostered ten days consecutively and four consecutive nights, instead of the limits that then applied of twelve consecutive days (two weeks, Monday to Friday and the weekend in between) and seven consecutive night shifts.

[17] The proposed change to the roster limits concerned some RMOs, in particular surgical registrars, who felt that the proposed changes would dilute their training. Dr Lash, who was a surgical registrar, said the chief concerns were that the limitations proposed on consecutive days of work would affect RMOs' access to elective and non-urgent procedures and clinics as they do not generally occur at the weekend. Dr Lash said that another concern was there would be an increased risk to patient safety, as there would be more handovers, which are a risky time for patients.

[18] Dr Lash raised his concerns regarding the proposed change to the rosters with Dr Powell, the National Secretary of the NZRDA, but they were not allayed. It was these issues, and what Dr Lash and others saw as the NZRDA's refusal to contemplate a 12-day roster for surgical trainees, that prompted him and others to incorporate SToNZ in March 2018. SToNZ initially was focussed on the needs of surgical trainees. Reflecting that focus, SToNZ was at first an acronym for Surgical Trainees of New Zealand Incorporated - and advocacy for those undertaking a surgical career was an express part of the rules. The name was changed in June 2018 to the more inclusive Specialty Trainees of New Zealand, reflecting the fact that increasingly members were from non-surgical specialities.

[19] There are approximately 4,000 RMOs employed by DHBs across the country. As at the hearing, the NZRDA had approximately 2,500 members and SToNZ had approximately 1,400 members, leaving a small number of RMOs who are not union members. It is mainly amongst registrars where there has been a significant move from the NZRDA to SToNZ.

[20] SToNZ initiated bargaining for a MECA in mid-2018 and concluded its MECA towards the end of 2018. The SToNZ MECA took effect from 10 December 2018. In

many respects it replicates the NZRDA MECA, but it did not include the "safer hours" limits to rosters.

[21] Negotiations for the NZRDA replacement MECA became protracted. By virtue of s 53 of the Act, the expired MECA continued in force until 28 February 2019, but it then lapsed. This meant that the only MECA with coverage over RMOs at that time was the SToNZ MECA. RMOs who were members of the NZRDA moved onto individual employment agreements based on the expired NZRDA MECA.

First question arose after s 62 included in Act

[22] On 6 May 2019 the Act was amended to include s 62 as it now stands.[3] This reintroduced the "30-day rule" that had applied in a slightly different form when the Act was first enacted, but which then was removed from the legislation in 2014.[4] Also in May 2019 house officers were due to rotate between runs; the changeover date for house officers for the third quarter of 2019 was 27 May 2019. For registrars, on a six-month rotation, it was 10 June 2019.

[23] On 8 May 2019, anticipating the 27 May rotation, the NRA wrote to rotating RMOs advising them that, to comply with the amended Act, on rotation to another DHB their terms and conditions had to be based on the SToNZ MECA for the first 30 days of their employment with their new employing DHB.

[24] The NZRDA disagreed with this stance. The NZRDA, through Mr Manning as its counsel, wrote to the Auckland DHBs asserting that the RMOs were not, prior to the rotation of 27 May 2019, new employees of the DHB to whom they were rotating because they had been persons intending to work, and thus employees as defined by s 6 of the Act. After the NZRDA raised its concern over the letter of 8 May, the NRA wrote to RMOs giving them a choice as to whether or not they regarded themselves as "new employees" for the purposes of s 62 of the Act. The NRA sent this letter because of the disagreement between the DHBs and the NZRDA on the correct application of s 62 in the circumstances and, the NRA said, to ensure that no

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3 Employment Relations Amendment Act 2018, s 22.
4 Employment Relations Amendment Act 2014, s 17.

employee perceived themselves as being disadvantaged. Although the Auckland DHBs, through counsel, advised the NZRDA that they were making that choice available to RMOs, they did not consult with the NZRDA before sending the letter to RMOs.

[25] Negotiations between the NZRDA and the DHBs for a MECA continued and the current MECA was ultimately settled in August 2019. Once the NZRDA MECA settled, the only people who continued to be affected by the first question were RMOs who were not members of either the NZRDA or SToNZ.

Second question arose after NZRDA MECA settled

[26] It was after the NZRDA MECA had settled that the second question arose, as the DHBs had to ascertain which of the two MECAs would cover new employees who were not a member of either the NZRDA or SToNZ for the first 30 days of their employment. This required an analysis of "the work the employee will be performing".[5]

[27] In that context, Central Region Technical Advisory Services Ltd (TAS)[6] provided a memorandum to the DHBs in or around September 2019, following the settlement of the NZRDA MECA, giving advice on which MECA would apply to RMOs for the first 30 days of their employment. TAS advised that, from an administrative perspective, this required an analysis of the current RMO workforces to determine which was the predominant MECA for each category of RMO at the relevant DHB. TAS identified house officers, senior house officers and dental house officers each as a work group for the purposes of s 62(4); but advised that, for registrars, the nature of their work should be differentiated on the basis of the relevant professional college.

[28] The advice in the TAS memorandum was not universally adopted by the DHBs. For the Wellington DHBs,[7] the membership of SToNZ was relatively low so that it

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5 Employment Relations Act 2000, s 62(4).

6 TAS is a centralised agency that provides strategic and advisory services to DHBs and other health sector stakeholders.

7 Capital Coast DHB, Hutt Valley DHB, Wairarapa DHB.

would have been unlikely their membership would have been greater than the NZRDA in any area. For this reason, and because the Wellington DHBs' RMO Unit was under significant pressure at the time, the Wellington DHBs made a pragmatic decision not to go through the process identified in the TAS memorandum as the effort involved was not seen as warranted. The General Manager of the Integrated Operations Centre of the Capital Coast DHB gave evidence that this was not a considered decision and the Wellington DHBs intend to review their approach, including in light of this judgment.

[29] When it found out about the advice given by TAS to the DHBs, the NZRDA objected, contending that the work an RMO would be performing for the purposes of s 62(4) meant the work of RMOs generally, who were in the employ of the particular DHB.

First question – application of s 62(3) to rotating RMOs

[30] The NZRDA withdrew its first argument that, as a person intending to work, s 62(3) did not apply to rotating RMOs. All parties now appear to accept the 30-day period specified in s 62(3) starts when the new employee commences work, not when the employment agreement is signed.

[31] The NZRDA then moved to argue that the Auckland DHBs were "joint employers" and so the RMO's employment was continuous. However, at the hearing it moved away from that argument to a further argument that s 62(3) did not apply for two reasons. First, there was a subsisting, continuous and open-ended umbrella relationship between the Auckland DHBs and RMOs which, in the context of s 62(3), meant that RMOs were not "new employees" when they moved from one Auckland DHB to another. Second, none of the policy objectives of s 62 or the Act would be satisfied by applying s 62(3) to rotating RMOs.[8]

[32] Mr Manning's argument was summarised in nine steps:

(a) The NZRDA accepted that each DHB is a separate legal entity.

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[8] Employment Relations Act, s 3(a)(iv).

(b) It acknowledged that rotating RMOs are not in a joint employment relationship with the Auckland DHBs and that the RMOs' employment relationship is with the DHB for whom they are working at the time.

(c) Therefore, when an RMO rotates from one DHB to another, the RMO moves from one employer to another.

(d) Legal consequences are relevant but not determinative.

(e) Almost invariably, the consequence of moving from one employer to another will mean that the employee is a new employee under s 62(3).

(f) However, in rare situations a more nuanced or granular application is required. This is such a rare case.

(g) When looking at all characteristics, it can be said that there is a continuous subsisting employment relationship with all DHBs.

(h) The concept of an "umbrella" relationship is not a legal proposition but one that reflects features of this unique workforce. It captures the real nature of the employment relationship.

(i) Adopting the same approach the Supreme Court adopted in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, but with a limiting rather than expanding approach, the contractual and legislative context required the term "new employees" to exclude RMOs when they transfer from one DHB to another.[9]

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9 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212, [2017] ERNZ 617.

[33] Mr Manning relies on Turner J's judgment in *Police v Thompson*, referred to in the *AFFCO* judgment.[10] On the basis of Turner J's judgment, Mr Manning argues that "context" should include the policy objectives underlying the Act generally, and s 62 in particular, and the consequences of a given interpretation. Mr Manning said the fundamental policy objectives of s 62 were to protect newly employed vulnerable employees and to ensure that they are on terms and conditions of employment that are not less favourable than the applicable collective agreement. He said another objective is to enable employees to 'try before they buy' – that is, see what a union could do for them before deciding whether to join it. He says that neither of those policy objectives would be served by applying s 62(3) to rotating RMOs, making RMOs change their terms and conditions on rotation. Further, he submits that requiring RMOs to be employed on the terms of the SToNZ MECA when they might prefer to be employed on terms based on the expired NZRDA MECA would be counter to one of the Act's overarching policy objectives of supporting integrity of personal choice.[11]

[34] The position of the Auckland DHBs and of SToNZ was that there was no ambiguity in s 62(3) and so there was no need to look to context. Further, as noted by the Supreme Court in the *AFFCO* decision, the context that may be taken into account must relate to the statute rather than something extraneous.

[35] Their point is that RMOs are, in fact and in law, new employees when they rotate from one DHB to another. The consequence of that in s 62(3) is clear and there is no need to look beyond the words of the section.

AFFCO and the meaning of "context"

[36] *AFFCO* involved a situation where seasonal workers who had been employed by AFFCO in a previous season, but whose employment was discontinued at the end of the season, were only able to return to AFFCO if they agreed to new terms of employment. The issue was whether those seasonal workers were "employees" for the purposes of s 82 of the Act, and locked out. The Supreme Court found the seasonal workers were not employed continuously and nor were they persons who had been

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10 *Police v Thompson* [1966] NZLR 813 (CA), at 819-822 per Turner J.
11 Employment Relations Act, s 3(a)(iv).

offered, and accepted, work as employees.[12] Therefore, they were not covered by the definition of "employee" under s 6(1) of the Act; however, that definition includes a context qualification: "unless the context otherwise requires". The issue in *AFFCO* then became whether that context qualification applied to "employee" in s 82(1)(b) so that, for the purposes of that section, a broader meaning of employee applied.

[37] A key issue in the case was whether "context" included circumstances extraneous to the Act itself. After reviewing previous authorities, including the various approaches adopted in *Police v Thompson*,[13] the Supreme Court summarised the correct approach when there is a defined meaning of a statutory term that is subject to a context qualification.[14] It did not endorse the approach taken by Turner J. The Supreme Court said that strong contextual reasons will be required to justify departure from the defined meaning, with the starting point for the Court's consideration of context being the immediate context provided by the language of the provision under consideration. The Supreme Court accepted that surrounding provisions also may provide relevant context and that it is legitimate to test the competing interpretations against the statute's purpose, against any other policy considerations reflected in the legislation, and against the legislative history where that is capable of providing assistance. It accepted that the context must relate to the statute rather than something extraneous but did not see the concept as otherwise constrained.[15]

[38] Against that background, the Supreme Court turned to the words of s 82 and its statutory purpose, finding that "employees" as used in s 82 referred not only to existing employees, but also included seasonal workers who had worked for AFFCO in the preceding season and to whom AFFCO owed contractual obligations, including as to rehiring.[16] Key to its finding was that the phrase "refusing or failing to engage employees", in s 82(1)(a)(iv) must cover persons who were not current employees, but rather were seeking employment.[17] Thus, the context of s 82 itself required a wider meaning than that found in s 6.

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12 At [29]–[53].
13 Above n 10.
14 *AFFCO*, above n 9, at [62]–[65].
15 At [65].
16 At [73].
17 At [67].

Analysis – AFFCO *does not assist the NZRDA*

[39] In our view, the first question is one of statutory interpretation.

[40] First, despite the way in which he framed his argument Mr Manning is not arguing for a meaning of "employee" based on the language of s 62 or its surrounding provisions. Rather, he points to the circumstances of RMOs and the consequences of interpreting "new employees" as including them on rotation.

[41] Any tension with the objective in s 3 of supporting integrity of personal choice arises from the specific requirements of s 62. That possible tension applies generally to new employees, none of whom can choose to commence on an individual employment agreement that is inconsistent with an applicable collective agreement and must have been contemplated by the legislator. While the focus of s 62 may be on employees who are new to a working environment and perhaps unfamiliar with that work environment, including RMOs on rotation, it is not in conflict with the purpose of the section.

[42] Second, there is nothing in the language used in s 62, or in the wider Act, that requires a departure from the otherwise clear meaning of "new employee". There is no "strong contextual reason" for concluding that it is appropriate to depart from the defined meaning of the term "employee" in s 6.[18] The word "new" is a commonly understood modifier. The result is that the term "new employee" is derived from s 6, and aptly describes the status of an RMO as they are engaged by a particular DHB.

[43] For both these reasons, *AFFCO* does not support the NZRDA's argument; it points away from "new employee" being interpreted in s 62(3) as anything other than its clear meaning.

[44] As noted, the NZRDA originally claimed that the three Auckland DHBs are in a joint employment relationship with RMOs employed in the Auckland region.[19] That

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[18] At [65].

[19] Relying on such cases as *Inspector of Awards & Agreements v Pacific Helmets (NZ) Ltd (in rec)* [1988] NZILR 411 at 417 and *Orakei Group (2007) Ltd (Formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345 (EmpC) at [53]; and *Hutton v Provencocadmus Ltd (in rec)* [2012] EmpC 207, [2012] ERNZ 566 at [79].

was not ultimately the basis on which the Union's claim was put, with the NZRDA agreeing that the employer at any particular time was the DHB for which the RMO worked.

[45] In our view, this was a correct concession, since an analysis of the conventional indicia of an employment relationship, as evidenced by the terms and conditions of the IEAs entered into with the RMOs, and other relevant documents and contextual circumstances, would not have led to a conclusion that there was more than one employer.

[46] Accordingly, we accept the position argued by the DHBs and SToNZ that, for the purposes of s 62(3), the RMOs are new employees when they rotate to, and change their employment from, one Auckland DHB to another.

Second question – the work an RMO "will be performing"

[47] The parties' positions in relation to the second question – what is the work an RMO "will be performing" for a DHB for the purposes of s 62(4) of the Act – can be shortly summarised:

(a) The plaintiff's case is that the words in s 62(4) are capable of either a broad or a narrow application but that, for the purposes of the sub-section, the work to be done or performed by the new employee is the work done or performed by RMOs generally.

(b) The defendants' position, with which SToNZ agrees, is that s 62(4) requires a more specific assessment of the work that the RMOs will be performing, and that categorisation simply by occupational group is too broad. They say the work performed by RMOs is differentiated, and for the purposes of s 62(4), RMOs must be categorised in accordance with the work they perform.

[48] Elaborating on its position, the NZRDA says:

(a) For the purposes of applying s 62(4) it is both reasonable and practicable to conform to the way in which the parties have viewed RMOs.

(b) The employing DHBs, the NZRDA and SToNZ have consistently recognised RMOs as an occupational class and organised their respective relationships with RMOs on that very basis.

(c) In particular, all three parties elected to define the coverage of their collective employment arrangements by reference to RMOs as a collective group.

(d) The NZRDA acknowledges that there are distinctions between different cohorts of RMOs but says those do not derogate from the common characteristics which define RMOs as an occupational group.

(e) All RMOs are engaged in an apprenticeship model, combining elements of service and education. They all must work under supervision and, with very few exceptions, complete their apprenticeship in the public health sector.

(f) RMOs all rotate from run to run, often requiring the RMO to transfer employment from one DHB to another.

(g) These features distinguish RMOs as an occupational group notwithstanding the obvious distinctions between different cohorts of RMOs; it is the features they have in common which set them apart from Senior Medical Officers.

(h) The NZRDA and SToNZ both represent the interests of an occupational group just as the Association of Salaried Medical Specialists represents the interests of salaried specialists or senior medical or dental officers employed in New Zealand's public hospital system.

(i) The TAS memorandum cuts across the approach that the parties have chosen to adopt by slicing and dicing RMOs.

(j) In any event, the groups identified in the TAS memorandum are not as discrete as is now argued; training across a range of specialities often is required so that training pathways overlap. Further, the TAS memorandum fails to recognise that, even within the colleges, there are sub-specialities, with no explanation as to why the demarcation between sub-groups of RMOs was done by reference to the colleges rather than to the specific training programmes of each cohort.

(k) The approach being taken to RMOs is inconsistent with the approach taken in other areas where there is overlapping coverage in the public health sector, for example with clinical physiologists.

[49] The defendants and the intervener say the purpose of s 62 is to give new employees access to the benefits of collective agreements. The defendants point to the explanatory material to the Bill in 2018 that included the reintroduction of s 62 saying it "will improve employees' ability to make an informed choice about whether to join a union by allowing them appropriate time and information to consider their options".[20] The intervener submits the underlying presumption of s 62(4) is that existing employees doing the work the new employee will do are best placed to discover which collective agreement has better terms and conditions so that, pursuant to s 62(4), new employees are provided with the best "default" terms, essentially "democracy in action".

[50] Both the defendants and the intervener reject the suggestion that the coverage clause of the collective agreements should govern the meaning of "the work [RMOs] will be performing". They say such a proposition is not supported by the legislative history – Parliament could have used that criteria, or alternatively occupational class, but purposefully chose not to.

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[20] Employment Relations Amendment Bill 2018 (13-1) (explanatory note) at 2.

[51] Further, they say that the purpose of a coverage clause in a collective agreement is quite different from the purpose of s 62(4); coverage is an unreliable mechanism to be used as the basis for determining the work that is to be performed because it is determined by parties going into bargaining with certain interests in mind; it may make sense for parties to a collective agreement to define coverage broadly.

[52] In its submissions, SToNZ suggests that there are at least five ways to categorise the work an RMO is performing. In order of most general to most specific, those five ways are:

(a) the broad RMO categorisation;

(b) by seniority (house officer, senior house officer, registrar, trainee);

(c) as suggested in the TAS memorandum, by college or intended college (representing broad specialities) and with house officers as a separate category;

(d) by specific speciality – which may be a mixture of college and sub-specialties (that is, different fields controlled by the same college), and aligned to the DHB departments, and with the house officers as a separate category; and

(e) by run description.

[53] The intervener's position is that the categorisation set out in the TAS memorandum (that is, category (c)) is the best approach to identifying the most advantageous MECA for RMOs across the DHBs' diverse business, and it is on this basis that the rule on s 62(4) should be applied.

[54] The defendants agree that there is a strong rationale for applying categorisation (c), including because the colleges are legislatively empowered and accredited bodies that govern training and confer the relevant fellowship; there is a strong identification between the RMOs and their vocational college which determines how their training and work, at a practical level, will operate. The defendants also note the importance

of the role of the speciality colleges, as recognised in the coverage clauses of the respective MECAs.

The legislative history is instructive

[55] Section 62 requires an applicable collective agreement to govern the employment of a new employee for the first 30 days. In effect, it provides the new employee with an opportunity to experience the terms and conditions in the collective agreement and consider whether they wish to continue on those terms and conditions after the expiry of the 30-day period. If so, the employee can join the union so that, by law, the collective agreement continues to be applicable to that employment relationship.[21] Section 62(4) deals with the situation where the work a new employee is to do is covered by more than one collective agreement.

[56] When first enacted in 2000, s 63(3) of the Employment Relations Act provided:

> (3) If the work to be done by the employee is covered by more than one collective agreement, subsection (2)(a) applies to the collective agreement that binds more of the employer's employees than any of the other collective agreements.

[57] In 2004, s 63(3) was amended to insert the words "in relation to the work the employee will be performing" after the words "the greatest number of the employer's employees", so that the sub-section read:[22]

> (3) If the work to be done by the employee is covered by more than 1 collective agreement, sub-section (2)(a) applies to the collective agreement that binds more of the employer's employees in relation to the work the employee will be performing than any of the other collective agreements.

[58] When the 30-day rule was reinstated by the Employment Relations Amendment Act 2018, s 62(4) included much of the post-2004 wording, but not including the final words "than any of the other collective agreements".

[59] What is apparent from this history is that the rule moved from requiring an employer to adopt the collective agreement that applied to the greatest number of its

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21 *Chief Executive of the Open Polytechnic of New Zealand v Halsey* [2010] NZEmpC 63, [2010] ERNZ 100, at [9]-[11].

22 Employment Relations Amendment Act (No 2) 2004, s 22(2).

employees across the entire workplace, to requiring a more specific comparison, looking at the work to be performed by the new employee. The amendment in 2004, materially reinstated in 2018, must be construed as being a deliberate modification. It suggests a nuanced approach, recognising that there might be different preferred collective agreements in different parts of an employer's operation; one union's approach might be preferred by one part of the workforce, while the approach of another union is preferred elsewhere. Section 62(4) recognises that the people already employed in each part of the workforce can assess which of multiple collective employment agreements offers the best terms and conditions in relation to their work. Section 62(4) therefore enacts a presumption that the existing employees' union membership represents their collective view as to which of the collective agreements available is the best for their circumstances.

[60] The words of s 62(4) and this legislative history point away from the NZRDA's argument that it is the coverage of the collective agreement that is the determining factor. We accept a more nuanced approach is required.

How is work best defined here?

[61] Having found the test requires the Court to look beyond the coverage clause of the respective collective agreements, the issue is factual.

[62] While there are many aspects of the work that RMOs share, we are satisfied that there are significant differences, particularly for different cohorts of registrar. Their work is closely aligned to one of the 12 distinct vocational pathways offered by the different vocational colleges and registrars identify themselves by their vocational pathway more than by their collective status as RMOs. The SToNZ MECA arose because of concerns from registrars that the NZRDA MECA did not suit the work for their vocation.

[63] Accordingly, we reject the categorisation sought by the NZRDA (categorisation (a)) as being too broad. Categorisation by seniority (categorisation (b)) also does not best achieve what is intended by s 62(4) as it would not distinguish

between the different cohorts of registrar sufficiently to enable newly employed registrars to trial the collective agreement most relevant to their circumstances.

[64] We accept there would be practical problems with drilling down to categorisation (e) – run descriptions – where the number of runs is so great and the number of RMOs in each run is so small there could be a change to the applicable collective agreement every time a new union member is employed. That the runs change over several times a year also would cause real difficulties. None of the parties advocated for categorisation (e).

[65] The same issue applies, but to a lesser degree, when looking at categorisation (d) – the specific specialities within colleges. The evidence was that, in some DHBs, there might be only one registrar employed in a particular speciality, and that registrars may rotate into different specialities within a college as part of their training.

[66] We accept that categorisation (c), including classifying new registrars' work by the college to which they are attached, may not be perfect as some training pathways overlap. Nevertheless, on the evidence before us, it is the most practical and appropriate way of determining the work to be done, and therefore which MECA should apply.

[67] It follows that we accept the position argued by the DHBs and SToNZ that, for the purposes of s 62(4), the work an RMO employee will be performing is properly broken down into house officers, senior house officers and dental house officers, each as a group but, for registrars, is determined by reference to the speciality of the relevant professional college.

Costs follow the event

[68] Having been successful in defending these proceedings, the defendants in each proceeding are entitled to costs. The matter was provisionally assigned Category 2B under the Practice Direction Costs Guideline Scale.[23] The parties now should

[23] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

endeavour to agree costs. If there is any disagreement as to the calculation of costs to be paid by the NZRDA, the defendants may file and serve a memorandum within 21 days of the date of this judgment. NZRDA then is to file and serve its memorandum in response within a further 21 days with any reply from the defendants to be filed and served within 7 days thereafter. Costs then will be determined by the Court on the papers.

J C Holden
Judge
for the full Court

Judgment signed at 3.15 pm on 14 October 2020