IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2021] NZEmpC 138
EMPC 266/2021

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	THE 20 DISTRICT HEALTH BOARDS (listed in Appendix A) Plaintiffs
AND	NEW ZEALAND NURSES ORGANISATION Defendant

Hearing:	11 August 2021 (Heard at Wellington)
Appearances:	S Hornsby-Geluk, counsel for plaintiffs R Harrison QC and J Lawrie, counsel for defendant
Judgment:	23 August 2021

JUDGMENT OF JUDGE B A CORKILL

Background

[1] This judgment clarifies important issues as to the provision of life preserving services by an employer operating in the public health sector when its employees strike.

[2] The parties to the proceeding are The 20 District Health Boards (DHBs), which provide hospital and health services throughout the country; and the New Zealand Nurses Organisation (NZNO or the Union), whose members are employed by those DHBs.

[3] The parties are currently in bargaining for the renewal of a multi-employer collective agreement (a MECA) covering nurses and midwives. To date, the parties have been unable to agree the terms of a renewed MECA.

[4] On 2 August 2021, each DHB received a copy of a notice to strike issued by NZNO on behalf of its members. The notice stated that the proposed strike would be continuous and would involve a complete withdrawal of labour for eight hours on 19 August 2021, by NZNO members, on whose behalf the notice of intention to strike was given.

The Code of good faith for public sector

[5] Under the Code of good faith (the Code) for the public health sector DHBs are responsible for ensuring that life preserving services (LPS) activities can continue to be available during industrial action.[1] The DHBs are required, as part of their contingency planning, to determine resourcing levels which will ensure there is no loss of life or permanent disability during the industrial action. Elective and non-urgent procedures are suspended, as are study leave, meetings, and other non-essential work. Each DHB is also required to maintain services for patients who have no other choice but to remain in hospital.

[6] As soon as industrial action is notified, DHBs are required under the Code to develop and finalise a contingency plan and to take all reasonable and practical steps to ensure that LPS can be provided without the assistance of the Union. However, in the event that any DHB determines it is unable to do so without the assistance of the Union, a request may be made to it within 24 hours after the industrial action is notified.

[7] This case concerns the way in which such a request must be resolved. Each DHB and the Union are required to meet within four days after the notification to negotiate and agree the LPS required. The Court was advised that this process generally takes four days during which the contingency planners and the Union debate what is and is not required.

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1 Employment Relations Act 2000, sch 1B.

[8] If agreement is reached, the details of the assistance to be provided by the Union are recorded in a written document, the form of which has been developed over time in a series of workshops held between Technical Advisory Services,[2] the Ministry of Health and combined unions, including the NZNO.

Compliance issue

[9] Hitherto, the standard agreement has stated that, not less than 72 hours before a strike, the Union will provide the names and contact details of the Union members who will cover gaps in rosters left by striking members.

[10] The Union says its understanding was that the version of the LPS agreement which had been developed did not impose a legally binding or absolute and unqualified obligation on it to ensure that its members would work the agreed LPS rosters.

[11] In June of this year, problems arose as to the provision of LPS support for the purposes of an intended strike. On behalf of a particular DHB, the prospect of legal proceedings arose; the DHB said it would seek a compliance order requiring the Union to "ensure that members who are named to provide LPS, present for work in accordance with the applicable rosters" during the period of the upcoming strike.

[12] This led to the Union taking advice and forming the view that, given the interpretation being placed by the DHBs on the language used in the LPS agreement, it needed to minimise its legal exposure and risk for the future.

[13] Its lawyer accordingly advised the lawyer acting for the DHBs that henceforth the Union would confirm in LPS agreements that it would "use its best endeavours to ensure that the services of its members sought by the DHB are provided"; and that it would "use its best endeavours to ensure that individual NZNO members who agree to provide the services sought by the DHB confirm their availability directly with the DHB no later than 72 hours prior to commencement of the industrial action."

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[2] TAS provides strategic employment relations advice and collaboration functions for the DHBs.

[14] At the heart of the Union's position was the proposition that it could not direct individual members to give up their lawful right to strike; this meant they could only be required under an LPS agreement to use "best endeavours" to discharge their obligations.

[15] It followed, the Union said, that LPS agreements were not legally binding, could not be enforced, and that non-compliance could not give rise to a breach of either the Code or obligations of good faith.

The proceedings

[16] Because sufficient staff members became available to fill the LPS rosters for the purposes of the June strike, the issue was not taken further at that time.

[17] However, after a further strike notice was issued in early August, the 20 DHBs applied to the Employment Relations Authority for declarations, so as to clarify the legal position. Urgency was sought. The parties agreed that the proceedings should be removed to the Court for hearing, but the Authority declined leave for reasons set out in a determination of 5 August 2021.[3]

[18] The DHBs immediately filed an application for special leave to remove the matter. This was heard and considered by Chief Judge Inglis on 6 August 2021, who later that day issued a judgment in which special leave for removal of the proceeding was granted.[4] In her view, there were plainly important questions of law which needed to be resolved promptly. A tight timetable for the urgent hearing of the matter was established, with evidence and submissions to be filed in advance.

[19] Parallel to these procedural steps, the parties continued to engage in the LPS support processes of the Code. Each DHB concluded it could not deliver life preserving services during the strike without the assistance of Union members. Requests were accordingly made for Union assistance; the necessary negotiations then took place. By the time of the hearing, the Court was advised that standard LPS

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3 *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZERA 346 (Member van Keulen).

4 *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 123.

agreements had been reached with three DHBs, being the Waikato and Waitemata DHBs, and the Bay of Plenty DHB in respect of Whakatane Hospital.

[20] Under the Code, where parties cannot reach such an agreement, provision is made for adjudication by a clinical expert. The adjudication process occurred over the weekend of 7 – 8 August 2021, with determinations being issued on 9 August 2021 in respect of some 18 DHBs.[5]

The hearing

[21] In its statement of claim, the DHBs sought three declarations; these were similar, but not identical, to the form of the declarations which had been sought in the Authority. It also sought a compliance order against the Union, essentially on the basis that negotiating for a best endeavours qualification within an LPS agreement would be a breach of good faith. This application had not been advanced when the case came before the Authority.

[22] The Union filed a statement of defence opposing the grant of the relief sought, and contending that the Authority, and, on removal, the Court, did not possess jurisdiction to make the orders sought.

[23] At the commencement of the hearing, there was discussion with counsel as to whether the hearing should be limited to the issues of principle that had been raised originally and/or whether the Court should also consider the making of a compliance order.

[24] Mr Harrison QC, counsel for NZNO, also sought a direction that an affidavit which had been filed the previous day for the DHBs, not be accepted by the Court for the purposes of the hearing. He said it contained evidence as to the Union's negotiation stance over the proceeding days which was contentious.

[25] Mr Harrison submitted that the proceeding had been removed on the basis that both parties sought a resolution of important matters of principle. An application for

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5 It appears that a limited LPS agreement was reached with the Bay of Plenty DHB, so that an adjudication was required by it for other life preserving services.

a compliance order would mean, however, a great deal of evidence having to be considered in which LPS agreements had been negotiated with each and every DHB. This possibility had not been contemplated at the time of removal, and the Union did not have a proper opportunity to place evidence before the Court on that basis.

[26] Ultimately, the parties were able to agree that the Court should deal only with the issues of principle. It would consider whether declarations should be made as follows:

(a) An agreement entered into pursuant to cl 12(5) of the Code for the provision of an LPS agreement is legally binding and enforceable by way of a compliance order;

(b) A refusal to comply with an LPS agreement entered into in accordance with cl 12(5) of the Code would amount to a breach of the Code, and of the duty of good faith under s 4 of the Employment Relations Act 2000 (the Act), in accordance with s 100D(4) of the Act; and

(c) The defendant's refusal to enter into LPS agreements unless they contain a "best endeavours" qualification would be in breach of its obligation under cl 12(5) of the Code to "meet and negotiate in good faith and make every reasonable effort to agree on" (the matters provided for in cl 12(5)(a) to (c) of the Code).[6]

[27] It was agreed that the Court was not required at this stage to consider the making of a compliance order against NZNO. The objection as to the admissibility of the affidavit filed as to the parties' negotiations about LPS support was accordingly withdrawn.

[28] Mr Harrison also confirmed that, in light of these arrangements, the Union formally withdrew its protest to jurisdiction. It accepted that there was a qualifying

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6 This was the form of the declaration sought in the statement of problem which had originally been filed by the DHBs in the Authority.

employment relationship problem capable of being dealt with under s 161(1)(r) of the Act.

[29] A final procedural matter which was also discussed with counsel related to the timeframe within which a judgment should be issued following the hearing.

[30] At the time the proceeding was issued in the Authority, there were no LPS support arrangements in place. As noted, by the time of the hearing, there were three LPS agreements and 18 adjudications. None of these documents were before the Court. However, it seemed that contingency plans were in place for the purposes of the strike notified for 19 August 2021. I accordingly sought confirmation as to whether the parties required the views of the Court on the matters of dispute for the purposes of that particular strike.

[31] On 13 August 2021, after counsel had taken instructions, I was advised the DHBs who had entered into agreements were reasonably comfortable that the LPS rosters would be filled 72 hours prior to the strike, that is, by 11.00 am on Monday, 16 August 2021. Accordingly, the issuing of urgent orders prior to that date was not sought.[7]

[32] That said, I was advised it was possible further notices of strike action would be issued for strikes occurring on 9 September 2021, with notices being issued on 25 August 2021.

[33] I accordingly advised the parties that this Court's judgment would be available prior to that date.

Jurisdiction

[34] Although the protest for jurisdiction was not maintained, it is appropriate to make some brief remarks on that topic.

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[7] The strike did not in fact proceed due to COVID-19, Level 4 lockdown restrictions which commenced at 11.59 pm on 17 August 2021.

[35] The Authority's jurisdiction is described in s 161 of the Act. It relevantly provides:[8]

> **161 Jurisdiction**
>
> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including–
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> ...
>
> (f) matters about whether the good faith obligations imposed by this Act (including those that apply where a Union and an employer bargain for a collective agreement) have been complied with in a particular case:
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> ...
>
> (r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):
>
> ...

[36] Also relevant is cl 1 of sch 2, which states:

> **1 Construction of employment agreements and statutory provisions**
>
> (1) The Authority may, in performing its role, deal with any question related to the employment relationship, including–
>
> ...
>
> (b) any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any investigation by the Authority.
>
> ...

[37] The definition of "employment relationship" problem includes any problem "relating to or arising out of an employment relationship". The term "employment relationship" means any of the employment relationships specified in s 4(2) of the Act, which includes those between a union and an employer.[9]

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8 As noted by the Supreme Court in a judgment just issued, the language of the section is broad; Parliament intended the Authority would exercise an extensive jurisdiction: *FMV v TZB* [2021] NZSC 102 at [75].

9 Employment Relations Act 2000, s 4(2)(b).

[38] Although there was an apparent argument at the time the statement of problem was issued that the good faith issues between the parties were anticipatory rather than actual, by the time the case was heard this was no longer the case. The negotiations for a contingency plan had taken place, and the relationship problems underpinning the claims for declarations had become actual.

[39] Whereas a prospective problem may not have fallen within the confines of s 161(1)(f) which deals with whether good faith obligations "have been" complied with, by the time of the hearing of the removed matter, the subsection plainly applied.

[40] Had that not been the case, the catch-all clause, s 161(1)(v) relating to "all other matters", would have applied.[10] The interpretation issues raised are properly described as being part of an employment relationship problem, arising from the particular employment relationship which is before the Court.

[41] Can the Authority issue a "declaration" in a case such as the present? It is plain from the provisions I have summarised that the Authority can resolve questions of interpretation or construction of the Act.

[42] In its determination resolving such a problem, the Authority must of necessity express its view on the point of interpretation. In substance, it can and must declare its findings, albeit these will be contained in a determination. In that sense, it may issue declarations, as can the Court on removal.[11]

The provisions of the Code

[43] The Code was inserted on 1 December 2004, as an aspect of the suite of provisions relating to codes of employment practice now contained in pt 8A. One of the provisions in that Part is s 100D, which relevantly provides:

> **100D Code of good faith for public health sector**

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10 See *FMV v TZB*, above n 8, at [94].

11 Were the Court to conclude that an LPS agreement is a contract, s 162 of the Act would apply. This would mean that the Authority or Court could make a declaration as would the High Court under any enactment or rule of law relating to contracts. That would not, however, bestow any rights under the Declaratory Judgments Act 1908, or that Court's inherent jurisdiction: *New Zealand Fire Service v Professional Firefighters Union* [2007] ERNZ 405 (EmpC) at [7]–[13].

(1) Schedule 1B contains a code of good faith for the public health sector.

(2) The code—

(a) applies subject to the other provisions of this Act and any other enactment; and

(b) in particular, does not limit the application of the duty of good faith in section 4 in relation to the public health sector.

(3) Compliance with the code does not, of itself, necessarily mean that the duty of good faith in section 4 has been complied with.

(4) It is a breach of the duty of good faith in section 4 for a person to whom the code applies to fail to comply with the code.

...

[44] I turn to the Code. It relevantly applies to DHBs, employees of DHBs, and Unions whose members are employees of DHBs.

[45] Clause 2 sets out the purpose of the Code:

2 Purpose

The purpose of this code is–

(a) to promote productive employment relationships in the public health sector:

(b) to require the parties to make or continue a commitment–

(i) to develop, maintain, and provide high quality public health services; and

(ii) to the safety of patients; and

(iii) to engage constructively and participate fully and effectively in all aspects of their employment relationships:

(c) to recognise the importance of–

(i) collective arrangements; and

(ii) the role of unions in the public health sector.

[46] "Life preserving services" are defined in this way:[12]

Life preserving services means–

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12 Clause 3.

(a) crisis intervention for the preservation of life:

(b) care required for therapeutic services without which life would be jeopardised:

(c) urgent diagnostic procedures required to obtain information on potentially life threatening conditions:

(d) crisis intervention for the prevent of permanent disability:

(e) care for therapeutic services without which permanent disability would occur:

(f) urgent diagnostic procedures required to obtain information on conditions that could potentially lead to permanent disability.

[47] Included in cl 4 are general requirements. Parties are to "engage constructively" and "participate fully and effectively" in all aspects of their "employment relationship". They must also use their "best endeavours" to resolve, in a constructive manner, any differences.

[48] After these and other introductory provisions, several specific topics are addressed. These include particular obligations for collective bargaining.

[49] The provisions which are at the heart of this proceeding then follow. They state:

Patient Safety

11 General obligation for employers to provide for patient safety during industrial action

During industrial action, employers must provide for patient safety by ensuring that life preserving services are available to prevent a serious threat to life or permanent disability.

12 Contingency plans

(1) As soon as notice of industrial action is received or given, an employer must develop (if it has not already done so) a contingency plan and take all reasonable and practicable steps to ensure that it can provide life preserving services if industrial action occurs.

(2) If an employer believes that it cannot arrange to deliver any life preserving service during industrial action without the assistance of members of the union, the employer must make a request to the union seeking the union's and its members' agreement to maintain or to assist in maintaining life preserving services.

(3) The request must include specific details about—

(a) the life preserving service the employer seeks assistance to maintain; and

(b) the employer's contingency plan relating to that life preserving service; and

(c) the support it requires from union members.

(4) A request must be made by the close of the day after the date of the notice of industrial action.

(5) As soon as practicable after the employer has made a request but not later than 4 days after the date of the notice of industrial action, the parties must meet and negotiate in good faith and make every reasonable effort to agree on—

(a) the extent of the life preserving service necessary to provide for patient safety during the industrial action; and

(b) the number of staff necessary to enable the employer to provide that life preserving service; and

(c) a protocol for the management of emergencies which require additional life preserving services.

(6) An agreement reached between the parties must be recorded in writing.

13 Adjudication

(1) If the parties cannot reach agreement under clause 12(5) they must, within 5 days after the date of the notice of industrial action, refer the matter for adjudication by a clinical expert or other suitable person as agreed under clause 8.

(2) The adjudicator must conduct the adjudication in a manner he or she considers appropriate and must—

(a) receive and consider representations from the parties; and

(b) in consultation with the parties, seek expert advice if the adjudicator considers that it is necessary to do so; and

(c) attempt to resolve any differences between the parties to enable them to reach agreement and, if that is not possible, make a determination binding on the parties; and

(d) provide a determination to the parties as soon as possible but not later than 7 days after the date of notice of industrial action.

(3) The parties must use their best endeavours to give effect to the determination.

(4) The parties must bear their own costs in relation to an adjudication.

[50] Judge Couch fully analysed these provisions in *Association of Professional and Executive Employees Incorporated v The New Zealand District Health Boards*.[13]

[51] He set out dicta from an earlier full Court judgment which noted that sch 1B containing the Code was drafted in haste, but it had been intended Parliament would adopt, or at least follow closely, a pre-existing informal code.[14]

[52] With regard to patient safety issues, Judge Couch noted the detail of the processes described in cls 12 and 13 were not clear and consistent.[15] In construing those provisions, he therefore relied on to the guidance of the Supreme Court in *Commerce Commission v Fonterra Cooperative Group Ltd,*[16] to the effect that, where meaning is not clear in the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

[53] On that basis, Judge Couch found that the scheme of this part of the Code is clear.[17] He noted that ss 90 and 91 require 14 days' notice be given of any strike or lockout in a hospital care institution or any necessary supporting service.[18] The clauses just summarised set out the short, but specific, timeframes for agreement or determination of the patient safety regime which is to apply during industrial action. I reproduce a helpful timetable to which Judge Couch referred, as it operates in relation to a strike:

> Day 1: Union issues notice of industrial action.
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> Day 2: If the DHB believes it cannot arrange to deliver any life preserving services without union assistance, it must make a request to the union seeking the union's and its members'

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13 *Association of Professional Executive Employees Inc v New Zealand District Health Boards* [2013] NZEmpC 3, [2013] ERNZ 1.

14 *Service & Food Workers Union Nga Ringa Tota v Auckland District Health Board* [2007] ERNZ 533 (EmpC).

15 At [20]–[21].

16 *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

17 At [10].

18 Clause 11 of sch 1 of the Act applies ss 90 and 91 to hospitals and to services that necessarily support them.

agreement to maintain or to assist in maintaining life preserving services.

Days 3 to 5: Parties must meet and negotiate in good faith and make every reasonable effort to agree on the matters described in cl 12(5)(a) – (c).

Day 6: If the parties cannot reach agreement under cl 12(5) they must refer the matter to adjudication.

Days 7 to 8: The adjudicator must attempt to resolve any differences between the parties to enable them to reach agreement. If that is not possible the adjudicator must make a determination as soon as possible "but not later than seven days after the date of notice of industrial action".

Day 15: Strike.

[54] As the Court found, the effect of this timetable is that the parties have at least seven days prior to the start of industrial action to put in place specific arrangements for affected employees to participate in providing LPS support.[19] It is in that period that the Union may carry certain responsibilities dependent on either the terms of an LPS agreement or of an adjudication.

[55] Judge Couch was concerned with a question as to whether adjudication should be confined to the three matters referred to in cl 12(5)(a) to (c). In determining that this was not the case, he made this finding as to the broad objective of the Code:

> [27] By its very nature, patient safety is of critical importance and cannot be compromised to meet other objectives. It follows that the provisions of the Code are designed to assist employers in providing life preserving services during industrial action should be interpreted in a manner which allows patient safety to be maintained. That requires an effective contingency plan. It is the employer's responsibility to produce and implement that plan but, to the extent that the employer needs the assistance of potentially striking employees, the Code must be interpreted in a manner which enables a fully effective contingency plan to be put in place.

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19 At [11].

[56] Given a purposive approach, Judge Couch found that the scope of the negotiations under cl 12(5) and the jurisdiction of the adjudicator under cl 13 must be wide enough to permit the parties to agree, or the adjudicator to determine, all issues relating to the provision of an LPS agreement necessary to make the employer's contingency plan effective. But, he held, the interpretation of those provisions should be no wider than as strictly required for that purpose.

[57] He accordingly concluded:

> [35] ... that the proper interpretation of the patient safety provisions of the Code is:
>
> (a) The parties may negotiate under cl 12(5) any issues directly related to the proposed contingency plan detailed by the employer under cl 12(3); and
>
> (b) The jurisdiction of the adjudicator under cl 13 to determine matters not agreed by the parties under cl 12(5) extends to any issue strictly necessary to ensure the effect of operation of the employer's contingency plan but no further.

[58] I respectfully agree with these conclusions.

[59] I turn now to deal with the issues which follow from the declarations sought in a slightly different order to the pleading.

Issue one: issues as to LPS agreements

Formation

[60] I begin by considering a debate which occurred during the hearing as to who the parties to an LPS agreement may be.

[61] This issue flows from cl 12(2), which states that the employer must make a request to the union "seeking the union's and its members' agreement" to maintain or to assist in maintaining LPS.

[62] Mx Hornsby-Geluk, counsel for the DHBs, submitted that it cannot be sensible to conclude that each employee must be a party to such an agreement. Within the tight timeframes involved, it would never be possible to arrange for each and every

employee to provide that agreement, given the significant numbers of Union members employed by the 20 DHBs. Moreover, she said the NZNO Constitution authorised the Union to represent its members on such matters.

[63] Mr Harrison relied on s 18 of the Act. To the extent that negotiating an LPS agreement related to the members' collective interests, under s 18(1) it was arguable the Union had the entitlement to represent members' interests. However, a right to strike was an individual right; therefore under s 18(3), the Union could only represent the employee if it had an express authority from the employee to do so under s 236. Such an authority had not been bestowed by the NZNO's Constitution. That said, Mr Harrison accepted the parties to an LPS agreement would be one or more DHBs, and the Union.

[64] I find that Parliament cannot have intended that the parties to an LPS agreement would necessarily include negotiating directly with Union members as well as the Union itself. The timeframes for negotiation rule out such an impractical scenario.

[65] It follows that the parties to an LPS agreement are the employer and the union.

[66] Whether s 18(3) of the Act is a relevant restriction on the Union when negotiating an LPS agreement turns on whether the right to strike is indeed a right held by an individual member. If it is, due allowance for this issue may have to be made in the agreement. I shall return to this topic later.

Status

[67] The next question I consider relates to the status of an LPS agreement.

[68] Mx Hornsby-Geluk submitted that, having regard to the structured and prescriptive set of rules relating to timeframe and processes for agreeing an LPS agreement, Parliament must have intended that such agreements would be certain and able to be relied on; and thus, binding and enforceable as a contract.

[69] Counsel said such an agreement is the product of a good faith negotiation under cl 12(5); significantly, it must be recorded in writing. It can readily be inferred that the obligations of the document are intended to be certain. She said, to give effect to the purpose of the Code, it was critical that the plaintiff could rely on such agreements; in this way, patient safety would be put first as to the Code required.

[70] Mr Harrison submitted that neither the Act nor the Code expressly state that an LPS agreement reached in response to the compulsion imposed by cl 12(5) duty to negotiate is legally binding.

[71] He argued that the Act expressly provides for agreements to be binding and enforceable as contracts in two instances only – employment agreements as defined,[20] and agreed terms of settlement under s 149.[21] Mr Harrison also submitted that other possible indirect means of enforcement would include treating a relevant promise as an implied term of an individual employment agreement, or as amounting to acting unjustifiably in terms of the personal grievance procedure.[22]

[72] It is necessary to consider the purpose and context of the Code. As to purpose, the Code plainly supplements the general duties of good faith in s 4 with particular obligations that are to apply in the public health sector.

[73] The importance of good faith on matters covered by the Code is underscored by the remedy which is contained within it. Clause 22 of the Code states that, if a party believes another party has breached the duty of good faith in s 4, that party must bring it to the attention of the other at an early stage. Clause 23 provides that, if the breach can be made good, this should occur by making every endeavour to restore the other party to the position which should have applied. If the breach cannot be made good, an explanation is to be provided.

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20 Defined in s 5, and enforceable in a variety of ways but most directly pursuant to s 161(1)(a) and (b).

21 Enforceable pursuant to s 151.

22 See s 103.

[74] As to context, good faith is of course a cornerstone concept of the Act, underpinning its "relational approach".[23] The starting point is s 3(a) which emphasises the importance of good faith in all aspects of the employment environment and of the employment relationship as a key object of the Act.

[75] This is followed by the core good faith obligations of s 4, which provides some examples of the high standard of conduct required by the statute. Further applications of the concept are provided for specific instances: for example s 32 in respect of bargaining for a collective agreement and s 60A in respect of bargaining for an individual employment agreement.

[76] Further amplification of the concept is provided by the enactment of codes of employment practice.

[77] The code promulgated by the Minister of Labour under s 100A gives more specific guidance to employers and unions on their duty to act in good faith when bargaining a collective agreement.[24]

[78] Two particular codes were promulgated by Parliament itself, being the document under consideration in the present case and the Code of Good Faith for New Zealand Police services.[25]

[79] The Code which applies to the public health sector is accordingly but one example of an expansive set of good faith principles which underpin obligations under the Act for the purpose of building productive employment relationships.

[80] Good faith duties are enforceable. So, penalties for certain breaches can be sought under s 4A. Consideration as to the making of a compliance order may arise where any person has not observed or complied with any provision of pt 1 of the Act.[26] Section 4 is of course contained in pt 1.

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23 *FMV v TZB*, above n 8, at [47].
24 "Code of Good Faith in Collective Bargaining" (2 May 2019) *New Zealand Gazette* No 2019-go1890.
25 Section 100F and sch 1C.
26 Section 137(1)(a)(ii).

[81] A further compliance mechanism in respect of the Code is contained in s 100D(4). Where a person to whom the Code applies fails to comply with its provisions, there is a breach of s 4. That subsection operates in respect of any of the numerous obligations of the Code, whether that relates to the processes relating to patient safety, or to bargaining, or otherwise. So, non-compliance with the Code is a breach of the duty of good faith in s 4 via s 100D(4).

[82] However, an LPS agreement is not part and parcel of the Code, although the Code's processes describe how such a document is to be negotiated. Nonetheless, such an agreement may be assessed under s 4 itself since the Code does not limit the application of the duty of good faith in relation to the public health sector, as stated in s 100D(2).

[83] An adjudication under cl 13 may also result in agreement but, if that does not occur, the clause states, for the avoidance of doubt, that such an outcome is nonetheless binding. Thus, compliance with such a document would also fall for assessment under s 4 via s 100D(2).

[84] Given these conclusions, it remains to be considered whether an LPS agreement is a contract.

[85] It is common ground between the parties that such an agreement is not an employment agreement and thus enforceable on contractual grounds for that reason. That must be the case.

[86] The provisions in cl 12 emphasise the mandatory nature of the process by which agreement is to be concluded. The clause is prescriptive both as to time and as to the duties placed on the parties. They are required to meet, to negotiate in good faith, and to make every reasonable effort to agree on certain matters. If agreed, they must record their agreement in writing. Moreover, cl 4(4) provides they must use their best endeavours to resolve any differences in a constructive manner.

[87] In short, there is a mandatory requirement on both the employer and the Union to attempt to reach an agreement under these prescriptive rules which are imposed for

the sake of agreeing "life preserving services" as defined, which focus on crisis intervention for the preservation of life.

[88] The Code goes on to recognise that parties, notwithstanding their best efforts, may not be able to reach agreement, in which case the last resort option of adjudication applies under cl 13. As noted, it too provides for agreement, even at that late stage.

[89] Given the place of any agreement in this framework, I am not persuaded that Parliament intended that parties to such an agreement should be deemed to have entered into a contract, enforceable as such. The document is a creature of statute. Its subject matter is highly prescribed. It is not a contract where, in the orthodox sense, parties intend to enter into contractual relations with each other.

[90] I conclude that, for the purposes of the first declaration sought, an LPS agreement is not a legally binding contract, but it is an agreement which may contain obligations that can be assessed for remedies that flow from a breach of good faith.

Second issue: breach of duty of good faith

[91] A declaration is sought to the effect that a refusal to comply with an LPS agreement is a breach of good faith under s 4 of the Act, via s 100D(4).

[92] My earlier discussion resolves this issue. A refusal to comply with an LPS agreement may fall for assessment under s 4, not via s 100D(4) but by s 100D(2).

[93] Further, as the Court of Appeal noted in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*, a breach of a relevant agreement may not necessarily amount to a breach of good faith, for example, if there has been a genuine misinterpretation of relevant obligations in the particular circumstances.[27] Any assessment as to whether a breach of the duty has occurred will require a fact-specific analysis.

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[27] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] ERNZ 360, [2011] NZCA 595 at [28].

Third issue: availability of compliance order

[94] I have already noted that the Authority may make a compliance order under s 137 of the Act, if there is a breach of pt 1, which includes s 4 as to good faith duties.

[95] However, the power to do so is qualified. Section 137(2) provides that the power may only be exercised where any person has not observed or complied with a relevant obligation; that is, there must be a pre-existing breach. In such a case, the Authority may then order that person "to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance or non-compliance". In short, the jurisdiction arises only where a breach has already occurred. Then, the Authority must be persuaded that a compliance order is necessary to prevent a recurrence.

Fourth issue: is insistence on a best endeavours qualification a breach of good faith?

[96] The remaining issue concerns the question raised by the proposed third declaration, as to whether a "best endeavours" qualification could amount to a breach of the obligations under cl 12(5) of the Code.

[97] This again involves a consideration of the good faith context, since cl 12(5) requires negotiations to take place on that basis, with a further requirement that the parties must make every reasonable effort to agree. Alongside those particular duties is the general requirement already noted that the parties must use their best endeavours to resolve differences in a constructive manner.[28]

[98] At the heart of the DHB's submission is its point that the Code requires certainty. Mx Hornsby-Geluk emphasised that, given the subject matter is the provision of LPS, the DHB employers must know where they stand. Mx Hornsby-Geluk says a "best endeavours" qualification is completely unsatisfactory from the perspective of the DHBs since an obligation subject to this qualification would not

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[28] Clause 4(4).

deliver the necessary certainty. Therefore, it must be concluded there is a mandatory requirement on the Union and its members to provide LPS in certain situations.

[99] There are several intertwined considerations that fall for consideration.

[100] First, cl 12(5) refers expressly to three particular factors on which the parties are required to negotiate.

[101] There is no express statement in cl 12 that states the Union, as a party to an LPS agreement, must ensure that members having the necessary expertise to provide LPS support will do so.

[102] The DHB's position would in effect require a conclusion that such a duty arises by necessary implication.

[103] It is reasonable to conclude that, since the Union is representing its members when negotiating such an agreement, those persons will be informed of the outcome. But that does not imply that the Union is thereby empowered to make a decision on behalf of its members as to which of them will provide the agreed LPS support.

[104] As noted, the Union says that it has no power in law to ensure compliance by its members; it could not be compelled to require a member to forego their right to strike if that person chose to decline to provide the service.

[105] Thus, Mr Harrison argued that there could be no breach of good faith were a union to respect this right; the most it could do would be to agree to use its best endeavours to persuade members to provide the necessary services and then to advise the employer of the names and contact details of members who, in fact, agree to do so.

[106] The question thus arises as to whether the right to strike is, in fact, that of an individual worker.

[107] On this point, Mr Harrison submitted that s 100D(2) of the Act makes it clear the Code applies subject to other provisions of the Act, which must include the right to strike.

[108] Then he emphasised the mandatory nature of s 238, by which the provisions of the Act are to have effect despite any provision to the contrary in any contract or agreement.

[109] He says a range of provisions emphasise the role of individuals when undertaking a strike. Thus:

- Section 82A(2): the necessary pre-strike ballot is a ballot of members who are employed by the relevant employer(s) and who would become a party to the strike.

- Section 82B: the terms of the question for the secret ballot is whether the member of the union is in favour of the strike.

- Section 90: no employee employed in an essential service may strike unless the necessary qualifying factors have been met; the notice in respect of this strike must be signed by a representative of the union "on the employee's behalf".

[110] Against the background of those provisions, Mr Harrison emphasised the importance of s 85, which provides that lawful participation in a strike may not give rise to certain proceedings, including for the grant of a compliance order. By reference to the findings of the Court of Appeal in the *Firefighters* case, Mr Harrison said that lawful participation in a strike cannot be contracted out of, or prevented via a compliance order.[29] In short, it was his point that the Union was not permitted to override these clear statutory requirements by requiring a member not to strike but to provide LPS support.

[111] Mx Hornsby-Geluk submitted there is no provision in the Act which confirms a Union member has an individual and unqualified right to strike. She said the definition of strike refers to an act that is due to a combination agreement, common understanding or concerted action; that is, collective action.

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[29] *New Zealand Professional Firefighters Union*, above n 27, at [34]–[38].

[112] She also took the Court to the NZNO's Constitution, which sets out the rules for separate ballots, noting that the members' vote goes to a result which is determined by simple majority, reinforcing the collective nature of that process.[30]

[113] It is well established that the right to strike is both collective and individual in nature.[31]

[114] Under s 81(3) of the Act, the expression "to strike" means to become a party to a strike. That is a step taken by an individual.

[115] As one respected author notes, unions cannot "strike" as a principal because s 81(1) extensively defines strike action in terms of withdrawal or modification of labour.[32]

[116] In *New Zealand Baking Trades Employees' Industrial Union v General Foods Corp (NZ) Ltd*, Cooke J held that "if there is a right to strike, it belongs to the workers, not the union".[33]

[117] Yet further support from this conclusion is derived by considering the position of employees on whose behalf a notice has been given but who do not participate in the strike itself.

[118] In *Finau v Southward Engineering Company Ltd*, the Court was required to consider whether members of a union involved in collective bargaining were bound by the rules of the Union to accept the result and thereby became parties to the strike.[34] The full Court affirmed a conclusion which had been reached by Goddard CJ in *Heke v Attorney-General in respect of the Department of Corrections*.[35] In that case, it was

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30 New Zealand Nurses Organisation "Constitution 2020-2021" <NZNO.org.nz>.

31 *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 2)* [2007] ERNZ 539 (EmpC) at [35]. This decision was overturned on appeal but not on this point: *Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580, [2008] ERNZ 609.

32 Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at [14.30].

33 *New Zealand Baking Trades Employees' Industrial Union v General Foods Corp (NZ) Ltd* [1985] 2 NZLR 110 (CA) at 118.

34 *Finau v Southward Engineering Co Ltd* [2007] ERNZ 522 (EmpC) at [45]–[50].

35 *Heke v Attorney-General in respect of the Department of Corrections* [1998] 1 ERNZ 583 (EmpC).

held that notice of an intention to strike is notification of a future strike and not of participation in a present strike. For any particular employee to become a party to a strike, it would have to be shown that he or she was not only a party to the original agreement to strike but had continued to support it when it occurred.

[119] The full Court confirmed that this accorded with the definition of "strike" in s 81(1), which was framed in terms of the "act" of a number of employees.[36]

[120] It is those persons who have to decide whether to participate when the time comes, notwithstanding that the union indicated in the notice of strike that the member intended to do so.

[121] I conclude that individual members possess the right to determine whether they will participate in a strike.

[122] Moreover, there is no provision in the NZNO Constitution which states that members are bound by a decision to strike.

[123] In such a case, it is open to a union to conclude that this is a matter which indeed falls under s 18(3) of the Act as an individual right, and that in the absence of express authority, the union may not require an employee not to strike but to work.

[124] Against this background, NZNO says it can undertake to use its best endeavours, but it cannot be required to go further.

[125] It is appropriate to consider the meaning of this term, noting that it is one used in other contexts of the Act[37] and the Code.[38]

[126] In *Association of University Staff v Vice Chancellor, University of Auckland*, a full Court explained this obligation, as it appears in s 32:[39]

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36 *Finau v Southward Engineering Co Ltd,* above n 34, at [48].
37 Employment Relations Act 2000, s 32(a).
38 At cl 4(4).
39 *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] ERNZ 224 (EmpC).

> [50] The first particular minimum obligation of good faith under s 32(1)(a) is that all parties, unions and employers nominated as intended parties, must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner. The use of the phrase "best endeavours" sets a high standard for the entering into of such an arrangement. "Best endeavours" is a phrase well known in contract law although its use by Parliament, albeit in a statute dealing broadly with contracts, may be a recent development if not novel. There seems to be no reason for the phrase to be given a different meaning in the statutory context. ... It means trying ones very best in all the circumstances. It means more than making an initial proposal where that is either not responded to or is even rejected. ...

[127] Here, the term is to be construed in the particular context of an agreement reached in a good faith context about the provision of life preserving services so as to ensure the safety of patients in extreme circumstances.

[128] Were the standard to apply to a union's efforts to populate an LPS roster, and then as to the provision of names and contact details of those who would provide such support, the standard would indeed be high.

[129] The union would have to try its very best in those particular circumstances. The various factors that it might engage with its members on it could include discussion as to the ethical obligations they may owe to patients, whether under the Union's own Code of Ethics, or the code imposed by a regulatory authority on relevant health practitioners.

[130] The final consideration relates to the consequences of agreement not being reached under cl 12. A c13 adjudication would then issue. At that point, the parties are required by the Code to use their "best endeavours" to give effect to the determination. If this is the applicable standard under cl 13, could it not also be the applicable standard under cl 12?

[131] Mx Hornsby-Geluk submitted a distinction was appropriate, because, under an agreement concluded under cl 12, a union would be agreeing to take certain steps. She said a union should be held to that agreement for the sake of certainty. By contrast, where cl 13 applies, a union would not be in control of the circumstances, so it would be reasonable to be held to a lower standard.

[132] Since the Code applies subject to other provisions of the Act, I conclude the implication advocated by Mx Hornsby-Geluk is not available, as this would cut across other provisions in the statute, including the right to strike. A distinction in the relevant standard, between cls 12 and 13, is also not available for this reason when considering the Union's obligations with regard to LPS rosters.

[133] Drawing these threads together, the issue is one of good faith. If a union has a good and proper reason for not concluding an LPS agreement on a particular basis, it cannot be regarded as breaching its good faith obligations, or duty, to make every reasonable effort to agree on the matters provided for in an agreement under cl 12(5). The individual's right to strike is preserved via s 100D(2)(a). Adherence to a best endeavours qualification could not constitute a breach of s 4 if the Union's position was to recognise the right to strike of individual members.

Result

[134] For the foregoing reasons, I make the following declarations:

(a) An agreement entered into pursuant to cl 12(5) of the Code for the provision of LPS is not enforceable as a contract.

(b) Refusal to comply with an LPS agreement entered into in accordance with cl 12(5) of the Code would not amount to a breach of the Code so that s 100D(4) of the Act would apply; it may fall for assessment as a breach of a s 4 duty via s 100D(2)(a) of the Act.

(c) A compliance order may be issued by the Authority under s 137(2) if there has been a non-observance of, or non-compliance with, the requirements of s 4, and if the Authority considers it appropriate to exercise its discretion under s 137(2) of the Act.

(d) A Union decision not to enter into an LPS agreement unless there is a "best endeavours" qualification in respect of the provision of LPS support by members, on the grounds that the Union could not properly determine for a member whether that person should participate in a legal

strike, where the Union did not hold an authority from members to do so, could not amount to a breach of the Union's obligation under cl 12(5) of the Code to meet and negotiate in good faith.

[135] This judgment resolves the issues of principle on which the parties sought a judgment. I adjourn all other issues raised by the parties in their pleadings.

[136] The Registrar is to confer with counsel to establish a date for a telephone directions conference at which the resolution of any outstanding issues in the proceeding can be discussed and, if appropriate, timetabled.

[137] I reserve costs.

B A Corkill
Judge

Judgment signed at 2.25 pm on 23 August 2021

APPENDIX A

District Health Boards of New Zealand

Auckland District Health Board

Northland District Health Board

Waitemata District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Hutt Valley District Health Board

Capital and Coast District Health Board

Wairarapa District Health Board

Nelson Marlborough District Health Board

West Coast District Health Board

Canterbury District Health Board

South Canterbury District Health Board

Southern District Health Board