

BETWEEN HINE EKETONE  
Applicant

AND DIAGNOSTIC MEDLAB SERVICES LIMITED  
Respondent

Member of Authority: Leon Robinson

Representatives: Nicola Bush for Applicant  
Gary Blair for Respondent

Determination: 28 May 2007

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**DETERMINATION OF THE AUTHORITY**

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[1] The applicant Ms Hine Eketone (“Ms Eketone”) applies to the Authority for an investigation into her entitlement to be reimbursed for her travel. Ms Eketone says that when she was first employed by what is now Diagnostic Medlab Services Limited (“Diagnostic”), she and Diagnostic agreed that she could claim mileage at IRD rates for any excess travel from her home to base. Ms Eketone regards this agreement as a continuing term of her employment.

[2] Diagnostic says Ms Eketone has not been entitled to the allowances she claims consequent upon her membership of the New Zealand Nurses Organisation (“the union”) and a collective employment agreement effective from February 2000.

[3] Ms Eketone asks that the Authority order Diagnostic to continue to reimburse her travel expenses in accordance with the alleged agreement.

[4] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[5] Ms Eketone commenced employment with Diagnostic’s predecessor Diagnostic Laboratories in April 1999 as a relieving clinic phlebotomist. Her present title is senior phlebotomy technician.

[6] Ms Eketone says that she had several interviews prior to her appointment. This is what her witness statement says about what she relies on as the agreement entitling her to travel allowances:-

3. *I had a telephone interview and three face-to-face interviews before I got the job. At one of those I negotiated the travel allowance. The meetings included the then Nurse Manager (Armyne Raines) and a representative of the Human Resources Department. We had a discussion about the nature of the work and the travel required.*
4. *This was the first position I had had where there was travel required but no company car was offered. I therefore was eager to clarify how travel was paid for. The manager told me that travel allowance was paid, and I clarified what that meant.*
5. *The agreement was that I was paid (at the IRD rates) any mileage which I did on company business. This was travel in excess of my travel from home to base. This meant that if the clinic I was working in was closer to home than my area base, I would not claim anything. If it was further away, I would claim the difference between the actual travel and the home to area base distance. In addition if I have to travel between clinics during the day, I am able to claim that.*
6. *I see this provision which was agreed, as part of my terms and conditions of employment.*

[7] Ms Armyne Raines, General Manager, Collection Services and PR/Marketing ("Ms Raines") says that to the best of her knowledge she was not present at Ms Eketone's interview. Ms Eketone is adamant that Ms Raines was. Ms Eketone remembers particularly that the material interview took place at the back of the Symonds Street Head Office. She says Ms Raines discussed mileage reimbursement for travel in excess of home to base and they reached agreement that Ms Eketone would receive such entitlement. I prefer Ms Eketone's relative certainty and find Ms Raines was present and the term was agreed ("the Agreement") and I do not understand Ms Raines to seriously challenge Ms Eketone. The matter is put beyond doubt in my view because Ms Eketone was subsequently paid according to the Agreement.

[8] Ms Eketone says initially the Area Manager East Ms Lynley Atkins submitted her (Ms Eketone's) claims for payment.

[9] In July 1999, the two Auckland community pathology laboratories merged. Medlab Limited merged with Diagnostic Laboratory Limited which was then renamed as the present respondent Diagnostic. The two employing companies remained registered to better facilitate the transition of staff to the reformed Diagnostic because there were disparities in employment conditions. Medlab phlebotomists continued to be employed under the Medlab Limited/New

Zealand Nurses Organisation collective employment contract while Diagnostic Laboratory Limited employees continued on individual employment contracts, as Ms Eketone was.

[10] Ms Eketone has been a member of the New Zealand Nurses Organisation since April 2000. She says her clear understanding was there her conditions of employment would not be disadvantaged by that membership. Ms Eketone's duties, job title and area location have remained the same since the commencement of her employment.

[11] In May 2000 a collective employment contract between the New Zealand Nurses Organisation and Diagnostic was entered into. This collective brought together the two constituent company employees under one collective contract. The collective was signed on 8 May 2000 and was effective from 12 February 2000. In August 2000 the word "Medlab" was inserted so that Diagnostic Laboratory Services Limited became Diagnostic Medlab Laboratory Services Limited – the respondent Diagnostic.

[12] In 2001, the South Area Manager (Collections) Ms Barbara Fowler ("Ms Fowler") was alerted to Ms Eketone's claims in the terms of the Agreement and which exceeded the collective entitlement. Ms Fowler raised the matter with Ms Eketone at the Clendon rooms and requested that she cease claiming. Ms Eketone maintained her entitlement to claim and declined to cease. Ms Fowler gives evidence as follows:-

5. *I told her I would follow it up and get back to her. To the best of my recall I did not ask with whom she had made arrangement but assumed it was with someone senior in the company. It is fair to say that I had no cause at the time to doubt that some special arrangement had been made, as she was quite adamant about this.*
6. *I asked Anne-Louise Tuck who was the HR Advisor with Collections to check and advise me. I hoped that she would be able to find a record or some recall of the arrangement.*
7. *Anne-Louise later confirmed that she could find no record of any special agreement on the HR files, but, if such an agreement existed, then she believed we should honour it.*
8. *I chose to accept Hine's word that she had made a personal arrangement for this to be maintained beyond the 2000 collective employment contract. I took the same approach in Fiona's case as well.*
9. *I personally did not make any arrangement with Hine in respect to claiming mileage but allowed it under a mistaken understanding, based on what she had told me, that an arrangement had been previously entered into with her for it to continue notwithstanding the changes in the CEC, and subsequent CAs.*

[13] Diagnostic has continued to pay Ms Eketone's claims for travel allowances over many years of Ms Eketone's employment.

[14] A further collective employment contract was effective from 1 September 2001 - 31 August 2003.

[15] A further collective employment contract was effective from 1 September 2003 - 31 August 2005.

[16] On 25 October 2005, Mr Peter Ford, Diagnostic's Area Manager - South ("Mr Ford") verbally gave Ms Eketone two weeks' notice that he would not be signing off her claims for travelling allowances as from Tuesday 8 November 2005 outside of the entitlement in the collective agreement. Mr Ford subsequently confirmed this verbal advice in a letter to Ms Eketone dated 2 November 2005 as follows:-

*As discussed with you on Tuesday 25th October 2005, I gave you a fortnight's notice that I will not be signing off mileage c/aims for you as from Tuesday 8th November 2005 that are outside the current collective agreement to which you are a party. As we discussed, calculating mileage to the depot from Kolmar Road return and deducting your home to Kolmar Road return off the amount. Although you have told me there was some agreement made with you regarding this practice, you have not provided me with any letter stating this and there is no file note on your records. Since 2000 we have had very clear mileage provisions in the Collective so even if any agreement has been made with you at your commencement time in April 1999, this should have lapsed with the introduction of the Collective agreement in 2000 to which you were a party. For this reason we are now providing notice that we will not be continuing to pay out mileage which clearly has been paid in error.*

*By way of clarification for the future, you will be aware that the collective Agreement effective September 2005 did include some changes to when mileage is payable. You will be covered by these provisions which are copied below for your reference.*

*There is now a newly negotiated collective agreement which you are party to. This agreement provides a formula for relief staff to claim a transport allowance. I would expect any further mileage claims after Tuesday 8th November 2005 are calculated and claims as per this agreement.*

[17] He then recited clause 10.0 *Transport* of the existing collective agreement. He concluded by inviting Ms Eketone to discuss any matter with him that required clarification.

[18] Ms Christine Gallagher an organiser with the union ("Ms Gallagher") wrote to Mr Ford on Ms Eketone's behalf by letter dated 23 November 2005. That advice stated:-

*We write on behalf of Hine Eketone in response to a letter Hine received from you on 2 November 2005 regarding travel allowance.*

*In that letter you state that as from 8 November you will no longer sign off mileage claims for Hine as you believe these payments to be outside the current collective agreement arrangements.*

*Hine had a verbal agreement with managers at the time of her employment in 1999, that she would be paid the travel allowance for any travel required over and above the distance from Hine's home to base i.e. 6kms (return).*

*In your letter you state that since 2000 any agreement with Hine would have lapsed. However, the organisation has continued to pay Hine as per the verbal agreement for the following five years.*

*We regard payment of travel allowance to Hine in this way as part of her individual agreement with DML (on top of the Collective Agreement) and ask that it be reinstated forthwith.*

*We look forward to your response.*

[19] Ms Naomi Johnson, Diagnostic's Human Resources Manager ("Ms Johnson") responded by letter to Ms Gallagher dated 1 December 2005 as follows:-

*We wish to acknowledge your letter dated 23 November 2005 in which you request us to reinstate the travel allowance which Hine has been claiming since 1999. Peter Ford, Hine's manager, has passed the letter to me.*

*Peter queried why Hine was in receipt of this allowance several months ago - he picked up the inconsistency of the practice when the latest collective agreement was implemented. On questioning Hine as to why she was claiming this allowance on a reasonably regular basis, she advised that she was holding documentation relating to this allowance that dated back to when she started. Peter asked to see it but she declined to provide it.*

*In your letter you indicate that she had a verbal agreement with her employing manager. There is nothing recorded anywhere in her HR or Payroll file that would support her claim that there was a verbal agreement. However we do know that at the time Hine was employed, which was prior to the first Diagnostic Medlab collective agreement, there was a practice whereby relief phlebotomists were entitled to calculate mileage to the depot from their hub room (currently Kolmar Road as Hine transferred to South in Feb 2000) return and deducting the distance from home to Kolmar return off the amount. So we would assume, in the absence of any specific letter, that this is the basis on which Hine has continued to claim mileage as this is the formula she is currently using to the best of my knowledge.*

*However this practice was discontinued with the implementation of the first combined collective contract which was negotiated in May 2000 which contained no such provisions for relief staff. About that time the management changed of the South Area and it would appear that Hine may not have been advised at that time of the change in practice and so continued to claim this allowance. The incoming manager continued to pay the allowance in the belief that there were some special circumstances relating to Hine.*

*Peter Ford brought the matter to my attention just recently as he could not understand the basis on which Hine was claiming mileage.*

*We investigated the matter and genuinely believe that Hine has been paid this allowance in errors since mid 2000. Peter therefore spoke with Hine, once again asked her to provide any*

*documentation to support her claim that it was by special arrangement, and then in the absence of any supporting documentation, gave her two week's written notice that would discontinue on the basis that this allowance has been paid in error. We have not sought to recover the monies already paid out in error.*

*We do not agree that there is any individual agreement on top of the Collective Agreement in regard to Hine. In light of our belief that the allowance has been paid in error, it would be inequitable to reinstate this allowance.*

*Hine is, of course, entitled to claim mileage under 1 0.2 (ii) which is the new provision that came in with the latest collective agreement.*

*If you can provide any further information relating to the circumstances by which Hine is entitled to be claiming this allowance other than in line with the current Collective Agreement, we are happy to reconsider our position.*

[20] Two weeks later Ms Johnson again wrote to Ms Eketone care of Ms Gallagher by letter dated 15 December 2005 as follows:-

*Further to your discussions with Christine Gallaher and our discussions also with Christine relating to the ongoing mileage that you have been claiming, we confirm that we are willing to offer you \$600 gross as a confidential ex gratia payment on the basis that any future mileage payments will be made in accordance with Clause 10 of the current Collective Agreement. Your Area Main Room is Kolmar Road.*

*As you are aware from your discussions with Peter, you have been receiving reimbursement in error. While we are not seeking to recover the monies paid in error, we do need to correct the error which is what Peter Ford has done by advising that he will reimburse mileage only in accordance with the collective. We note that Clause 10.2 was amended in this latest collective so there will still be a number of times when you will qualify for mileage reimbursements as a relief phlebotomist.*

*Please confirm your acceptance of this offer so that I can arrange payment.*

### **The merits**

[21] The simple issue is whether an individual agreement continues to exist between Ms Eketone and Diagnostic subsisting contemporaneously with the prevailing collective employment agreement.

[22] Ms Eketone maintains there is such agreement and it entitles her to be reimbursed for her travel in excess of an amount covering her travel to and from her home and south area base. She says she has been paid this way for six and a half years before Diagnostic decided it would not pay any longer. She says she has made her claims under at least four different managers and while successive collectives operated.

[23] Diagnostic now submits that the 2000 collective completely succeeded Ms Eketone's individual employment contract, if any. It argues that the collective did not offer any additional terms and conditions to Ms Eketone. It further says there was no other individual or collective agreement made to continue to provide Ms Eketone with any such continuing entitlement to reimbursement. It concludes that it has made overpayments to Ms Eketone which it is now entitled to correct.

[24] I have found there was an original Agreement when Ms Eketone was first employed. Thereafter it was paid to Ms Eketone and these matters are sufficient for my finding now that Ms Eketone was so entitled as from the commencement of her employment in 1999. I shall refer to this oral contract hereafter as "the entitlement". The entitlement continued as an individual term of employment in addition to those of the collective. It was mutually agreed.

[25] Ms Johnson's advice of 1 December 2005 makes no reference to the mutual agreement reached with Ms Raines. It does not proceed on the basis of the finding I have made above. It does however, take for granted that any such entitlement whatever it was was extinguished by a subsequent collective.

[26] I agree with Ms Bush's submission that the details of the entitlement have never been in dispute. It is only the status of the entitlement itself which is now in question. Ms Bush further submits that the 2000 collective, made under the Employment Contracts Act 1991, had no impact on the validity of the entitlement. She refers to clause 1.2 of that collective as follows:-

*1.2 The terms and conditions in this contract are a minimum. Better terms and conditions for employees may be provided for in any individual or collective employment contract.*

[27] The 2001 Collective contains an identical provision.

[28] It is submitted that the collective provision expressly permits the entitlement, which is superior to the provisions of the collective.

[29] Diagnostic argues that the collective was negotiated to rationalise the two constituent company employees' terms of employment. It says this intention was made clear at negotiations. Mr Blair submits that Ms Johnson and Ms Raines give evidence that no additional individual contract or agreement was entered into to preserve or provide Ms Eketone with better terms and

conditions than were agreed in the 2000 collective, nor in any subsequent agreement. Mr Blair also submits that no further agreement was made with Ms Fowler or Mr Ford either.

[30] It is correct that Ms Eketone does not give evidence of any such agreement. Mr Blair further submits that negotiations for the 2000 collective included express negotiation in relation to travel reimbursement and in particular, the deletion of a phrase in respect of travel allowance "*as otherwise agreed (in advance of vehicle use) with management*". It is conceded however, that the negotiations did not include any particular reference to Ms Eketone. Mr Blair emphasises that personal departures from the settled collective that were in the nature of better terms and conditions, were identified and specifically recorded. He cites clauses 5.1.3 and Schedule 3 of the collective in support.

[31] Mr Blair also points to the 2003 and 2005 collectives which contain an express completeness clause as follows:-

*1.4 No representations, understandings or other agreements or arrangements will be recognised as terms of this agreement unless they are:  
1.4.1 Set out in this agreement or deemed to be part of; or  
1.4.2 been agreed and recorded in writing to take effect as individual terms and conditions and which are not inconsistent with anything in this agreement.*

[32] But that completeness clause relates only to what is included in the collective and not in relation to an individual employee's terms and conditions of employment. It is true that the entitlement is not recorded in writing and so cannot be conferred by the collective. But Ms Eketone's entitlement is not one which is derived from any collective. She relies on an historical oral agreement independent of any collective. I consider that she is correct to do so. In any case, the entitlement, whether or not it is recorded in writing remains valid and there is only a breach of a term of the collective. Nothing in clause 1.4 is sufficient to preclude the entitlement.

[33] The entitlement has continued as an individual term of employment subsisting side by side with the collectives. Section 61 of the *Employment Relations Act 2000* permits terms and conditions of employment additional to those under a collective. That section provides:-

*61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment  
(1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—  
(a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and*

- (b) *not inconsistent with the terms and conditions in the collective agreement.*
- (2) *If the applicable collective agreement expires or the employee resigns from the union that is bound by the agreement,—*
- (a) *the employee is employed under an individual employment agreement based on the collective agreement and any additional terms and conditions agreed under subsection (1); and*
- (b) *the employee and employer may, by mutual agreement, vary that individual employment agreement as they think fit.*

[34] Section 61 also makes clear that such individual terms can survive the operation of a collective, because a mutual agreement is recognised irrespective of when it was agreed. Such agreements I find subsist side by side with the collective. Individual agreements based on expired collectives are created by statute are not mutually agreed. They are a different situation.

[35] I find further, that such individual terms as have been mutually agreed, remain operative, binding and effective until they are revoked by mutual consent.

[36] I find that Ms Eketone's entitlement was historically agreed at the commencement of her service. It was a specific term that she and Ms Raines agreed between them. It was therefore mutually agreed. That mutual agreement was entered into before the commencement of the current collective. By section 61 of the *Employment Relations Act 2000* it is a legitimate term of the terms and conditions of Ms Eketone's employment. I also find that it has not been extinguished by any previous collective. She is entitled to enforce it.

[37] There is another basis I find that Ms Eketone is entitled to the entitlement. In 2001 Ms Fowler asked Ms Eketone to stop claiming. When Ms Eketone declined and maintained a binding contractual entitlement, Ms Fowler had the matter investigated. Ms Fowler was advised by HR advisor Anne Louise Tuck that as it was an existing condition the entitlement should be honoured. Ms Fowler accepted that advice. Mr Blair says Ms Eketone was simply taken at her word. He says Ms Tuck's enquiries were inconclusive being that if any such agreement did exist it should be honoured. But this was Diagnostic's opportunity to determine the legitimacy or otherwise of the entitlement. When Ms Fowler accepted Ms Tuck's advice, Diagnostic affirmed the entitlement to Ms Eketone and Ms Eketone was entitled to rely on that affirmation. It did not reserve its position in any unequivocal way through Ms Fowler so as to put Ms Eketone on notice that it disputed the entitlement. Because it did not do so then, it has waived its right to do so now. Ms Eketone has conducted her affairs on that basis since then.

[38] As well, on each occasion Ms Eketone claimed, Ms Fowler, continued to authorise payments to Ms Eketone. Ms Fowler did not thereafter question or challenge the entitlement, on the contrary, she regarded the issue at an end. Thereafter, she approved each and every claim that Ms Eketone submitted. And so too did every other manager. On each occasion a claim was submitted, each manager authorised and approved those claims. Each approval was a separate and independent affirmation of the entitlement. If there was no entitlement, they should not have been approved. That is the whole point of an authorisation on each occasion.

[39] The letter of 15 December 2005 is not made without prejudice. It made an offer to Ms Eketone to end the entitlement. As such, it was made in recognition of a legitimate and continuing contractual entitlement.

[40] It would in all of these circumstances, be contrary to equity and good conscience to deny Ms Eketone the entitlement - an entitlement she has been paid for more than six years.

[41] I agree with the resolution Ms Eketone's Union proposes. Diagnostic is required to pay Ms Eketone in accordance with the entitlement I have found was mutually agreed. As is suggested, the parties are to attempt to resolve issues of quantum within 28 days. If they cannot agree within those 28 days, they may make written application for the Authority's further assistance but no later than 60 days from the date of this Determination.

### **Costs**

[42] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Bush is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Blair is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson  
**Member of Employment Relations Authority**