IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 30/08
5085985

	BETWEEN	Careen Wilson-Busing & Others
	AND	New Zealand Public Service Association

Member of Authority:	Janet Scott
Representatives	Careen Wilson-Busing for Applicants Tanya Kennedy & Steve Ross for Respondent
Submissions	6 December & 18 January 2008 for applicants 21 December for respondent
Date:	4 February 2008

INTERIM DETERMINATION OF THE AUTHORITY ON PAPERS

Employment Relations Problem

[1] The applicants are health co-ordinators and smoke free coordinators employed by Waikato District Health Board.

[2] In 2005 the PSA entered into negotiations with 21 district health boards to negotiate pay scales with national coverage. Agreement was reached on National Terms of Settlement (NTS) and it was signed off by the PSA and the 21 DHBs on 21 September 2005. The NTS was ratified by PSA members in the Midlands region in a series of meetings held in December that year.

[3] As I understand the situation these nationally agreed pay scales were to be included with locally negotiated conditions into regional MECAs. Waikato District Health Board was party to the regional negotiations for the Midlands' MECA - Midlands Allied Public Health and Technical Multi Employer Collective Agreement

[4] The applicants allege the respondent breached its duty of good faith to them in the regional negotiations when it changed the terms of the NTS, after ratification, by including Health Promotion Officers without 3-year degrees in the Community Health Workers' Scale. This was contrary to the previous situation under the Waikato Allied CEA where Health Promotion workers were covered under the Health Education Officers' scale and where *all* Health Promotion Officers were covered by a separate

scale, the Community Workers, Psychotherapists and Drug and Alcohol Workers (the Allied scale). It is also claimed this change was not consistent with the NTS and that there was no advice to the workers in question, nor were the changes put to them for approval.

[5] The applicants claim they have lost on average $4,000 - being the value of the incremental movement available to them had they remained on the Allied scale - and worse, because the resulting MECA was backdated to July 2005, they have been overpaid since that date. They have been advised of this by the DHB and requested to repay overpayments of approximately $1,500 to the Board.

[6] The applicants sought a range of remedies to alleviate the claimed disadvantage. The Authority has advised that a number of the remedies sought are not available. However, there is a potential action available to the applicants for a penalty in respect of breaches of s.4 (1) of the Act in relation to changes that were allegedly made to the NTS in the subsequent negotiations to translate its terms into the new MECA.

[7] However, the respondent submits that the claim for a penalty in respect of the alleged breach of s. 4(1) of the Act is out of time in that it was not commenced within 12 months of the date when the cause of action first became known to the person bringing the action or within 12 months of the date when it should reasonably have become known to the person bringing the actions. 135 (5).

Discussion and Findings

[8] In arriving at this interim determination I have had regard to the submissions of the parties, relevant documentation submitted to the Authority, statutory provisions of the Act and relevant case law.

[9] Section 135 of the Act deals with the Recovery of Penalties. S. 135 (5) of the Act provides:

> *An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of-----*
>
> *(a) the date when the cause of action first became known to the person bringing the action; or*
>
> *(b) the date when the cause of action should reasonably have become known to the person bringing the action.*

[9] Essentially it is the respondent's position, relying on contemporaneous documents, that the applicants knew or should have known about the cause of action on 21 April 2006 when local delegates received a copy of the final version of the MECA and that Ms Wilson-Busing did know of the potential cause of action on 26 April because on this date she emailed the PSA advocate for the negotiations that she had noticed an error in the document.

[10] On this analysis, it is the respondent's position that, the last date for filing the action in the Authority was 25 April 2007. The respondent submits the claim was not filed until 30 April 2007 and that, therefore, it is out of time.

[11] For the applicants, Ms Wilson-Busing submits that the claim was filed in reliance on the information provided on the Department of Labour website and it was received by the Authority on 23 April 2007. It was subsequently returned to her because she had only included one copy of the documentation associated with the claim. She resubmitted the claim with correct copies of the documentation and asked the Authority to accept the claim as having been filed on 23 April.

[12] The Authority has documented that the claim was filed on 30 April 2007 although I do note that a copy of the statement of problem is held on file with a date stamp of 23 April 2007.

Findings

[13] The answer to the problem presented is relatively simple. I find that on April 21 2006 PSA representative Cilinnie Agyepong, sent the final copy of the proposed MECA, to delegates, including Ms Wilson-Busing. She notes it is being printed and signed off in the next couple of days and that it would then be sent to CEOs for signing. On 26 April Ms Wilson-Busing emailed Ms Agyepong to point out what she saw as *"an error"* in the document i.e. that is that health promotion workers had been included in the community workers scale (3.5.14) and that health promotion officers should have been included in 3.5.2 – the scale for allied and public health workers. On 27 April Ms Wilson-Busing received a reply to her email that read, *"the reason for this is that if a health promoter has a 3-year degree or more they go into Allied – if not they go into the Community Health workers scale"*.

[14] It is clear that, on receipt of this email, Ms Wilson-Busing carried out some further investigation into the issue and on 2 May she emailed Ms Agyepong to the effect she had just searched her emails and found the document that was ratified; that

community health pay scales made no reference to health promotion as being part of those scales at ratification and she wonders why there was a change made after ratification. She also notes that the members did not vote on the MECA document in its current form.

[15] Ms Agyepong replied on May 5 stating there had been no change made after ratification and to do so would be illegal. She explains the scales as she sees them and states *"if any individual stands to lose money because health promotion has been included in the community health pay scales we will regard that as a very serious issue and address it accordingly. If you can see any disadvantage to PSA members let me know."*

[16] I understand it was not until late May and June that PSA members had the opportunity to attend workshops to obtain advice on the application and operation of the new MECA and, I note, that it was not until July 4 2006 that Ms Wilson-Busing emailed employees she represented as delegate telling them *"letters for the MECA translations"* were on their way. She advises that the MECA has two scales for health promoters and she asks members to let her know if they are advised by payroll that their pay scale is anything other than that contained in 3.5.2 (the Allied scale).

[17] Thereafter the documents disclose that individual employees are raising with payroll and Ms Wilson-Busing that they believe they have been translated to the wrong pay scale i.e. the community workers scale and that they have been disadvantaged by this including receiving requests (signed by the Board and a PSA representative) asking them to repay overpaid salary.

[18] I need go no further to describe the documentation on this.

[19] It is my finding that in late April and early May 2006, Ms Wilson-Busing was alerting the PSA to what she considered was a *mistake* or *error* in the MECA i.e. that health promotion officers had been included in the Community Workers scale rather than in the Allied scale. At this time, I find, Ms Wilson-Busing was not contemplating a breach by the PSA of its duty of good faith towards its members. She was simply raising what she saw as an error in the documentation and she continued to raise this *"error"* with the PSA into May.

[20] I find that it could not have been until after the MECA was in the hands of members and meetings had been held with them, that individual members became aware of the translations and how they would be affected. Only then could they reflect

on the means by which they had suffered the disadvantage that they now claim was caused the Union's alleged breach of good faith. This alleged breach of good faith (as opposed to a suspected error) could not have become clear to Ms Wilson-Busing and the other affected applicants until, at the earliest late May 2006, and possibly later.

[21] I do not have to decide the issue as to whether the application for a penalty in this matter was filed on 23 or 30 April 2007 because at the very latest it was filed with the Authority on 30 April 2007 and given my finding that the cause of action could not have become known to the applicants until late May 20067 (at the earliest) then the application has been filed within the time frame stipulated in s. 135 (5) of the Act.

Determination

[22] The application for recovery of a penalty was filed within 12 months of the date when the cause of action first became known (or reasonably should have become known) to the person bringing the action. (s.135 (5)) .

Costs

[23] Costs in this matter are reserved and will be dealt within when costs in the substantive matter are decided.

Janet Scott

Member of the Employment Relations Authority