

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2007-485-1814**

**UNDER** The Judicature Amendment Act 1972

**IN THE MATTER OF** An application for review

**BETWEEN** **HealthCare Providers New Zealand Incorporated and  
New Zealand Association of Residential Care Homes  
Incorporated**

Applicants

**AND** **Northland, Waitemata, Auckland, Counties Manukau,  
Waikato, Lakes, Bay of Plenty, Tairāwhiti, Taranaki,  
Hawke's Bay, Wanganui, MidCentral, Hutt Valley,  
Capital & Coast, Wairarapa, Nelson Marlborough, West  
Coast, Canterbury, South Canterbury, Otago, and  
Southland District Health Boards**

Respondents

---

**THIRD AFFIDAVIT OF MARTIN JOHN TAYLOR  
IN SUPPORT OF APPLICATION FOR JUDICIAL REVIEW**

**NOVEMBER 2007**

---

Next Event Date: 19 November 2007 at 10.00 am

Before: Justice Miller

**Solicitor:** Susan-Jane Davies  
**EMA Legal**  
Address: PO Box 1087  
Wellington  
Telephone: (04) 470 9923  
Facsimile: (04) 473 4501

**Counsel:** FMR Cooke QC  
**Thorndon Chambers**  
Address: PO Box 1530  
Wellington 6140  
Telephone: (04) 499-6040  
Facsimile: (04) 499-6118

**AFFIDAVIT OF MARTIN JOHN TAYLOR IN SUPPORT OF APPLICATION FOR  
JUDICIAL REVIEW**

1. I, **Martin John Taylor** of Wellington, Chief Executive Officer, swear:

**Introduction**

2. I am the Chief Executive of Healthcare Providers New Zealand Incorporated ("**HCPNZ**"). I have sworn two affidavits in this proceeding, on 20 August 2007 and 19 October 2007.
3. In this affidavit I respond to the affidavits sworn by Anthony Foulkes, Jon Shapleski and Samantha Cliffe.
4. Annexed marked "**A**" is a paginated bundle of true copies of relevant documents, to which I refer to in this affidavit by their page number.

**Providers' knowledge of LPW initiative**

5. The defendants' affidavits suggest that the providers knew about the pass through and collective agreement items sufficiently far in advance to constructively engage on them when they were formally presented to providers in May. Mr Shapleski at paragraph 111 and Ms Cliffe at para 56 state that at the meeting on 23 May 2007, where providers were first told of the Low Paid Workers Initiative, providers were not surprised by the pass through and collective agreement items and suggest providers were able to respond to the substance as a result.
6. This is incorrect. Providers were very surprised. I recall that Simon O'Dowd, Chair of HCPNZ, expressly stated at the end of that meeting that he was surprised and disappointed, and that in all his years in the industry he had never seen anything like it.
7. While it is true that I knew something was in the wind because I had heard murmurs from my contacts [and had had a conversation with Dwayne Crombie where he told me he attended a meeting [*what exactly did he tell you the meeting was about?*]], when nothing was mentioned at the 20 March meeting, I took it that there would be no additional clauses especially because I specifically asked whether anything would be coming and was advised that nothing was coming. I therefore proceeded on the basis that the rumours were either untrue or were related to issues which would be addressed in a later contractual round.

8. The Minister's press release on 1 May referred to at para 91 of Mr Shapleski's affidavit and specifically its reference to "continue efforts" indicated to me that any initiative would be the same as in the past ie funding would be provided and it would be recorded whether it was passed through the use of surveys. (I note in relation to this paragraph of Mr Shapleski's affidavit that the 5.7% was only for hospitals. Rest homes only got 3%.)
9. My understanding that any increase would be a percentage increase which would be passed on in the usual way is reflected in my press release recorded at para 91 of Mr Foulkes' affidavit and lay behind all the conversations referred to by Ms Cliffe at paras 53-54.
10. I was shocked by the pass-through requirement and the collective agreement clause.
11. The comment of Mr Crombie referred to at para 56 of Ms Cliffe's affidavit does not reflect the plaintiffs' perspective. He represents one provider. I do not recall him making this comment but he may well have, as he was the provider that the CTU selected to attend the early meetings on the LPW initiative and therefore was given the relevant information. He did not pass on this information to the provider group. He never told the group about the proposal to increase wages by a dollar amount, mention the \$1.30 or share his "maths" with us.
12. I do not understand why the DHBs were able to share all the relevant details of the LPW initiative (the pass through mechanism, the proposed amount and the collective agreement clause) with the CTU and CTU-selected providers in February 2007 but it was at too formative a stage and too confidential (Foulkes para 89; Cliffe paras 43-44; Shapleski para 78) for it to be shared with providers generally until late May 2007.
13. Because we had been expressly told that there was nothing of this nature in the pipeline, we simply were not in a position to respond to it fully or in any real substance in the time provided by the DHBs.

**DHBNZ's mandate**

14. I was surprised by the statements at para 14 of Mr Shapleski's affidavit, para 34 of Ms Cliffe's affidavit and para 88 of Mr Foulkes' affidavit that DHBNZ was not authorised to negotiate or make decisions in the A21 process.
15. I would not have expected the DHBs to put people up to negotiate with us without a mandate. But in any event I was expressly told that they did have such a mandate. Because it was important to providers that the people we

were negotiating with had the necessary authority, I asked Ms Cliffe and Mr Shapleski at the beginning of the meetings on 20 March and 23 May whether they had authority to negotiate and make decisions. They said they did.

16. [Provider representatives certainly had such a mandate.]

### **Past reviews**

17. My experience of the last four reviews is that the reviews are not standard in any respect. There has been no usual commencement or timing for the previous reviews as suggested by Mr Shapleski at para 21 and all have had difficulties. Each time deadlines have not been met, the DHBs have been unable to state a definitive position and in three of the reviews new issues were introduced at the last minute or after the deadline for tabling issues had passed.

18. Mr Shapleski states that "There is also the possibility that new issues or policy initiatives will be introduced during the process, as had occurred in the past" at the end of para 24. Providers have always vehemently objected to DHBNZ raising new issues during the process of past reviews. I attach at p[ ] a letter dated 8 March 2005 recording provider representatives' dissatisfaction at the unilateral reintroduction of 12 issues that had been withdrawn by agreement referred to at para 39 of Mr Shapleski's affidavit. In the context of the 2005/2006 review I wrote to Mr Shapleski on 19 July 2005 seeking assurance that all claims would be tabled at the outset. This letter is at p[ ].

19. I note that at para 89 Mr Shapleski suggests that providers raised a "new" issue part way through the current A21 review in the form of the "LTO issue". This was a proposal based on an issue raised in our statement of claims and their response. We have consistently taken the position that all issues should be tabled at the outset.

20. Ms Cliffe states at para 45 that the statement in her 1 March 2007 letter initiating the review that "advice will also be sought from the Ministry of Health on any policy issues that will impact on the ARC A21 Review, particularly those that will add additional costs or require amendments to the current agreements" is part of the standard practice when initiating clause A21 reviews. However, the statement she refers to (or any similar statement) did not appear in the letters initiating the 2005/6 A21 review (attached at p[ ]) or the 2006/7 A21 review (attached at p[ ]).

## **20 March 2007 meeting**

21. By the time of the 20 March meeting the providers and DHBNZ had set out their claims. The timeframes had been set out in the original letter which is attached at pp107-110 of my second affidavit. The suggestion by Mr Shapleski at para 81 that the 20 March meeting was very preliminary is not correct. The purpose of the 20 March meeting was to discuss the issues raised by each party's claims.

## **Future Workforce strategy group**

22. Mr Foulkes suggests in his affidavit that the passing through and collective clauses originate in work undertaken by DHBs through the Future Workforce strategy group (paras 23-30). This group published a five year collaborative plan on the non-regulated workforce in the Health and Disability Sector in September 2006 which is attached at **p[ ]**. The document does not mention any perceived need to collectivise the sector.

23. It does refer to issues with the sustainability of the workforce at p5, identifying that many are low-paid, female, casualised, volunteer and have high turnover rates and that there is "a need to develop alternative service delivery models that develop and support workers, to change employment practices and to look at quality and safety issues".

*[The issues and solutions that this document suggest are at an entirely different level of sophistication to the LPW initiative (and it is suggested are already underway) which I think is quite compelling. But I will discuss with Francis whether he thinks this creates too much risk of the DHBs identifying the 2003 document you have identified, and also whether the reference to the MECA agreement will be problematic. The reference to the need to change employment practices on p5 is also risky]*

24. I attach an email exchange in early April 2007 between the CTU and Mr Foulkes at **p[ ]**, an email from the Ministry of Health and Mr Foulkes dated 11 April 2007 at **p[ ]**, an email exchange in early May between the CTU and Mr Foulkes at **p[ ]** an email from the CTU to Mr Foulkes dated 28 May 2007 at **p[ ]** and an email exchange between Mr Foulkes and the CTU dated 11 May 2007 at **p[ ]** which show not only that the passing through and collective clauses initiated with the CTU but that the CTU was closely involved in their development including the actual drafting of the collective agreement clause and in repeatedly chasing the DHBs to make progress on them. [I attach an email dated 10 May from DHBNZ to Mr Foulkes at **p[ ]** and an email exchange between Mr Foulkes and DHBNZ dated 11 May 2007 at **p[ ]** which shows how constrained the DHBs were by the CTU.

25. I also attached an email from Mr Foulkes recording a conversation with the Minister on 24 April 2007 to my second affidavit at p198 in which Mr Foulkes recorded that "He was clear it was a Government decision not DHBs, and would be prepared to put in writing to us, and front any response from the sector."

**FFT cannot cover inflation, LPW initiative and flow on effects**

26. At para 103 Mr Shapleski says that the price breakdown given to providers at the 23 May meeting was for "demonstration purposes" only and that did not mean that the money under each element could only be used for that element. I do not recall any statement being made to this effect and this is not the impression we got at that meeting or from the slides that were presented which are at Shapleski p27 (see p37 in particular). My understanding was that each of the elements was a specific allocation to compensate for historic costs. [This is consistent with the approach taken by DHBNZ in the past]. In particular the Holidays Act and MECA components were presented as compensation for the events that had led to providers making claims under clause A23 of the contract. I do recall however that DHBs indicated that some of the FFT funding could be allocated to low paid workers. It is clear from the DHBs' modelling that they based their calculations on the low paid worker component and a proportion of the FFT component (not the total price adjustment).

27. FFT is an inflation adjustment as Mr Shapleski notes at para 23. Mr Shapleski states that DHBs can pass it on or retain it as they see appropriate but in fact DHBs have always passed it on. DHBs are provided 2.6% which they have always passed on subject to subtracting a 0.5% administration fee. The FFT would therefore have been the same regardless of the LPW initiative.

28. Providers disputed from the beginning that FFT could be used for both general inflation and the LPW initiative. Mr Shapleski now suggests at para 107 that the FFT was also intended to fund the flow on effects on other wages. [This had not previously been suggested by the DHBs, and would also have been strongly resisted by providers.]

**National consistency**

29. I note that:

29.1.[none of the 2850 services agreements referred to at para 37 of Ms Cliffe's affidavit have a passing on or collective agreement clause];

29.2. it is possible to create a Variation which will affect providers in the same way if a percentage is used. It would not however have the same outcome for all workers. This is the critical difference: the Minister and DHBs were seeking an outcome which affected all workers in the same way.

### **Percentage increase**

30. At para 126-9 Mr Shapleski sets out the DHBs' argument that using a percentage passing on mechanism in the HBSS contracts was appropriate as these contracts are less complicated than the ARC contract.

31. The logic behind this argument does not hold.

32. Over all, there are about 90 HBSS providers in the country, with the two biggest providing more than half of all care. Furthermore, many DHBs only have 3-5 HBSS providers.

33. It is easier for DHBs to insist on a specific dollar amount being paid to homecare workers where there is a direct connection between what a provider receives to deliver an hour of homecare and what they pay to the person delivering the homecare. For example, I give you \$23 an hour to deliver care, and you pay \$13 an hour in wages. Therefore, if I give you \$24 an hour, you will be able to pay \$14 per hour

34. It is precisely because the residential care sector is significantly more complex that a percentage approach is more appropriate. The more complex cost structures of residential care and the differences in staffing ratios means that there is no direct link between the bed day rate paid by DHBs and wages paid by providers.

35. The DHBs different treatment of the two sectors can only be explained by differences in DHB intentions. In the HBSS sector DHBs only wanted to ensure LPW funding was passed on, i.e., they did not have a Ministerial directive to ensure a \$1 or \$1.30 was passed on whereas in the aged residential care sector, the directive was that a minimum of \$1 had to be passed on, as indicated in Sam Cliffe's email of 4 April which reported back on her meeting with the Minister (attached at p196 of my second affidavit).

### **Pohlen Hospital example**

36. At para 205 Mr Shapleski states that the large number of staff for Pohlen Hospital's ten beds will result in wasted funding.

37. The reason why Pohlen's staffing ratio is high is that Pohlen Hospital also provides maternity services using the same workforce. For example, a care giver may work one hour with an ARRC client and then move on to look after a maternity client and a cleaner will clean both rooms.

38. The Pohlen example shows that facilities which use their workforce to provide services other than aged care are disadvantaged, i.e., the clauses say you must increase wages to all caregivers you employ by a minimum of \$1, regardless if some of their work is not aged care work.

**Email of 11 June 2007**

39. Mr Shapleski has annexed at p61 of his exhibits an email from Sam Cliffe recording a conversation with me. I never said "some idealogues" will hold out for a % amount. I also never said that "They have thought about splitting flexi fund and FFT much as we had". I recall the conversation and I would have said something about the DHBs being agents of the unions and there would have been a discussion about ideological views held by both sides.

**Verification measures, date correction, HCPNZ survey,**

40. I note in relation to para 147 of Mr Shapleski's affidavit that the reason that providers objected to the verification measures proposed is that the DHBs refused to tell us what they were and we did not want to agree to something that was not disclosed.

41. I accept that the date at para 158 of Mr Shapleski's affidavit is correct. I based my date on information from members as to when they were paid (members only actually received payment at a later date).

42. In relation to the suggestion by Mr Shapleski at para 168 that we had withheld information from them I note that the base information was only available from April/May 2007 and we only collated it in a survey in September this year (which we were happy to make available and is attached at p333 of my second affidavit). So we did not have the information to pass on until September. (The request Mr Shapleski refers to was made in June.)

Sworn at Wellington  
On November 2007  
Before me:

)  
)  
) \_\_\_\_\_  
Martin John Taylor

---

A Solicitor of the High Court of New Zealand