



## Industrial Relations Commission New South Wales

<b>Medium Neutral Citation:</b>	<b>Health Secretary, NSW Ministry of Health v New South Wales Nurses and Midwives Association [2024] NSWIRComm 4</b>
<b>Hearing dates:</b>	18 September 2024
<b>Date of orders:</b>	18 September 2024
<b>Decision date:</b>	18 September 2024
<b>Jurisdiction:</b>	Industrial Relations Commission
<b>Before:</b>	Taylor J, President
<b>Decision:</b>	See para [18] - [22] for Recommendation
<b>Cases Cited:</b>	<i>Health Secretary, Ministry of Health v NSW Nurses and Midwives Association [2024]</i> NSWIRComm 3
<b>Category:</b>	Procedural rulings
<b>Parties:</b>	Health Secretary, NSW Ministry of Health (Applicant/Respondent) New South Wales Nurses and Midwives Association (Respondent/Applicant)
<b>Representation:</b>	Ms S Johnston, Health Secretary Ms L Allen, Health Secretary Mr D Gardner, Health Secretary  Ms B Craig, New South Wales Nurses and Midwives Association Ms N Maher-Boyle, New South Wales Nurses and Midwives Association Mr P Collier, New South Wales Nurses and Midwives Association
<b>File Number(s):</b>	2024/242813, 2024/242824, 2024/297588, 2024/330392
<b>Publication restriction:</b>	None

## STATEMENT AND RECOMMENDATION

### Ex Tempore, amended from Transcript

- 1 These matters come before me today against the following background. On 2 July the Health Secretary filed applications for two new awards being awards that would have increases over a three year period with wage increases consistent with the *NSW Government Fair Pay and Bargaining Policy 2023*.
- 2 I am informed that both before and after that time, the Nurses Federation and the Health Secretary engaged in a series of meetings. During that period the Nurses Federation put significant efforts into identifying, consistent with the *NSW Government Fair Pay and Bargaining Policy 2023*, productivity and other improvements which would assist to fund higher increases.
- 3 I have not had the opportunity to examine such materials to be able to express a view one way or the other as to the extent to which such efforts indeed would justify the level of increases that the Nurses Federation seek, but I can say that I have looked at them sufficiently to identify that the Nurses Federation was taking precisely the steps that the *NSW Government Fair Pay and Bargaining Policy 2023* suggests ought to be taken by unions and industrial parties, namely to identify productivity and efficiency improvements or attempt to do so, in a manner which would have the capacity or at least the potential to fund increases above what the government describes as its base offer.
- 4 I understand that those efforts, which included commissioning expert evidence, were not in and of themselves sufficient to move the Health Secretary to put a different offer, such that on 13 August the Nurses Federation filed a dispute notification in which it identified to this Commission it had a log of claims seeking, amongst other matters;
  - (a) an immediate 15% pay rise;
  - (b) an increase in night shift penalty to 30%;
  - (c) changes in conditions; and
  - (d) increases or extensions to particular allowances and loadings.
- 5 This Commission on the following day listed these matters before me for initial directions. On that day the Secretary sought conciliation. I indicated the Commission was available to conciliate these matters expeditiously. The Nurses Federation had a preference for such conciliation to occur after two high level meetings, which the Nurses Federation expected would be occurring over the following four weeks, such that the matter would not come before me before mid-September.

- 6 What was not indicated at that time one way or the other was anything about the potential for industrial action. On 5 September 2024, the Nurses Federation notified its members of industrial action in the form of a strike to be held on 10 September. On 6 September the Health Secretary notified a dispute to the Commission which came before Commissioner McDonald who made a Recommendation that same day that the planned industrial action not proceed and that there be discussions between the parties.
- 7 The Recommendation included direction that following a meeting of the relevant delegates of the Nurses Federation to be held the following day, Saturday 7 September, the Health Secretary be notified as to whether the industrial action would proceed by no later than 3pm on Sunday 8 September. The Health Secretary was so notified, only shortly before 3pm that day, that the industrial action would proceed.
- 8 As a result, an application was made for dispute orders that came before Chin J the following day on 9 September. Chin J determined in his decision *Health Secretary, Ministry of Health v NSW Nurses and Midwives Association* [2024] NSWIRComm 3 to make the dispute orders sought.
- 9 Amongst other matters his Honour took in account, at [25], the limitation of the Health Secretary's bargaining parameters with respect to the Association's wages claim, which his Honour considered a significant factor which may explain some of the frustration of the Association's members that had been addressed in evidence in the proceedings before him.
- 10 His Honour also took into account, at [27], the consequences of the planned industrial action as revealed to him in evidence that had been given before him that day, which his Honour considered strongly favoured the making of the dispute orders. His Honour noted that such action had the potential to create a significant risk of compromising patient care. His Honour identified how the evidence revealed that elective surgery would need to be cancelled, and how such steps could have the real potential to cause pain and suffering to patients.
- 11 I was informed today, I accept not in the form of evidence, that as a matter of fact a significant number of planned surgeries were in fact impacted including a number of category 1 cases, that there was insufficient staffing - at least according to the submissions of the Health Secretary - which caused concerns and impacted patients and their families.
- 12 It is a matter of some concern that the Nurses Federation, having invoked the jurisdiction of this Commission to resolve the dispute over its log of claims, then determined not to prosecute that dispute by conciliation and arbitration before this

Commission, but instead by taking industrial action. That is notwithstanding the efforts that this Commission took to deal with its dispute as expeditiously as possible in the manner that I have described.

- 13 When this matter came on before me this morning, Ms Craig on behalf of the Nurses Federation, identified the strong feelings of nurses whose expectations were, she said, that after many years of a government wages policy which denied the opportunity of arbitration, that there would be change, and that there had not yet been change as far as they were concerned. Ms Craig noted what she described as the creation of the “new Commission” (a reference, as I understood it, to the re-establishment of Presidential Members) and “the removal of the wages cap.” Ms Craig said that as a consequence of those things there was an expectation that there would be change.
- 14 Ms Craig is quite right to identify that those things have occurred. The consequence of those changes is that there is now a Commission which is unrestricted in its capacity to make an award setting actual rates of pay which are fair and reasonable. It can do so by using conciliation powers to encourage the parties to come to a sensible industrial compromise. But if compromise cannot be reached by those means, the Commission has the capacity to act as “an independent umpire” to resolve the competing claims by arbitration.
- 15 Nurses do not take industrial action lightly. There is no doubt in my mind that the members of the Nurses Federation have a strongly held belief that their pay and conditions are not appropriate. Those views are reflected in the log of claims. The solution though is not to take industrial action. Not while, as Ms Craig has quite properly identified, there is an industrial umpire that is unrestricted in its capacity to set fair terms and conditions by arbitration.
- 16 Industrial action does not just cost nurses pay. It has, as Chin J identified, real world effects on patients and the public. Patients can have waited significant periods of time for their elective surgery. Those are periods of time when they can be in pain. Their families have been supporting them. Their families are also affected by industrial action. It is not in the public interest that industrial action be taken.
- 17 The way to resolve these issues is to utilise the powers of the Commission. But can I say this, the Commission does not arbitrate changes in pay and conditions whilst industrial action is occurring.
- 18 In light of those matters, I make the following Recommendation, and I urge both parties to adopt it.

## **RECOMMENDATION**

- (1) The parties should enter into four weeks of intensive discussions immediately on the basis that:
  - (a) as a circuit breaker the Health Secretary agrees to vary the awards to provide an immediate 3% interim increase effective 1 July; and
  - (b) the Nurses Federation commit to cease all industrial action that is affecting patient care, pending the outcome of those discussions and any subsequent arbitration.
- (2) In order for those discussions to be effective, I recommend that on the Health Secretary's side, persons present be not only senior office holders within the Department of Health, but also ministerial level staff in respect of those ministers who ultimately will need to give approval for any alteration to pay offers.
- (3) Should those discussions not result in a resolution, then these disputes be set down for arbitration expeditiously, and that no industrial action take place while that process is occurring.

- 19 I ask the Nurses Federation communicate to its members that should such a recommendation be accepted, it would be without prejudice to the Nurses Federation's capacity to press its log of claims through discussions, conciliation, and if necessary, arbitration.
- 20 That is, should the government agree to the proposal to immediately vary the awards to provide an interim increase, that increase would be an interim increase, it would not be a final outcome. In my view, it would be appropriate for the hard working nurses in the public sector to at least receive an immediate increase whilst their organisation takes the appropriate steps in this tribunal to seek what it submits are fair pay and conditions as reflected by its log of claims.
- 21 Finally, I grant leave to the parties' representatives to approach my Associate with a view, ideally on a consent basis, to pencilling in dates for any potential arbitration.
- 22 I list these matters before me at 9.30am on Monday 30 September at which time I will expect the parties to report to me as to:
- (1) whether the Recommendation has been accepted;
  - (2) what is the state of play in respect of the disputes; and
  - (3) whether industrial action is ongoing or planned.
- 23 Having heard the parties, including whether and to what extent the parties think it will be of assistance for the Commission to be involved in conciliation, I will then determine the best approach to dealing with these matters. But I can reiterate that the

Commission's willingness to assist the Nurses Federation in respect of the dispute that it notified is going to be significantly affected by whether there is in fact ongoing industrial action.

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Decision last updated: 19 September 2024