Common Law Division
Supreme Court
New South Wales

Case Name:	**Fakhouri v The Secretary for the NSW Ministry of Health (No.2)**
Medium Neutral Citation:	[2024] NSWSC 1171
Hearing Date(s):	12 August 2024
Date of Orders:	12 August 2024
Date of Reasons:	20 September 2024
Jurisdiction:	Common Law
Before:	Garling J
Decision:	Approval granted.
Catchwords:	CIVIL PROCEDURE – Representative proceedings – Settlement or discontinuance – Court approval – Representative proceedings claiming that junior medical officers had been underpaid – Whether the settlement, is fair and reasonable – Settlement approved.
Legislation Cited:	Civil Procedure Act 2005 Uniform Civil Procedure Rules 2005
Cases Cited:	Fakhouri v Ministry of Health [2023] NSWSC 808
Texts Cited:	Not Applicable
Category:	Principal judgment
Parties:	Amireh Fakhouri (P) The Secretary for the NSW Ministry of Health (D1) State of New South Wales (D2)

Representation:	Counsel: J Sheahan KC / C Winnett (P) R Lancaster SC / D Fuller (D1, D2) Solicitors: Maurice Blackburn (P) Minter Ellison (D1, D2)
File Number(s):	2020/356588
Publication Restriction:	Not Applicable

JUDGMENT

1 On 16 December 2020, Dr Amireh Fakhouri commenced representative proceedings pursuant to Part 10 of the *Civil Procedure Act* 2005 ("the Act") on behalf of a large number of junior medical doctors ("JMOs").

2 The JMOs included in the group were those were employed to work in the public hospital system in the State of New South Wales in the relevant period.

3 By the time these proceedings came to be resolved, the relevant period, which determined membership of the group, was between 16 December 2014 and 21 March 2024.

4 The proceedings claimed that the State of New South Wales, and the Secretary of the NSW Ministry for Health (to whom I will refer as "the defendants") failed to comply with their obligations under the *Public Hospital Medical Officers (State) Award* which was applicable during the relevant period. In addition to their entitlements under this award, the JMOs (a description which it will be convenient to use to refer to the entire group), were entitled to be paid salaries set out in the *Health Professional and Medical Salaries (State) Award*, which were in place during the relevant periods.

5 The proceedings claimed that in a number of respects, the JMOs had not been paid their entitlements for working overtime which had not been formally rostered, had not been paid for meal breaks which were not taken in accordance with various awards, and that the rostered overtime which they had worked, whilst being paid, had resulted in the junior doctors being underpaid because of an incorrect calculation of the rates of pay to which they were entitled. As well, it as alleged that the JMOs were entitled to superannuation payments arising from the various underpayments.

6 The defendants filed a comprehensive Defence to these allegations.

7 In short, the defendants contested the correct interpretation of each of the Industrial Awards, arguing that on their interpretation, the plaintiffs had been properly remunerated in accordance with the Awards.

8 The defendants put the plaintiff and each group member to proof, strictly, as to the hours which they contended they had been required to work by way of un-rostered overtime, and to each of the other heads of claim.

9 Additionally, the defendants relied upon a policy directive issued by the Ministry of Health, entitled "*PH2017_042: Employment Arrangements for Medical Officers in the NSW Public Health Service*". The policy directive described an approval process required of all employed medical officers, including JMOs, for obtaining payment of un-rostered overtime. The policy stated that un-rostered overtime required prior approval before being undertaken, and the claims were required to be submitted no later than four weeks after the overtime was worked. The policy was relied upon by the defendant for a number of purposes including that, if the plaintiff or a group member did not act in accordance with it, the defendants had acted on the basis that no such claims were going to be made and, accordingly, the plaintiff and group members were estopped from now bringing any such claim.

10 The hearing of the plaintiff's case and identified common questions for other group members in the proceedings, was fixed to commence on 6 May 2024.

11 At the same as these proceedings were being case managed, the industrial association responsible for JMOs, namely the Australian Salaried Medical Officers Federation (NSW Branch), commenced proceedings seeking civil penalties and unpaid salaries on behalf of a number of identified and named JMOs. A number of individual proceedings were commenced, each containing a different number of JMOs. Ultimately, these multiple proceedings were consolidated by the Court ("the ASMOF proceedings") which resulted in the proceedings being brought on behalf of 62 named JMOs.

12 Although the proceedings were not entirely identical, the Court determined that there was a sufficient commonality of questions and issues for the proceedings to be heard at the same time.

13 In the course of case management, the Court specified the common questions arising in Dr Fakhouri's proceedings and also, pursuant to the provisions of r 28.2 of the Uniform Civil Procedure Rules 2005 (the "UCPR"), determined separate questions arising in the ASMOF proceedings which were to be heard together with the hearing involving the common questions in the representative proceedings.

14 The proceedings were fixed for a period of many weeks.

Mediation

15 The parties attended three mediations with the Honourable Patricia Bergin AO SC acting as mediator. The first such mediation was in October 2022 and the second in December 2023 – neither of which resulted in agreement to resolve the proceedings.

16 The parties attended a further mediation in March 2024, which resulted in an agreement to settle Dr Fakhouri's proceedings for the amount of $229.8 million, which was inclusive of all legal and other administration costs.

17 The parties' agreement was contained in a Deed dated 23 April 2024, which was executed by the parties.

18 The ASMOF proceedings have not settled.

Settlement Approval

19 The settlement reached between the parties at the third mediation, and detailed in the Deed, requires the approval of the Court pursuant to s 173 of the *Civil Procedure Act* 2005. In giving such approval, the Court may make such orders

as it considers just with respect to the distribution of any money including interest paid under a settlement of the kind which has occurred here.

20 This judgment sets out the Court's reasons for approving the settlement of these proceedings on 12 August 2024.

Legal Principles

21 Section 173 of the Act does not constrain the way in which this Court approaches the approval of the settlement of these proceedings.

22 A number of Judges of this Court have considered this question. From those judgments, I derive the following approach. The first question is whether the proposed settlement is reasonable as between the representative plaintiff on their own behalf and on behalf of the group, and the defendants. In addressing this question, the Court takes a supervisory and protective role in relation to the group members as a whole. In considering whether the settlement between the parties is reasonable, the Court takes into account such things as the prospects of success of the plaintiff and group members in the proceedings, the risks and costs to which the plaintiff and group members are exposed if the matter proceeds to trial, the likelihood of appellate consideration of any first-instance judgment, and the future pathway for the litigation including the likely time period over which the litigation would extend before a final resolution is reached of all of the group members' claims.

23 One element which is essential to consider in deciding whether a settlement is fair and reasonable between the parties, is what the deductions from the proposed settlement sum are and whether they are reasonable. This may include but are not always limited to, a fair and reasonable sum for legal costs, whether there is any claim for funder's commission, and any other expense such as the costs of the administration of the proposed settlement scheme.

24 It is only by assessing these matters that one can proceed to the second question, which is whether, as between the plaintiff and group members, the proposed settlement is fair and reasonable. In assessing this question, the

Court is not concerned with the individual position of the plaintiff or of the defendant(s) but is rather concerned to take into account and determine whether the interests of the group members as a whole are such that the Court should conclude that the proposed settlement is fair and reasonable. This may involve identifying any objections from group members to the proposed settlement, or the absence of any objections. It also important in considering this question to have a sense, which may not be precise, of the likely number of group members and the likely proportion of group members who will make a claim upon the settlement sum. It is also appropriate to consider whether the proposed settlement distribution scheme will, as far as is reasonably practicable, provide a fair distribution of the settlement funds to the group members who choose to participate in the settlement.

25 The evidence upon which the consideration of these two questions depends will vary from case to case. It would be an unusual case in which the Court proceeded to consider an approval where it was not in possession of an advice from counsel and the solicitor on the record setting out their views on the relevant range of matters, including their assessments, from the perspective of the plaintiff and group members of the litigation, its resolution, the settlement and its distribution. However, consistently with the Court's regular procedure in approving settlements of various kinds, such material would not usually be made public. In approving any settlement, the Court will proceed upon information which must necessarily be kept confidential as it is the subject of client legal privilege, or else addresses matters which are, by their nature, confidential.

26 The consequence of this is that a Court, in setting out its reasons for approving any settlement, is necessarily circumspect in its judgment.

27 Nevertheless, the Court undertakes the approval process in a thorough and careful way. In so doing, it is exercising its protective role with respect to the group members, and its supervisory role in respect of the claims made by the interested parties, such as litigation funders or lawyers, to sums of money to be deducted from any proposed settlement sum.

28 Ultimately, because the Court has the power to make "*… such orders as are just with respect to the distribution of any money, including interest, paid under a settlement…*", the Court's task is to ensure that claims upon the settlement sum are fair and reasonable.

29 In addition to the confidential material described above, it is not uncommon for the Court to receive expert evidence which assists it in the determination of whether sums to be claimed from the settlement sum are fair and reasonable. That material itself may also be regarded as confidential.

30 In this case, there is no reason for the Court to appoint a contradictor to consider the material advanced by the parties seeking approval, and to draw the Court's attention to any issue which may suggest that the settlement is not fair and reasonable. However, it is open to the Court to require the assistance from such a party or, alternatively, to appoint lawyers to represent group members whose identities are not specifically known to the plaintiff or the plaintiff's solicitors. Such a procedure, if followed, is designed to ensure that the Court is in possession of all relevant material before considering whether to approve a proposed settlement.

Consideration

31 The evidence satisfied me of the following facts and matters.

32 I am satisfied that there are about 28,500 group members who fell within the definition. Members of that group who wished to participate in the proposed settlement were required to register their details with Maurice Blackburn, the solicitors for the plaintiff, by 12 July 2024. A number slightly under 16,000 group members have registered their details and are entitled to have their claims for participation in the distribution of the settlement sum considered.

33 There may be some small adjustment to the total of about 16,000 group members seeking to participate in the settlement scheme which comes about as a consequence of the need to cross-check for duplicate names, and also the

initial eligibility assessment process to be undertaken by the scheme administrator as part of the distribution scheme.

34 But, whatever be the final number of group members, this settlement will, after allowance for legal costs and other legitimate deductions, ensure that no less than 95% of the settlement sum is to be made available to meet the claims of the plaintiff and group members.

35 In the Court's experience of class action litigation, this is a remarkably high proportion of a settlement sum being paid to the plaintiff and group members. It can readily be compared, and most favourably, to settlements in class actions which involve litigation funders. Not uncommonly, litigation funders claim a commission of between 25% and, in some cases, up to 40% of the sum recovered.

36 Only one objection has been received from any person who was notified of the proposed settlement. I have read and considered that objection. It does not seem to me to be an objection against the reasonableness or appropriateness of the settlement which is proposed for approval. Rather, it seems to be an expression of a view opposing the existence and conduct of the litigation. The objector worked as a junior doctor during the relevant time periods, the subject of the litigation, and records that he was always fully paid for any overtime which he worked. He says he knew of no-one who was not being paid overtime. He asserts that the culture, particularly in emergency medicine, is that junior doctors are encouraged to, and do in fact, claim overtime when required. He concludes with this statement:

> "I think the junior doctors class action is morally questionable and I fully oppose it."

37 I do not share the views of the objector. Whilst I accept his personal experience, that is not the experience of many JMOs about which evidence has been placed before this Court. It is to be remembered that the experience of individuals will vary from hospital to hospital and unit to unit. I do not regard this objection as standing in the way of my approving the settlement as a whole.

Discernment

38 The sum to be paid by the defendant is a significant one and has been arrived at after careful assessments have been made by the solicitors for the plaintiffs who have, assisted by experts, made various projections of what a maximum possible loss of the group members may amount to. It is not readily possible to make a precise calculation of that sum. That is because records if they exist, are not presently available from which such precise sums can be derived. Mathematical models, which I am satisfied are appropriate, have been used to arrive at such estimates. Necessarily, there is imprecision.

39 As memoranda from senior and junior counsel note, the Court in the final hearing of the proceedings would be called upon to adjudicate on some complex issues of the interpretation of each of the awards in respect of which there are arguable issues raised by the defendants. The issues raised, I am satisfied, were such that the solicitors for the plaintiff and group members have acted responsibly, and appropriately cautiously, in reaching a compromise with respect to the risks involved in the litigation.

40 On one view, as I observed in *Fakhouri v Ministry of Health* [2023] NSWSC 808 at [33], it may have been necessary for there to be individual assessments of the claims of each of the group members. Although, as I noted in that judgment, there were potentially other ways in which the Court could choose to address claims of individual members. Whether or not the Court would have been persuaded to make an award of aggregate damages for the entire group is a matter which would need to be considered at a future time. It is by no means certain that a court would have been so persuaded.

41 If the resolution of individual claims was necessary, such process would be extremely time consuming, expensive and procedurally difficult. It would have extended over a lengthy period of time. This settlement between the parties has the substantial advantage of avoiding any of the expensive and time-consuming alternatives for assessing claims individually.

42 As well, the settlement has the advantage of terminating the existing litigation, for which the Court had set aside a lengthy period of time, and would avoid any appeal and any further litigation of individual member's claims.

43 I am also confident that having regard to all of the issues being raised, which would have a variable effect from group member to group member, that the proposed settlement will benefit the group as a whole.

44 I consider that between the parties, the settlement is fair and reasonable.

45 The deductions from the settlement, as I have earlier said, do not exceed 5% of the gross sum. I am satisfied that the deduction which is for legal costs and expenses in a sum a little over $9 million is fair and reasonable. Such conclusion is supported by the expert opinion of a well-qualified and experienced Costs Assessor.

46 The costs of the settlement distribution scheme are in the order of $7.5 million. Again, those costs have been carefully assessed, and the reasonableness of them has been the subject of an expert opinion from a Costs Assessor. I also note that such interest as accrues on the settlement sum will defray part of these administration costs, and with the balance to be distributed to group members.

47 I am well satisfied that the deductions from the settlement sum which are proposed to be made are fair and reasonable.

48 The final question is whether the group members' interests are appropriately taken into account in the manner of distribution of the settlement sum.

49 In broad terms, with the exception of a sum to be paid to the plaintiff as recompense for the time and effort which she has spent in addressing the requirements of being a plaintiff in litigation of this kind, the sum for under-payment of income and allowances will be divided in accordance with a

formula which I regard as a balanced one, structured in a general way to achieve a fair and reasonable settlement as between individual claimants.

50 The factors which are to be taken into account for the purpose of calculating any individual group member's entitlement under the settlement are necessarily broad, such as how many years they worked as a JMO. In administering a settlement of this kind, having regard to the nature of the claims which have been made, it is inevitable that some group members will receive less than they might have if they had taken proceedings individually. Some may receive more than if they had taken individual proceedings. But that does not mean that the settlement is not fair and reasonable. After all, the group members do not have to face any litigation risks or the costs of funding their own proceedings for recovery. As well, they have had the opportunity to opt out of the proceedings if they did not wish to have their claims dealt with as a member of the group.

51 It would be wholly impracticable to have a settlement scheme in these proceedings which gave every individual group member (of which there are approximately 16,000) a precise calculation of the damages to which they are entitled.

52 There is no unfairness between group members of the method by which their entitlement under the settlement is to be calculated.

53 I am well satisfied that the settlement, as between group members, is fair and reasonable.

Conclusion

54 I am satisfied by the evidence which has been placed before me that this settlement is fair and reasonable and ought be approved.

55 The settlement was in fact approved, for the reasons which I have described in this judgment, on 12 August 2024. This judgment records the reasons for my approving that settlement.

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