

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

**[2019] NZERA 1**

**3049594**

BETWEEN

MIDWIFERY EMPLOYEE  
REPRESENTATION AND  
ADVISORY SERVICE  
INCORPORATED  
Applicant

AND

20 DISTRICT HEALTH BOARDS  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Helen White, Counsel for Applicant  
Susan Hornsby-Geluk, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 3 January 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is an application for facilitation pursuant to s 50B of the Employment Relations Act 2000 (the Act) in respect of the collective bargaining currently underway between the Midwifery Employee Representation and Advisory Service Incorporated (MERAS) and 20 District Health Boards (the DHBs).

[2] MERAS claims that pursuant to s 50C of the Act:

- the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties: s50(1)(b)(i) and (ii);
- there have been one or more strikes during the course of the bargaining, and the strikes have been protracted: s.50(1)(c )(1)
- in the course of bargaining a party has proposed a strike and if that strike were to occur, it would affect the public interest in that it is likely to disrupt social and economic interests and the effects of the disruption are likely to be widespread.: s50C(1)(d)(i) and(ii).

[3] MERAS further claims that the DHBs have failed to comply with the duty of good faith in s 4 of the Act and that this failure has been serious and sustained and has undermined the bargaining.

[4] MERAS has filed an application for facilitation setting out the background to the bargaining and its application for facilitation.

[5] The DHBs also seek an urgent reference to facilitation which MERAS supports.

[6] As a result, this is a joint application for facilitation and for urgency, noting that the grounds relied on for referring the matter to facilitation are those outlined above as set out in s 50C (1) (a) to (d).

### **Relevant facts**

[7] The facts have been drawn from the pleadings and the application filed by MERAS. It is essentially a joint application for facilitation and urgency.

[8] MERAS and the DHBs are parties to an expired Multi-Employer Collective Agreement (the MECA) that covers the work of midwives employed by the DHBs who are the 20 DHBs named in the MECA.

[9] MERAS represents 1187 of the 1430 midwives employed by the DHBs and initiated with the DHBs for a replacement agreement on 6 June 2017.

[10] The MECA between the parties expired on 31 July 2017.

[11] Until now the midwives have been grouped with nurses in the collective agreements applying to NZNO and MERAS midwives. From 2017 MERAS has repeatedly indicated that its members were seeking to differentiate midwives from nurses in the new collective agreement.

[12] The NZNO was also negotiating an expired MECA that covers 30,000 nurses and healthcare assistants but only approximately 200 midwives. The parties agreed that the DHBs would negotiate with the NZNO first but not that MERAS members would accept the same settlement.

[13] The negotiator teams for the parties met on 29 November 2017. This took place after the NZNO negotiators had reached an agreement with the DHBs which was being put forward to its members for ratification.

[14] A new date was set for negotiations to take place in December 2017, however this was postponed when NZNO members rejected the NZNO settlement.

[15] In May 2018 the Government convened an Independent Panel (IPP) to make recommendations on the protracted NZNO bargaining.

[16] The IPP made non-binding recommendations in its report on 21 May 2018 which referred to 'nurses' only, which term was subsequently clarified as including all the roles covered by the NZNO/DHB MECA, including midwives. The IPP did not discuss with MERAS its claims in regard to the midwifery workforce, and may not have known that the majority of employed midwives were not NZNO members.

[17] The DHBs provided NZNO with a revised offer on 28 May 2017 which included commitments about midwives which had not been discussed with MERAS e.g. that nurses and midwives would continue to be paid the same wage rates.

[18] The DHBs declined to meet with MERAS until the NZNO negotiations had settled.

[19] The NZNO MECA was ratified on 7 August 2018 following an Accord with the Ministry of Health, DHBs and NZNO that addressed issues affecting midwives as well as nurses.

[20] The DHBs and MERAS recommenced bargaining on 20 August 2018. On 17 September 2018 there was a further meeting of the parties to bargain. MERAS were informed that the Government had set up a Ministerial Oversight Group (MOG) comprising the Ministers of Finance, Health, Workplace Relations and State Services to oversee bargaining in the Health Sector.

[21] The DHBs made a formal offer to MERAS on 17 October 2018 which mirrored the NZNO settlement as to terms and conditions and included an agreement to have several working parties to consider change in the future.

[22] MERAS members rejected the offer by an overwhelming majority and voted for industrial action.

[23] MERAS members have taken industrial action for two hours at a time, twice each day over a two-week period in each of the 20 DHBs. A total of 540 strike notices being issued.

[24] Urgent mediation occurred on 14 November 2018 before the strikes commenced and again on 7 December 2018, after the strikes ended on 5 December 2018.

[25] MERAS members are proposing to strike again and the proposed strikes will increase in their scale and detrimental impact on the public.

### **MERAS's application for facilitation.**

[26] Section 50C(1) provides a ground for the Authority to accept a reference for facilitation. It must be satisfied that one or more of the grounds below exist:

#### **Grounds on which Authority may accept reference**

- (1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:
  - (a) that—
    - (i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and
    - (ii) the failure—
      - (A) was serious and sustained; and
      - (B) has undermined the bargaining;
  - (b) that—
    - (i) the bargaining has been unduly protracted; and
    - (ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement;
  - (c) that—

- (i) in the course of the bargaining there has been 1 or more strikes or lockouts; and
- (ii) the strikes or lockouts have been protracted or acrimonious:

(d) that—

- (i) in the course of bargaining, a party has proposed a strike or lockout; and
- (ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

**Section 50C(1)(b) – bargaining unduly protracted**

[27] Bargaining was initiated by MERAS between the parties on 6 June 2017, more than a year prior to this application. During that time, the parties met for the purposes of bargaining and have also been assisted by a mediator for the purposes of bargaining. The parties have been unable to conclude their bargaining.

[28] In these circumstances, I find that the bargaining has become unduly protracted.

**Section 50C(1)(c) – one or more strikes that have been protracted or acrimonious**

[29] The application states that there have been a number of strikes in a two week period of two hours a day, twice each day in each of the 20 DHBs with a total of 540 strike notices issued.

[30] I find that the strike action has had an impact upon the women and their babies requiring midwife services although MERAS attempted to minimise the impact by the short duration nature of the strikes.

**Outcome**

[31] MERAS sets out in the application that its members are proposing to strike again and that the strikes will increase in their scale and the detrimental impact on the public.

[32] On the basis of the details set out in the application, it is my view that the parties have met the grounds under s50C(1)(b) and (c) of the Act.

[33] The DHBs support the application for facilitation.

[34] The bargaining has clearly been protracted, taking place over a significant period of time. There have been a number of strikes and further strike action is proposed which, if it takes place, I find will affect the public interest substantially.

[35] In all the circumstances I grant the application for facilitation.

**Costs**

[36] Given that this matter has proceeded by consent, it is my view that costs should lie where they fall.

**Eleanor Robinson**

**Member of the Employment Relations Authority**