

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 391
3047872

BETWEEN

NORTHLAND DISTRICT
HEALTH BOARD
Applicant

A N D

ASSOCIATION OF
PROFESSIONALS AND
EXECUTIVE EMPLOYEES
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Susan Hornsby-Geluk, counsel for Applicant
Bill Manning, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: None from Applicant
None from Respondent

Date of Determination: 6 December 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. I grant the application for facilitation.

B. Given this matter has largely proceeded by consent, costs are to lie where they fall.

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 Northland District Health Board (DHB) and the Association of Professionals and Executive Employees (APEX).

[2] The applicant applies for facilitation in reliance on s.50C(1)(b) to (d) of the Act. The application by the DHB notes that APEX supports facilitation only on the grounds set out in s.50C(1)(b), namely that in the course of the bargaining there have been one or more strikes.

[3] The DHB says that the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties, APEX's members have engaged in repeated strike action and APEX has notified the DHB of its intention to escalate strike action in the event the bargaining remains unresolved. The DHB is concerned that in such a case the public interest will be affected substantially.

[4] The DHB has filed an application for facilitation setting out the background to the bargaining and its application for facilitation. The DHB also seeks an urgent reference to facilitation.

[5] Both the DHB and APEX have jointly agreed to support the application for facilitation and an application for urgency, noting that the grounds relied on for referring the matter to facilitation in respect of APEX is in respect of s.50C(1)(c), namely that there have been one or more strikes.

[6] I have determined pursuant to s.174D of the Act that no investigation meeting is required to be held to determine this application.

Relevant facts

[7] The facts have been drawn from the pleadings and the application filed by the DHB. As this is essentially a joint application for facilitation, affidavit evidence has not been filed.

[8] Bargaining was initiated by APEX on 3 October 2017 for the renewal of a single employer collective agreement (SECA) in place between the parties.

[9] The DHB employees 16 anaesthetic technicians, all of whom are members of APEX and fall within the coverage of the proposed SECA. These employees are an integral part of DHB's operating theatre teams.

[10] The anaesthetic technicians assist with the administration and monitoring of anaesthesia and have extensive knowledge of anaesthetic techniques, instruments, supplies, and technology.¹

[11] A bargaining process agreement was signed by the parties on 10 November 2017 (BPA). Bargaining took place between 22 November 2017 and 28 February 2018. Bargaining was adjourned for some months pending the outcome of bargaining between the New Zealand Nurses Organisation and the 20 DHBs.

[12] On 14 September 2018, the DHB tabled its first offer which was subsequently rejected by members of APEX. During September, APEX sent notices of intended strike action to the DHB. Strike action did not occur at that point. On 27 September 2018, the DHB and APEX attended mediation with the assistance of the Ministry of Business, Innovation, and Employment (MBIE) in an unsuccessful effort to avert the 3 October 2018 strike action. Mediated bargaining occurred during October 2018. Further offers of settlement were made by each of the parties respectively during October. A further mediation also took place for the purposes of bargaining on 10 October 2018.

[13] Differences were unable to be resolved and on 17 October 2018, members of APEX engaged in strike action for 24 hours. A third strike was held on 31 October 2018. In the case of each strike action, general surgical, orthopaedic and gynaecological procedures were postponed. Further strike action took place on 7 and 8 November which resulted in further postponement of neurological, orthopaedic, gynaecological and otorhinolaryngology procedures. A total of six strikes have been held in relation to the bargaining to date. Further mediation in respect of bargaining took place on 26 November 2018 but bargaining has not been concluded.

[14] In the course of the mediation on 26 November 2018, the DHB and APEX agreed to make a joint application to the Authority for referral to facilitation. The parties seek assistance from the Authority to move the bargaining forward.

Reference to facilitation

[15] 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:

¹ DHB's application for facilitation.

50C 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

[16] Bargaining was initiated between the parties on 3 October 2017, 14 months prior to this application. The parties have 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. 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

[17] The application states that there have been six strikes. As a result of the strike action, certain medical procedures were postponed. The application sets out that strike action will be escalated if settlement is not reached or the Authority does not accept this referral to facilitation.

Outcome

[18] On the basis of the details set out in the application, it is my view that the parties have met the grounds under s.50C(1)(b) and (c) of the Act. APEX states that it supports the application to the Authority for facilitation on the grounds that there has been more than one strike. In fact there have been six strikes. Further, it is clear that the bargaining has been protracted, taking place for some 14 months.

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

Costs

[20] Given this matter has largely proceeded by consent, costs should lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority