

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 55
3031206

BETWEEN CAPITAL AND COAST
DISTRICT HEALTH BOARD
First Applicant

NINETEEN OTHER DISTRICT
HEALTH BOARDS (LISTED IN
THE SCHEDULE TO THIS
DETERMINATION)
Second to Twentieth Applicants

AND THE NEW ZEALAND NURSES
ORGANISATION
INCORPORATED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Susan Hornsby-Geluk, Counsel for the Applicant
Jock Lawrie, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 June 2018 from Counsel for the Applicant
22 June 2018 from Counsel for the Respondent

Determination: 26 June 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The parties are referred to facilitation.

B. Costs are reserved.

Employment relationship problem

[1] Capital and Coast District Health Board together with 19 other District Health Boards, (the DHBs) seek the assistance of the Authority to resolve difficulties they are

having in concluding a collective agreement with the The New Zealand Nurses Organisation (NZNO), through reference to facilitation.

Reference to facilitation

[2] Before a reference to facilitation can be accepted, I must be satisfied that there have been serious difficulties in concluding a collective agreement.¹ The Court of Appeal has held that reference to “difficulties” in s 50B of the Employment Relations Act 2000 (the Act) should be read as a reference to “serious difficulties”.²

Attempts by parties to conclude a collective agreement

[3] The Multi-Employer Collective Agreement (MECA) between NZNO and the DHBs dated 24 August 2015 to 31 July 2017, has been under negotiation since 7 June 2017.

[4] Following negotiations between the parties during the months of July, August, September, October and November 2017, a settlement offer in respect of a first draft collective agreement failed to be ratified by members of NZNO.

[5] The parties attended mediation on 31 January 2018 provided by the Ministry of Business, Innovation and Employment (MBIE) in relation to the bargaining. Following mediation, a settlement was reached between the parties in respect of a second draft collective agreement. This second collective agreement was not ratified by members of NZNO.

Independent Panel Process

[6] On 2 April 2018, the Prime Minister proposed setting up an independent panel (Panel) to hear from the parties and to provide recommendations on the way to resolve the outstanding issues in the bargaining. The Independent Panel Process was established on 16 April 2018. The Panel heard submissions from the parties. Following consideration of the issues, on 21 May 2018, the Panel released a report including a set of recommendations.

¹ Employment Relations Act 2000, s 50B

² *McCain Foods (NZ) Limited v Service and Food Waters Union Nga Ringa Tota Inc.* [2009] 6 NZLR 426

[7] Following the Panel's report, a third settlement was reached between the parties in respect of a collective agreement. NZNO members voted on the offer during June 2018.

[8] On 18 June 2018, the NZNO informed the DHBs that the third draft collective was not ratified by NZNO members.

[9] On 20 June 2018, NZNO gave notice to the DHBs on behalf of its members of their intention to strike from 7am on Thursday, 5 July 2018 until 7am on Friday, 6 July 2018, and then from 7am on Thursday, 12 July 2018 to 7am on Friday, 13 July 2018.

Proceedings and process in the Authority

[10] On 18 June 2018, the DHBs filed a statement of problem in the Authority seeking a referral for facilitation pursuant to s 50B and 50C of the Act and attaching relevant documentation.

[11] An urgent telephone conference was convened on 19 June 2018 between the parties and the Authority. The parties were directed to attend urgent mediation. The NZNO was directed to file an urgent statement in reply. Both parties were directed to file submissions in respect of the application by the DHBs.

[12] The statement in reply by NZNO stated that it did not oppose the application for a referral for facilitation.

[13] On 21 June 2018, Mr Kevin Gordon McFadgen, an Employment Relations Specialist and advisor to the Southern Region employed by District Health Board Shared Services ("DHBSS") filed an affidavit in support of the application by the DHBs and attaching relevant documentation. Submissions on behalf of the DHBs were filed on the same date.

[14] On 25 June 2018, affidavits were filed by Ms Lesley Moana Harry, NZNO Industrial Advisor and Ms Hilary Graham-Smith, Associate Professional Services Manager and Acting Manager Nursing, in relation to the application by the DHBs. There was no opposition to the reference for facilitation. Submissions were also filed by the NZNO.

Serious difficulties in concluding a collective agreement

[15] I am satisfied there have been serious difficulties in concluding a collective agreement. The bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties. I have accepted the reference to facilitation.

Authority's investigation

[16] By consent of the parties this matter has been determined on the papers before the Authority.

[17] As permitted by s 174E of the Act, this Determination has not recorded all the evidence but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Grounds for reference to facilitation

[18] The grounds relied on by the DHBs for referral to facilitation are those contained in s 50C(1)(b) which requires that I am satisfied that:

- (a) The bargaining has been unduly protracted; and
- (b) Extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

Unduly protracted bargaining

[19] The parties have been in negotiations for more than a year and have had 16 days of meetings for the purpose of bargaining. There have been 2 offers of settlement in respect of a collective agreement, mediation assistance, engagement in an independent process conducted by a Panel, recommendations by the Panel, a third offer of settlement in respect of a collective agreement followed by further mediation.

[20] Strike action is imminent.

Extensive efforts

[21] The focus of this test is upon the quality and dynamism of bargaining and the nature and quality of the attempts that may have been employed by one or both of the parties to achieve settlement of the collective agreement. A qualitative analysis is a significant element of this test.³

[22] In this case the bargaining period has extended over a period of more than 12 months. In addition, there have been 16 meeting days for the purposes of bargaining, mediation and engagement with the Panel and recommendations to the parties by the Panel.

[23] I am satisfied that that no effective progress in bargaining has been made, and there remain a number of issues outstanding between the parties.

Conclusion

[24] Bargaining for a collective agreement has extended over the period of the last 12 months and has been unduly protracted. There are serious difficulties in bargaining and these serious difficulties have precluded the parties from entering into a collective agreement. The extensive efforts by the parties have failed to resolve the serious difficulties and it is now time for the facilitation process to be used to assist in the conclusion of a collective agreement.

Costs

[25] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the DHBs shall have 28 days from the date of this Determination in which to file and serve a memorandum on the matter. NZNO shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred, and be accompanied by supporting evidence.

[26] The parties could expect me to determine costs, if asked to do so, on the usual “daily tariff” basis after taking into account that this matter was dealt with on the papers and did not necessitate an investigation meeting.

³ *Service and Food Workers Union Nga Ringa Tota Inc. v Sandford Limited* [2012] NZEmpC 168 at [172] and [73]

Anna Fitzgibbon
Member of the Employment Relations Authority

SCHEDULE – LIST OF 19 FURTHER APPLICANTS

Northland District Health Board

Waitemata District Health Board

Auckland District Health Board

Counties Manukau District Health Board

Waikato District Health Board

Bay of Plenty District Health Board

Lakes District Health Board

Tairāwhiti District Health Board

Taranaki District Health Board

Hawkes Bay District Health Board

Whanganui District Health Board

Mid-Central District Health Board

Hutt Valley District Health Board

Nelson Marlborough District Health Board

West Coast District Health Board

Canterbury District Health Board

South Canterbury District Health Board

Southern District Health Board

Wairarapa District Health Board