

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 649
3079979

BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD First Respondent
AND	NORTHLAND DISTRICT HEALTH BOARD Second Respondent
AND	WAITEMATA DISTRICT HEALTH BOARD Third Respondent
AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Fourth Respondent
AND	WAIKATO DISTRICT HEALTH BOARD Fifth Respondent
AND	TARANAKI DISTRICT HEALTH BOARD Sixth Respondent
AND	TAIRAWHITI DISTRICT HEALTH BOARD Seventh Respondent
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Eighth Respondent
AND	LAKES DISTRICT HEALTH BOARD Ninth Respondent

AND HAWKE'S BAY DISTRICT
HEALTH BOARD
Tenth Respondent

AND WHANGANUI DISTRICT
HEALTH BOARD
Eleventh Respondent

AND MIDCENTRAL DISTRICT
HEALTH BOARD
Twelfth Respondent

AND WAIRARAPA DISTRICT
HEALTH BOARD
Thirteenth Respondent

AND HUTT VALLEY DISTRICT
HEALTH BOARD
Fourteenth Respondent

AND CAPITAL AND COAST
DISTRICT HEALTH BOARD
Fifteenth Respondent

AND NELSON MARLBOROUGH
DISTRICT HEALTH BOARD
Sixteenth Respondent

AND CANTERBURY DISTRICT
HEALTH BOARD
Seventeenth Respondent

AND SOUTHERN DISTRICT
HEALTH BOARD
Eighteenth Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Omar Hamed for the Applicant
Susan Hornsby-Geluk, counsel the Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 8 November 2019 from the Applicant
7 November 2019 from the Respondent

Date of Determination: 11 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Association of Professionals and Executive Employees (APEX) and fifteen of the Respondent District Health Boards (DHBs) are parties to a multi-employer collective agreement (MECA) covering psychologists.

[2] Psychologists, including clinical psychologists and health psychologists, are employed in District Health Boards across a range of mental health services including forensic services, community mental health, addiction and inpatient services. Psychologists also work in physical health services including child health, cancer, cardiac, spinal, diabetes and older persons' health.

[3] APEX represents 580 psychologists who are covered, or will be covered, by the MECA with the fifteen DHBs and three other DHBs who are to become parties. This equates to approximately 85% of all psychologists employed by the DHBs.

[4] The MECA expired on 28 February 2019 but continues in force by virtue of s 53 of the Employment Relations Act 2000 (the Act). Prior, and subsequent to, its expiry the parties have engaged in various efforts to bargain over the terms for a new MECA. However, as of November 2019, a new MECA has not been concluded.

[5] APEX now applies for facilitation pursuant to s 50 of the Act. This application is supported by the DHBs who confirm the parties are having serious difficulties in concluding a MECA and facilitation would assist in resolving those difficulties.

[6] By agreement this matter has been determined on the papers. As such, the facts that I set out in this determination are based on the untested assertions and allegations set out in APEX's application, the supporting affidavits, and the submissions filed by the parties.

The application

[7] The Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds set out in s 50(1) of the Act exist.

[8] In the present case, reference for facilitation is made by APEX in reliance on s 50C(1)(b), (c) and (d) of the Act namely:

- a. The bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties (section 50C(1)(b)); and/or
- b. In the course of the bargaining there have been one or more strikes which have been protracted or acrimonious (section 50C(1)(c)); and/or
- c. APEX has proposed strikes that, if they were to occur, would be likely to affect the public interest substantially (section 50C(1)(d)).

Relevant background facts

[9] By letter dated 31 December 2018 APEX initiated bargaining for a collective agreement to replace the MECA that was then in force and to include three new DHBs as parties.

[10] Thereafter the parties met for four days of bargaining on 18 and 19 March, 3 May, and 10 July 2019.

[11] On 14 June, the DHBs tabled their first offer. This was subsequently rejected by members of APEX.

[12] On 16 July, APEX served its first strike notice. This provided 14 days' notice of an overtime ban that applied to APEX members at 17 DHBs for the period 31 July to 3 September.

[13] On 30 July the parties attended mediation. As their differences were unable to be resolved, APEX members engaged in the strike action in accordance with their notice of 16 July.

[14] Between July and October no bargaining took place. The DHBs had reached the limit of their financial mandate and therefore made the decision that a further mediation with APEX was not worthwhile.

[15] The DHBs' stance led to further strike action by APEX members.

[16] A second strike took place between 3 September and 1 October. During this period, APEX members placed a prohibition on accepting new patients onto psychologists' caseloads and placed a ban on group work with patients. This applied for APEX members at 16 DHBs.

[17] A third strike took place from 1 October to 1 November 2019. During this period face-to-face contact with patients, and family members of patients, was limited to two hours per day. This applied to APEX members at 18 DHBS.

[18] On 17 October the DHB made a second offer of settlement. The parties also attended a second mediation. The offer made by the DHBs was again voted down by APEX members.

[19] In early November APEX opened ballots for a range of partial and full strikes by its Members. I understand these will target particular services psychologists provide within DHBS including forensic court reports, psychometric testing, and consultation within multi-disciplinary teams.

Ground One: Bargaining (s 50C(1)(b))

[20] I accept the joint submission that bargaining between the parties has been unduly protracted so as to meet the threshold set out in s 50C(1)(b) of the Act.

[21] It is clear that extensive efforts have been made to resolve the difficulties between the parties precluding them from entering into a new collective agreement. This includes six days of bargaining of which two were with a mediator, two settlement offers, three strikes, and further threatened strike action.

[22] In light of the impasse that has been reached, due largely to APEX's claims exceeding the DHB's financial and other mandates, I agree that further bargaining or mediation are unlikely to progress the matters in dispute.

Ground Two: Protracted strikes (s 50C(1)(c))

[23] I accept that the strikes have been protracted so as to meet the threshold set out in s 50C(1)(c) of the Act.

[24] From 31 July 2019 there have been three partial strikes by APEX members that have each lasted approximately one month. Further on-going strike action is imminent. The strike action has caused disruption to the operation of the DHBS and impacted not only the DHBS but its patients, their family, the Courts and the community.

Ground Three: Public interest affected (s 50C(1)(d))

[25] The strike action has affected, and will continue to affect, the public interest substantially so as to meet the threshold set out in s 50C(1)(d).

[26] I am fortified in this finding by the following evidence:

- a. The delays caused by the ongoing strikes have had a compounding effect on the DHB waiting lists, which have grown to 10 weeks to get an appointment with a psychologist. This has a significant impact for people with acute mental health issues, who require urgent care.
- b. The delays in scheduling appointments impacts almost every area of the services provided by DHBs in which psychologists provide support, including mental health services, child and family services, cancer and renal care.
- c. The increase in time between appointments has a significant impact on those patients who require the ongoing treatment of psychologists. For example, at Southern DHB, the time between appointments is now up to seven weeks. This has an impact on patients' wellbeing, as well as their families and the wider community.
- d. The delays in scheduling appointments caused by the partial strike action will have a roll-on effect for DHBs, meaning that there will be a significant time period before the services can be returned to normal.

[27] In addition, I am told that APEX is now balloting members on thirteen different strikes. If ballots close in favour of all strikes it appears that widespread disruption will occur that will inevitably affect the public interest significantly. For example, the proposed strikes will involve:

- a. Court reporting under the Children's and Young People's Wellbeing Act 1989, Protection of Personal and Property Rights Act 1988, Oranga Tamariki Act 1989, Criminal Procedure (Mentally Impaired Persons) Act 2003, Sentencing Act 2002, and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 will not be completed for periods between two and four weeks depending on the DHB at three DHBs.

- b. Psychologists will withdraw their participation at multi-disciplinary team meetings in addiction, mental health, child development, and physical health services at four DHBs.
- c. Psychologists at two DHBs will stop seeing new patients for a period of either two weeks or one month.
- d. There will be a ban on psychometric testing at four DHBs.
- e. There will be full withdrawal of labour at five DHBs and there is likely to be picketing of hospitals.
- f. Psychologists will not see patients for more than two hours per day at one DHB for a week.
- g. Psychologists at all DHBs will see patients for only one hour on one day.
- h. Union members at two DHBs are currently discussing withdrawing from supervising intern psychologists.

Outcome

[28] Taking into account the parties' agreement that a reference to facilitation is necessary, and my findings that the grounds under s 50C(1)(b), (c) and (d) of the Act have been met, I grant the application for facilitation on an urgent basis.

[29] Given this matter has proceeded by consent; costs should lie where they fall.

Jenni-Maree Trotman
Member of the Employment Relations Authority