

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

**[2019] NZERA 720**

**3082655**

BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES (APEX) Applicant
AND	NEW ZEALAND BLOOD SERVICE Respondent
AND	9 DISTRICT HEALTH BOARDS Respondent

Member of Authority: Eleanor Robinson

Representatives: Bill Manning, Counsel for Applicant  
Blair Scotland, Counsel for Respondents

Investigation Meeting: On the papers

Submissions: 10, 16 & 17 December 2019 from the Applicant  
13 & 17 December 2019 from the Respondent

Determination: 18 December 2019

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] This is an application for urgent facilitation pursuant to s50C of the Employment Relations Act 2000 (the Act) in respect of the collective bargaining currently underway between the Association of Professionals and Executive Employees (APEX) and New Zealand Blood Service (NZBS).

[2] APEX claims that pursuant to s50C of the Act:

- the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties: s50(1)(b);
- there have been one or more strikes during the course of the bargaining, and the strikes have been protracted: s50(1)(c )
- APEX has proposed strikes which, if they were to occur, would be likely to affect the public interest substantially: s50C(1)(d).

[3] NZBS opposes the application for facilitation on the basis that the statutory grounds are not made out on the evidence.

[4] NZBS further opposes the application for urgency on the basis that it is not warranted in this situation, particularly as the parties are still bargaining, the parties having attended mediation on 11 December 2019 with a further mediation scheduled to take place on 19 December 2019.

## **Should facilitation be granted?**

[5] Apex initially applied for the facilitation to be adjourned in light of the fact that the parties have arranged to attend mediated bargaining on 19 December 2019, however now seeks a determination on the issue of facilitation.

[6] Section 50C(1) provides grounds 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.

[7] In the circumstances which are that the parties are actively engaged in mediated bargaining I find that the bargaining is not: “unduly protracted” pursuant to s 50(1)(b)(i) of the Act, nor have the efforts by the parties including mediation failed to resolve the difficulties precluding the parties entering into a collective agreement pursuant to pursuant to s 50(1)(b)(ii) of the Act.

[8] APEX has applied for facilitation on the basis that there have been strikes with a further four strikes planned which it submits are likely to affect the public interest substantially. APEX places primary reliance on s 50(1)(d) and on s 50C(2) of the Act which states:

For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if –

- (a) The strike or lockout is likely to endanger the life, safety of health of person; or
- (b) The strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

[9] APEX submits that:

- The life preserving services provisions of the Code of Good Faith for the Public Health Sector minimise the risk of industrial action in the public health sector jeopardising life or risking permanent disability. However there are likely to be

hundreds of laboratory tests which, while clinically indicated, would not qualify as “life preserving services”;

- Based on experience from the strikes to date, it is submitted that the pending industrial action for which notices have been given is likely to cause significant adverse health consequences for patients, thereby endangering their health in terms of s 50C(2)(a).
- Alternatively, even if the disruption to the delivery of patient services is not considered likely to endanger the health of persons, undoubtedly it constitutes “social disruption” and furthermore, given the scope and duration of the strike action, its effects “are likely to be widespread”.

[10] The Respondent submits that the strike action and further strike action proposed by the Applicant’s members will not affect the public interest substantially on the basis that:

- The strikes to date have had little or no impact on most of the Respondents once rosters were reconfigured, and it is envisaged that the same will be true of any future strikes;
- The impact of strike action taken to date has been significantly muted as, for most of the Respondents, less than 50% of their medical laboratory workers are members of the Applicant. The majority of their medical workers are members of another union that is not in bargaining or non-union members. This will remain the case for future strikes by the Applicant’s members.
- The Life Preserving provisions of Schedule 18 of the Act, requiring strike workers to perform work in certain life-threatening situations, were activated by only one of the ten Respondents in respect of the first strike, and only two of the ten Respondents (one Respondent’s activation being a mistake). These requests were dealt with appropriately by the Applicant’s members. As such, the Respondents have been able to manage the strike action effectively and without significant impact on patients, and the Respondents have no reason to believe this will not be the case going forward.

[11] After considering the submissions of the parties I do not find that the grounds as set out in s 50C(1)(d) of the Act are satisfied.

[12] The threshold for facilitation assistance is high. I find that in the situation in which the parties are still bargaining with the assistance of mediation, the application for facilitation has been made prematurely.

[13] Consequently it is my view that the situation between the parties has not reached the high threshold as set out in the statutory criteria to trigger the facilitation process in the Authority.

[14] In the circumstances I do not grant the application for facilitation.

#### **Costs**

[15] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[16] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**

**Member of the Employment Relations Authority**