IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 225
3055772

BETWEEN	NEW ZEALAND RESIDENT DOCTORS ASSOCIATION Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD AND 19 OTHER DISTRICT HEALTH BOARDS Respondents

Member of Authority:	Nicola Craig
Representatives:	Bill Manning, counsel for the Applicant Susan Hornsby-Geluk, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions and further information received:	11 and 12 April 2019 from the Applicant 11 April 2019 from the Respondents
Date of determination:	15 April 2019

DETERMINATION OF THE AUTHORITY

A. **The reference to facilitation for the New Zealand Resident Doctors Association and the District Health Boards is accepted.**

Employment Relationship Problem

[1] The New Zealand Resident Doctors Association (NZRDA) applied for a reference to facilitation under s 50B of the Employment Relations Act 2000 (the Act),

for the collective bargaining underway between it and the twenty district health boards (the DHBs). NZRDA is a union representing resident medical officers (RMOs), including house surgeons and registrars. The DHBs, amongst other things, operate New Zealand's public hospitals.

[2] The NZRDA sought urgency from the Authority, which was granted. The parties were directed to urgent mediation.

[3] I received affidavits; three from Melissa Dobbyn (an advocate for the NZRDA) and two from Gregory Peploe (an advocate for the DHBs).

[4] An investigation meeting was scheduled for 3 April 2019 if the matter could not be dealt with on the papers. That meeting was adjourned until 11 April 2019 to allow the parties to attend mediation on 5 April 2019. It was later agreed that the matter could be determined on the papers and submissions were then received.

[5] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Recent events

[6] Shortly after the application was filed, NZRDA members voted to take a four-day strike commencing on 25 March 2019. Notice was given to the DHBs but subsequently withdrawn when it was realised that the notice had not been given to the Chief Executive of the Ministry of Business, Innovation and Employment within the requisite time.

[7] Towards the end of mediation on 5 April 2019 an offer was made by the DHBs but this has since been rejected. This offer appears to be similar or the same as a previous offer except this time it was made on an unconditional basis.

[8] Another strike ballot of its members was undertaken by the NZRDA. The outcome was notified to the Authority on 12 April 2019. Notices have now been issued for NZRDA members, with the exception of Canterbury DHB members, to undertake a strike involving a complete withdrawal of labour from Monday 29 April to Saturday 4 May 2019.

The DHBs' position

[9] The DHBs' position, until submissions were received, was that while not opposing facilitation at some point, they did not accept that the statutory criteria were currently met. They considered that there was room for the parties to reach settlement themselves.

[10] However, the situation evolved and by the time submissions were filed on 11 April 2019, the DHBs recognised there was very little prospect of advancing bargaining without the intervention of the Authority through facilitation. Their current view is that urgent facilitation is now required.

Statutory criteria

[11] To accept the referral to facilitation, I must be satisfied that the parties have encountered serious difficulties with their bargaining.[1] The application for facilitation was made on the basis of the grounds in s 50C(1)(b), (c) and (d) of the Act.

[12] The barrier to facilitation is set high to allow and encourage collective bargaining and the settlement of collective agreements by the parties themselves.

[13] While the barrier is high, I am also mindful of the comments of Chief Judge Colgan in *Service & Food Workers Union Nga Ringa Tota Inc v Sanford Limited* [2] *(SFWU v Sanford)* that the Authority:

> …should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

Serious difficulties

[14] The previous multi-employer collective employment agreement (MECA) between the NZRDA and the DHBs had a term which ran from 13 February 2017 to 28 February 2018. The NZRDA gave notice initiating bargaining on 30 December 2017. A bargaining process agreement was signed on 10 April 2018.

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[1] S 50A(1) of the Act, as discussed in *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28

[2] *Service & Food Workers Union Nga Ringa Tota Inc v Sanford Limited* [2012] NZEmpC 168

[15] The parties undertook the following bargaining from March 2018:

(a) Bargaining with no mediator on:
- 6 and 7 March 2018
- 10 and 11 April 2018
- 1 and 2 May 2018
- 22 and 23 May 2018
- 31 July 2018
- 1 August 2018
- 4 and 5 September 2018
- 20 September 2018
- 17 October 2018

(b) Mediated bargaining on:
- 22 and 23 November 2018
- 14 December 2018
- 9 January 2019
- 24 January 2019
- 4 February 2019
- 7 February 2019

(c) Bargaining without a mediator on:
- 15 February 2019

(d) Mediated bargaining on:
- 21 February 2019
- 26 February 2019
- 28 February 2019
- 7 March 2019
- 5 April 2019

[16] The NZRDA filed its claims on 6 March 2018. The DHBs initially focused on issues-based discussions, rather than taking a more traditional positional approach. However, on 4 September 2018 the DHBs presented their claims.

[17] In terms of industrial action, four 48 hour strikes occurred; mid and late January 2019 and mid and late February 2019.

[18] Progress has been made on some issues in bargaining. Outstanding issues are focused around the collective agreement provisions which require the NZRDA's agreement for certain issues concerning RMOs' hours of work and training. The union describe these provisions as recognising the vulnerability of RMOs, who are

often required to rotate to another DHB employer and are also very dependent on the goodwill of their superiors. The DHBs see these provisions as counter-productive to the delivery of safe, effective and efficient health services and that they "required change"[3].

[19] The NZRDA agreement issue remains the single most significant barrier to resolution. Extensive discussion has occurred about it. Senior medical representatives have made oral and written presentations to the bargaining group. Some of the DHBs commissioned a report on the effects of the expired agreement's provisions. A hui with key players such as the Medical Council, the vocational colleges and the Ministry of Health has been proposed. The prospect of devolving approval to members has been discussed. The establishment of at least two alternative structures for dealing with the concerns have been mooted and explored. And yet there is no agreement.

[20] I conclude that the parties have been experiencing serious difficulties for some months in getting the NZRDA agreement issue resolved and therefore getting their bargaining concluded.

Unduly protracted with extensive efforts failing to resolve difficulties – s 50C(1)(b)

[21] In order to satisfy the s 50C(1)(b) criteria bargaining must have been unduly protracted and extensive efforts must have been made to resolve the difficulties.

Unduly protracted bargaining

[22] Bargaining was initiated some sixteen months ago, although the actual time at the bargaining table has been thirteen months. There has been 27 days of bargaining, including 12 days of bargaining with the assistance of a mediator.

[23] Bargaining has clearly been a lengthy process. However, mere protraction is not enough to satisfy the test. There should be excessive or disproportionate protraction as distinct from reasonable or expected protraction.[4]

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[3] First affidavit of Gregory Peploe at [14]

[4] *McCain Foods (NZ) Limited v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28 at [64]

[24] The study of 21 accepted referrals to facilitation undertaken by Chief Judge Colgan in the *SFWU v Sanford* decision provided the following bargaining information:

(a) Length – a range of 9 to 54 months, with an average of 19.6 months and a median of 19.5 months;

(b) Number of total sessions - a range of 2 to 46, with an average of 15 and a median of 8; and

(c) Number of mediated sessions – a range of 2 to 16 with an average of 5 and a median of 3.[5]

[25] The bargaining here has been over a shorter period than the average and median in those cases. However, a substantially higher number of bargaining days have been undertaken here than was the average. The number of mediated days here is over twice the average and four times the median.

[26] Earlier in the proceedings the DHBs asserted that the current bargaining was not dissimilar in duration to previous bargaining between the parties. However, information compiled and attached to Ms Dobbyn's first affidavit indicates that the average time from initiation to settlement in the previous five NZRDA/DHBs bargaining was 14 months, whereas it is now over 15 months since initiation of the current bargaining, with no indication that settlement is imminent.

[27] Additionally, three of those sets of negotiations had no strike days, and the others had two and four. During the current negotiations there have been eight strike days, with a further five notified. This is more than in the last five negotiations put together.

[28] There are a number of other considerations in addition to the length of time itself. The one-year period of continuation of the collective agreement after the specified expiry date has now itself expired.[6] NZRDA's RMO members are now employed on individual employment agreements based on the expired collective agreement. This is of particular significance to RMOs who may be required to rotate to a new DHB and thus a new employer. There is now the possibility of RMOs being

[5] *SFWU v Sanford* [2012] NZEmpC 168 at [46]
[6] S 53 of the Act

offered terms and conditions of employment which are significantly different to those of the expired collective agreement.

[29] Also of relevance is the situation regarding the other, newly established, union representing RMOs, known as SToNZ.[7] That group has concluded its collective agreement with the DHBs which is in effect until 19 December 2020. After 6 May 2019, NZRDA raises the prospect that, for the first 30 days of the RMOs' new employment, even NZRDA members will have to be employed under the SToNZ MECA.[8] NZRDA believes that the terms and conditions of the SToNZ MECA are substantially inferior to the terms of the NZRDA MECA.

[30] I also take into account the approximately 3,300 RMOs being bargained for by the NZRDA, which is a high proportion of the country's RMOs. The number of employer parties also adds to the complexity of the bargaining, with Gregory Peploe identifying in his first affidavit that the employers require consensus and unanimous agreement rather than majority decision making.

[31] Taking a wider view, the work of RMOs is of importance to the operation of the public health system and thus the health and welfare of patients. The public interest in the bargaining, particularly the strike action, is high.

[32] I conclude that bargaining has been unduly protracted.

Extensive efforts

[33] The bargaining has encompassed a significant number of days, both in terms of time without a mediator and days when a mediator was used. Compared with the decisions summarised in *SFWU v Sanford,* there has been almost twice the average number of sessions and over twice the average number of mediated sessions here.

[34] The parties have used both claims or position-based bargaining and interest-based bargaining.

[35] Although there has been some continuity, the parties have had the opportunity to mediate with different mediators.

[7] SToNZ – Specialty Trainees of New Zealand
[8] The amendment to s 62 of the Act comes into force on 6 May 2019

[36] Not surprisingly the parties have different views about whether the other has always engaged constructively in bargaining. However, I accept that extensive efforts have been made to resolve the bargaining.

Summary

[37] The parties are having serious difficulties in concluding a collective agreement and bargaining has been unduly protracted despite extensive efforts having been made to resolve the issues between them. The criteria in s 50(1)(b) are met.

Other criteria - s 50C(1)(c) and s 50C(1)(d)

[38] NZRDA relied additionally on the two criteria which specifically involve industrial action, namely s 50C(1)(c) and s 50C(1)(d) of the Act. As noted above, strikes have already occurred and notice has been given for a five-day strike. Substantial evidence was filed regarding elements of these criteria. I did not take the DHBs' submissions to necessarily accept that these two criteria had been met.

[39] However, the Easter break and the notified strike are not too distant. Given the urgency to advance a referral to facilitation which both parties conveyed to the Authority, I do not propose to examine these two criteria.

Conclusion

[40] Even though one of the criteria under s 50C of the Act is established, I retain the discretion not to refer the parties to facilitation. This is where a common sense assessment of the overall position is required.[9] Having considered all of the circumstances including the public interest, I conclude that a reference to facilitation is desirable and grant the application.

Costs

[41] Costs are not sought.

Nicola Craig
Member of the Employment Relations Authority

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[9] At n 2