

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 298
3061232

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| BETWEEN | SECRETARY FOR EDUCATION Applicant |
| AND | NEW ZEALAND POST PRIMARY TEACHERS' ASSOCIATION TE WEHENGARAU Respondent |

Member of Authority: Michael Loftus

Representatives: Antoinette Russell, counsel for Applicant
Tanya Kennedy, counsel for Respondent

Investigation Meeting: On the papers up to and including 21 May 2019

Determination: 21 May 2019

DETERMINATION OF THE AUTHORITY

[1] The Secretary for Education seeks an urgent reference to facilitation pursuant to ss 50A to 50I of the Employment Relations Act 2000 with respect to bargaining with the New Zealand Post Primary Teachers' Association Te Wehengarau (PPTA) for the renewal of a collective agreement covering secondary school teachers.

[2] The PPTA objects and asserts *the high threshold required* for a reference to facilitation has not yet been met. It also considers the application pre-emptive and argues the parties should instead return to mediation and arranged for that to occur today (21 May) after our teleconference on 17 May. Unfortunately today's efforts have not resolved the issues.

[3] During the telephone conference the parties agreed I determine the application on the papers with the Statement of Problem constituting the Secretary's input and the response constituting that of the PPTA.

[4] To be accepted a request for facilitation must meet one or more of the criteria specified in s 50C(1). Those criteria are:

- (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 one or more strikes or lockouts; and*
 - (ii) *The strikes or lockouts have been protracted or acrimonious;*
- (d) *That –*
 - (i) *In the course of the 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.*

[5] Section 50C(3) specifies circumstances in which the Authority is precluded from granting an application for facilitation but those circumstances do not exist here.

[6] The Secretary relies on two of the above grounds. She says that having been initiated last August the bargaining should now be considered protracted and claims extensive efforts have been made to resolve the bargaining with the parties meeting on no less than 22 days with a mediator assisting on 7 of those (s 50C(1)(b)). Today can be added to the above count. The Secretary also notes there were pre-bargaining meetings which added another 6 days and during which claims were presented and issues discussed. Finally the Secretary notes there have been multiple offers, all of which teachers have rejected.

[7] The PPTA considers the process is not unduly protracted especially given the agreements nationwide coverage which, along with the numbers covered, inevitably

causes delay given the union's duty to consult its membership. The PPTA also submits mere protraction is not, in itself, sufficient grounds for a referral to facilitation. The protraction should be excessive or disproportionate as opposed to reasonable and expected which, it is submitted, this is.

[8] The secretary also relies on s 50C(1)(d) having noted strikes are planned. In reply the PPTA argues the Secretary has failed to advance any arguments in support of this contention. It also notes the Secretary did not react to a strike planned for 3 April.

[9] Finally the PPTA argues the Secretary has failed to identify what particular matter it wishes to have referred as required by s 50B and closes by submitting that notwithstanding today's mediation the proper course of action would be to order more.

[10] Having considered the parties argument I reach the following conclusions.

[11] I consider the bargaining is protracted and considerable efforts have been made to resolve it. In doing so and while noting the PPTA's comment each case turns on its own facts I also have to be cognisant of indicia other cases provide, especially those concerning a similar industry or bargaining. I also have to say I consider the pre-bargaining efforts to be part of the process especially if claims were presented and discussed as both parties statements imply. That is, to all intents and purposes, part of the bargaining process. Here I note time in bargaining is considerably more than occurred with PPTA's fellow education union, New Zealand Educational Institute Te Riu Roa, in a situation where both union and Secretary considered a joint request for facilitation warranted.¹ A also note time since imitation exceeds that in the NZEI case.

[12] With respect to the threatened strike action I note the Secretary's comments during our telephone conference and the claim this will have a substantial effect on the public and its interests in that over 280,000 students and a number of their caregivers will be affected. I agree and conclude that will, in all probability, cause widespread disruption to the social and economic interests of those people and there is the possibility of further collateral harm.

¹ *Secretary of Education and New Zealand Educational Institute Te Riu Roa* (joint application) [2018] NZERA Wellington 95

[13] The Secretary did identify the issues she wants referred in paragraph 2.18 of the application though a cynic might suggest it covered virtually everything – definitely the most important issues of remuneration and workload.

[14] Finally I note the PPTA's view further mediation would be a better option. I disagree. This is a dispute that has been the subject of widespread public comment and reporting which would suggest both parties are wedded to their positions and showing a degree of intransigence. I consider something different might assist in breaking the impasse. Facilitation is different – mediation is not.

[15] For the above reasons I conclude there are multiple grounds for accepting the application.

Conclusion

[16] Accordingly I refer to facilitation the current bargaining between the Secretary of Education and New Zealand Post Primary Teachers' Association Te Wehengarau relating to secondary school teachers.

[17] Another Member will contact the parties shortly to organise the facilitation process.

[18] There is no issue as to costs.

Michael Loftus
Member of the Employment Relations Authority