

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 15
3075312

BETWEEN NATIONAL UNION OF PUBLIC
EMPLOYEES INCORPORATED
Applicant

AND CANTERBURY DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew McKenzie, counsel for Applicant
Chris Jury for Respondent

Investigation Meeting: On the papers before the Authority

Submissions (and further information) Received: 9 December 2019 and 14 January 2020 from Applicant
17 December 2019

Determination: 15 January 2020

DETERMINATION OF THE AUTHORITY

- A. The application for referral to facilitation is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] The National Union of Public Employees Inc. (NUPE) seeks the assistance of the Authority to resolve the difficulties it is having in concluding a collective agreement with the Canterbury District Health Board (CDHB), through reference to facilitation.

[2] By the consent of the parties this matter has been determined on the papers before the Authority. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not referred to all submissions received but they have all been carefully considered.

Reference to facilitation

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

Background to application

[4] NUPE and the Canterbury District Health Board are parties to a collective agreement. On 3 December 2018 NUPE initiated bargaining to renew its collective agreement with CDHB.

[5] The parties have attended four bargaining sessions and have been assisted in their bargaining by a mediator employed by the Ministry of Business Innovation and Employment twice.

[6] The application for referral to facilitation was lodged with the Authority on 17 September 2019. At that time the parties had attended mediation once. With the consent of the parties a direction was made for them to participate in further mediation.

[7] On 25 November 2019 I held a case management call with the parties who advised me that they had remained unable to conclude a collective agreement. A timetable was set for the parties to make submissions on the application for reference to facilitation.

Grounds for reference to facilitation

[8] The grounds relied on by NUPE for referral to facilitation are those contained in section 50C(1)(a) or (b) which requires me to be satisfied that:

- a) In the course of bargaining, a party has failed to comply with the duty of good faith and the failure was serious and sustained and has undermined the bargaining; or

¹ Employment Relations Act 2000, section 50B.

² *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] 6 NZELR 426.

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

Breaches of good faith

[9] NUPE says CDHB has deceived and misled it during bargaining. NUPE says CDHB failed to follow through on its assertion that its offer for an increased remuneration package would be the same as the offer presented to the PSA and those on IEA's. Further that an apparent inability to move from its bargaining position has prevented the CDHB from bargaining effectively.

[10] NUPE submits the breaches of good faith have been serious and sustained and have resulted in the bargaining process being undermined. NUPE says it has lost members and therefore the number of members who will be covered by a concluded collective agreement has reduced.

[11] Further, NUPE submits CDHB has claimed during bargaining that its hands are tied and it has no ability to bargain outside particular financial parameters, which have already been met, and this position by CDHB further undermines the bargaining.

[12] CDHB denies any breaches of good faith on its part. It points to s 32 of the Act to support its assertion which sets out the duties of good faith particular to the bargaining process.

[13] CDHB says it is only required to continue bargaining over matters on which they have not reached agreement even though the parties may have come to a standstill or reached a deadlock about a matter. Further, it says it is not required to continue responding to issues it has already responded to.

[14] In this case, the parties have reached a deadlock over the remuneration to be payable under a new collective agreement. It is the only outstanding issue. CDHB says it is limited by a financial cap imposed by the Ministry of Health. NUPE says it is CDHB's stringent reliance on that financial cap which has led to the undermining of the bargaining process.

[15] CDHB says it has made an offer which is equivalent to the monetary offer made to members of the PSA. NUPE says it is not equivalent because its members

will not receive payment at the same rate of pay for doing the same work as members of the PSA for the same period of time.

[16] NUPE says the date increases proposed by CDHB will mean NUPE members will have worked for a period of about 15 months on less remuneration compared to the remuneration the PSA members will have received during that same period.

[17] In an effort to resolve the issues around remuneration, offers regarding the dates from which the new remuneration rates would apply have been made by CDHB and rejected by NUPE. This indicates there is still some willingness on the part of CDHB to attempt to resolve the impasse.

[18] Whether CDHB's conduct is a breach of good faith is informed by the requirements set out in s 32 of the Act. Section 32(3)(d) includes, among other matters that are relevant to whether an employer is dealing in good faith, the circumstances of the employer. This includes the operational environment of the employer and the resources available to it.

[19] In this case the financial cap imposed by the Ministry of Health is part of the circumstances and operational environment of the employer. Accordingly, I find the conduct of CDHB does not amount to a breach of good faith. Even if I held it did amount to a breach of good faith it has not been serious and sustained and has not undermined the bargaining.

Protracted bargaining

[20] NUPE submits that while the period of bargaining is not as long as other examples in the Health sector, it relies on s 53 of the Act to support its submission that bargaining extending over 12 months should be seen as protracted. Section 53 of the Act allows for an expired collective agreement to continue in force for a period of 12 months to allow the parties to bargain for a replacement collective agreement.

[21] CDHB denies the bargaining has been protracted or that there have been extensive efforts made to resolve the difficulties between the parties in concluding a collective agreement. In support of its position CDHB submits the four bargaining sessions, two mediations and lack of any industrial action either taken or threatened does not amount to extensive efforts as required by the Act.

[22] While bargaining extending over a period of 12 months may be considered a protracted period of time, it is not “unduly” protracted. Further I am not satisfied the parties have used extensive efforts to resolve the difficulties that have precluded them from concluding a collective agreement.

Conclusion and direction to further mediation

[23] For the foregoing reasons I am not satisfied the situation between the parties has reached the high threshold set out in the criteria to trigger facilitation. Accordingly, NUPE’s application for reference to facilitation is declined.

[24] Bargaining continues and the parties are directed to attend mediation (this may require attendance on more than one occasion) and attempt in good faith to resolve their difficulties in concluding a collective agreement.

Costs

[25] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so CDHB shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NUPE 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 the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority