

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROHE**

[2020] NZERA 22
3087172

BETWEEN	ASSOCIATION OF PROFESSIONAL AND EXECUTIVE EMPLOYEES Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD First Respondent
AND	WAITEMATA DISTRICT HEALTH BOARD Second Respondent
AND	COUNTIES MANUKAU DISTRICT HEALTH BOARD Third Respondent

Member of Authority:	Michael Loftus
Representatives:	Luke Coxon, advocate for the Applicant Susan Hornsby-Geluk, counsel for the Respondents
Investigation Meeting:	By telephone conference on 15 January 2020 and on the papers with input up to and including 22 January 2020
Determination:	22 January 2020

DETERMINATION OF THE AUTHORITY

[1] The Association of Professional and Executive Employees (APEX) seeks an urgent reference to facilitation pursuant to ss 50A to 50I of the Employment Relations Act 2000. The request relates to bargaining for the renewal of a multi-employer collective agreement covering Sonographers employed by the Auckland regions' three District Health Boards (DHB's), Auckland, Waitemata and Counties Manukau.

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

[3] Section 50C(3) specifies circumstances which preclude the Authority from granting such an application but they are not present here.

[4] APEX relies on three of the above grounds. It says bargaining has been unduly protracted despite extensive efforts to resolve the issues; that there have been strikes which were protracted and at the time of application more, which are likely to seriously affect the public interest, were imminent. I say at the time of application as they have now commenced.

[5] The DHB's deny bargaining has been protracted but do not oppose an application on the other grounds. Notwithstanding that concession the Authority must also be satisfied there are grounds to accept the application.

[6] The now expired collective agreement's term ran till 31 July 2019 though it remains in force pursuant to s 53 of the Act as APEX sought its renewal on 1 June 2019. Bargaining commenced on 10 July and there have been a further four days since. There have also been two comprehensive offers from the DHB's which were soundly rejected by APEX members.

[7] On this I agree with the DHB's. I do not see this level of interaction as unduly protracted though I note correspondence which suggests the parties are some way apart and their positions entrenched. That said I also note this may not be an issue as APEX need only make out one of the grounds of application and the other two are not opposed.

[8] The evidence leads me to suggest there has already been, by current standards in New Zealand, considerable strike action with each of the respondent DHB's having seen stoppages for at least part of 16 calendar days.

[9] The real crux though is APEX members have voted to take what the parties characterise as an unprecedented twelve week strike. It commenced on 18 January and the DHB's have expressed significant concerns. For example Auckland DHB says that depending on the level of life preserving services provided there is the potential for a *significant impact ... which may have long term detrimental impact on life or result in disability, with the potential to cause the development or deterioration of life threatening conditions.*¹

[10] I also note comments by the adjudicator asked to resolve the differences over the provision of life preserving services. He cites the strikes length as a unique factor which curbed his ability to determine the level of life preserving services required for its full duration. He notes clinical risk *may accrue* and concluded his decision would have to be reviewed after three weeks. The possibility of increasing clinical risk can only be considered an issue that has potential to affect the public interest, especially when a negative outcome may be life threatening.

[11] It is this that leads me to conclude that if nothing else APEX can make out a case for facilitation under s 50C(1)(d). A protracted strike has now commenced and it has potential to substantially affect the public interest. That said I also conclude the requirements of s 50C(1)(c) have also been met.

Conclusion

[12] Accordingly I refer to facilitation the current bargaining between the Association of Professional and Executive Employees, Auckland DHB, Waitemata

¹ Request to Adjudicator for a ruling in respect to the provision of life preserving services pursuant to clause 13 of Schedule 1B to the Employment Relations Act 2000

DHB and Counties Manukau DHB for the renewal of a collective agreement covering Sonographers.

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

[14] Neither party has sought costs. That, along with the nature of the application and the parties approach, leads me to conclude they should lie where they fall.

Michael Loftus
Member of the Employment Relations Authority