

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 464
3122792

BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED Applicant
AND	CHIEF EXECUTIVE OF THE WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority: Vicki Campbell

Representatives: Omar Hamed, advocate for Applicant
Ros Webby, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 10 and 11 November 2020 from Applicant
10 and 11 November 2020 from Respondent

Determination: 12 November 2020

DETERMINATION OF THE AUTHORITY

- A. The application for referral to facilitation is granted.**
- B. Costs will lie where the fall.**

Employment relationship problem

[1] The Association of Professionals and Executive Employees Incorporated (APEX) seeks the assistance of the Authority to resolve the difficulties it is having in

concluding a collective agreement with the Chief Executive of the Waikato District Health Board (WDHB) through reference to facilitation.

[2] The bargaining covers the work undertaken in the Property and Infrastructure Department at Waikato Hospital. The workers provide regular equipment and building maintenance as well as emergency repairs for electrical and mechanical services including, by way of example, anaesthetic gases and surgical equipment in the operating theatres of Waikato Hospital.

[3] 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 been carefully considered.

Reference to facilitation

[4] 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

[5] As will become apparent I am satisfied the parties are experiencing serious difficulties in concluding a collective agreement and a reference to facilitation is appropriate.

Grounds for reference to facilitation

[6] The grounds relied on by APEX for referral to facilitation are those contained in ss 50C(1)(b), (c) or (d) of the Act, namely:

- a) the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties;³ and/or
- b) in the course of bargaining there has been one or more strikes which have been protracted or acrimonious;⁴ and/or

¹ Employment Relations Act 2000 (the Act), section 50B.

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

³ The Act, s 50C(1)(b).

⁴ *Ibid*, s 50C(1)(c).

- c) APEX has proposed strikes that, if they were to occur, would be likely to affect the public interest substantially.⁵

[7] In its statement of problem APEX allege breaches of good faith by WDHB. I am satisfied there is no application before the Authority seeking to resolve allegations of breaches of good faith. The allegations of breaches of good faith are unsubstantiated and accordingly this determination has focussed on the two factors set out above.

Bargaining is unduly protracted

[8] The parties to the bargaining have had seven days of bargaining including four with the assistance of a mediator. Two offers presented by WDHB have been rejected.

[9] Apart from the face to face bargaining the parties have also communicated through correspondence and, nearly weekly, telephone calls. Bargaining was initiated 13 months ago with bargaining being conducted over a period of 11 months from December 2019.

[10] The WDHB denies the bargaining has been unduly protracted and points to the unprecedented circumstances caused by Covid-19 which has impeded its ability to make offers of settlement. The WDHB is required to consult with the Ministry of Health which has been focused on managing the Covid-19 crisis.

[11] Despite the pandemic collective bargaining has continued in the health sector and at least four collective agreements involving APEX have been settled since March 2020.

[12] The WDHB says the parties are still capable of engaging together in bargaining and have live matters to discuss and progress. APEX says no progress has been made in the last two months and WDHB has not communicated any areas for further discussion or negotiation.

[13] Taking into account the circumstances relevant to this application I am satisfied the bargaining has been unduly protracted and extensive efforts, including the assistance of mediation and strike action, have been made to resolve the difficulties that

⁵ Ibid, s 50C(1)(d).

have precluded the parties from concluding a collective agreement. I am satisfied further bargaining or mediation is unlikely to progress the matters in dispute.

Protracted strike action

[14] APEX members have participated in over 70 days of industrial action. The strikes have escalated in duration from two to 13 days. They have also escalated in terms of disruption from a withdrawal of using particular tools, bans on different types of work and a refusal to work in whole sectors of the Hospital.

[15] This includes a strike notice sent to the WDHB on 27 October 2020 advising of a 13 day strike beginning on Wednesday, 11 November 2020. This current strike includes the withdrawal of labour from all work associated with operating theatres at Waikato Hospital.

[16] If the strike which commenced on 11 November continues to its projected completion that will bring the total number of days of strike action to 99.

[17] WDHB says the strikes have not been protracted or acrimonious. They have all been partial strikes and occurred within a period of three months. There has been no picketing and the APEX members have continued to work alongside WDHB's contract workforce.

[18] I am not persuaded by WDHB's submissions. While the strikes may not have been acrimonious I accept APEX's submissions that the strikes have been protracted so as to meet the threshold set out in s 50C(1)(c) of the Act.

Public interest affected

[19] WDHB says the strike action, including the 13 day strike action which commenced on 11 November 2020 has not, and will not significantly affect the public interest, although it may cause some disruption.

[20] The WDHB has contingency planning in place and is able to mitigate the impact of any sterile service equipment breakdowns through the use of its existing and established mixed model of employee and contractor resourcing and other available service delivery options.

[21] APEX has not established that the strike is likely to endanger the life, safety or health of any person or that there will be a substantial affect on the public interest. Accordingly the grounds for referral to facilitation under s 50(1)(d) of the Act are not met.

Conclusion

[22] I have found the grounds under s 50C(1)(b) and (c) have been met. Accordingly the application for referral to facilitation is granted. An Authority Officer will contact the parties shortly to organise the facilitation process.

Costs

[23] APEX has been the successful party and has not sought an order for costs. That, along with the nature of the application leads me to conclude that costs should lie where they fall.

Vicki Campbell
Member of the Employment Relations Authority