

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 368
3148701

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| BETWEEN | 20 DISTRICT HEALTH BOARDS (listed in Schedule 1) Applicants |
| AND | NEW ZEALAND NURSES ORGANISATION Respondent |

Member of Authority: Andrew Dallas

Representatives: Susan Hornsby-Geluk counsel for the Applicants
Jock Lawrie, counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 18 August 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Aotearoa's 20 geographic district health boards (DHBs) and the New Zealand Nurses Organisation (NZNO) are currently in bargaining for the renewal of the District Health Boards – NZNO Nursing and Midwifery Multi-employer Collective Agreement, 4 June 2018 – 31 July 2020.

[2] It is a notorious fact that the bargaining between the DHBs and the NZNO has become acrimonious, protracted and has involved industrial action with the prospect of further strike action by the NZNO.

[3] The dysfunctional nature of the bargaining, and underlying relationship difficulties between the parties, have already resulted in two previous applications to the Authority in the last few months. I return to the latter of these applications below.

[4] Yesterday afternoon, the DHBs made an application for referral of the bargaining dispute extant to the Authority for facilitation under s 50B of the Employment Relations Act 2000 (the Act).

[5] The grounds advanced by the DHBs for referral are summarised as:

- (a) during the course of the bargaining the NZNO has failed to comply with its duty of good faith owed to the DHBs and this failure was serious and sustained;
- (b) the bargaining has become unduly protracted and extensive efforts have failed to resolve the difficulties;
- (c) during the course of the bargaining there have been one or more strikes; and
- (d) the NZNOs proposed further strike action, if it proceeds, would substantively affect the public interest.

[6] Sensibly, the NZNO supports the DHBs application for both urgency and the application for referral to facilitation on the basis of ground (b) above. However, the NZNO reserves its position as to the DHBs other asserted grounds.

[7] So then, upon the grant of urgency this matter was heard “on the papers” being the application for urgency, statement of problem, the affidavits in support of the referral affirmed by Margaret Aitcheson and Andrew Wilson and an email communication from the NZNO responding briefing to the application upon service of the same by the Authority.

Allegations of breach of good faith by the NZNO

[8] One of the grounds relied on by the DHBs for reference to facilitation are allegations of breach of good faith by the NZNO. These allegations primarily relate to the difficulties the parties have apparently faced entering into agreements under the Code of Good Faith for the Public Health Sector (the Code) at each DHB to maintain “life preserving services” (LPS) during strike action.¹ As stated above, the NZNO has reserved its position in respect of this ground and this is entirely understandable given the DHBs allegations are yet to be tested in evidence; let alone determined, assuming they would be, as facts.

¹ Employment Relations Act 2000, sch 1B

[9] The issue of LPS agreements between the parties is subject to collateral litigation in the Employment Court.² And, as a consequence there is some forum cross-over between the Authority and court with this bargaining dispute.

[10] The DHBs characterise that litigation this way:

As a result of the position taken by the [NZNO] with regards to LPS Agreements, and its refusal to enter into LPS Agreements without a “best endeavours” qualification, the [DHBs] filed urgent proceedings which were removed to the Employment Court claiming that the [NZNO] had breached its good faith obligations and seeking urgent compliance orders. In particular it is claimed by that the [NZNO’s] approach is a breach of its obligation to make every reasonable effort to agree on the provision of LPS (clause 12(5) of the Code). This matter was heard on 11 August 2021, and decision is expected from the Court in late August.

[11] Without being critical, the DHBs have not fully characterised the proceedings before the court. First, the DHBs’ application for removal to the court was declined by the Authority on the basis that it could not be said whether the grounds for removal³ had been met when the parties had not yet completed the mandatory processes in clauses 12 and 13 of the Code.⁴ Second, the application for compliance orders were made by the DHBs in their statement of claim to the court dated 6 August 2021, after the matter was removed from the Authority by the court as a result of the DHBs “special leave” application.⁵

[12] As the DHBs have said the court’s decision in this collateral matter is due in “late August”. Fortunately, the strike action scheduled to take place tomorrow has been cancelled due to the move to COVID-Alert Level 4 restrictions at 11.59pm last night.

[13] Sensibly then, pending the court’s decision consideration of this ground as a basis for referral to facilitation should be set aside.

² *20 District Health Boards v New Zealand Nurses Organisation* [2021] NZERA 346 (4 August 2021) and *20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 12 (5 August 2021)

³ Employment Relations Act, s 178(2)

⁴ *20 District Health Boards v New Zealand Nurses Organisation* [2021] NZERA 346, para [29]; [30]

⁵ Employment Relations Act, s 178(3)

Referral for facilitation

[14] Having carefully considered the material before the Authority relating to the remaining grounds for referral, I am satisfied that, at the least, the ground for facilitation set out in s 50(C)(i)(b) of the Act is made out. Therefore, I refer to the bargaining between the DHBs and the NZNO to Authority for facilitation.

[15] There is no doubt the parties will benefit from the intervention of the Authority given the protracted and dysfunctional nature of their current bargaining dispute.

Next steps

[16] The Authority will convene a teleconference with the parties at 4.00pm this afternoon.

Costs

[17] There is no order as to costs.

Andrew Dallas
Chief of the Employment Relations Authority

Schedule 1

Auckland District Health Board

First Applicant

Northland District Health Board

Second Applicant

Waitemata District Health Board

Third Applicant

Counties Manukau District Board

Fourth Applicant

Waikato District Health Board

Fifth Applicant

Bay of Plenty District Health Board

Sixth Applicant

Lakes District Health Board

Seventh Applicant

Tairāwhiti District Health Board

Eighth Applicant

Taranaki District Health Board

Ninth Applicant

Hawkes Bay District Health Board

Tenth Applicant

Whanganui District Health Board

Eleventh Applicant

Mid-Central District Health Board

Twelfth Applicant

Hutt Valley District Health Board

Thirteenth Applicant

Capital and Coast District Health Board

Fourteenth Applicant

Wairarapa District Health Board

Fifteenth Applicant

Nelson Marlborough District Health Board

Sixteenth Applicant

West Coast District Health Board

Seventeenth Applicant

Canterbury District Health Board

Eighteenth Applicant

South Canterbury District Health Board

Nineteenth Applicant

Southern District Health

Twentieth Applicant