

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 555
3158161

BETWEEN ASSOCIATION OF
PROFESSIONALS AND
EXECUTIVE EMPLOYEES
INC
Applicant

AND AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Claire English

Representatives: Omar Hamed, advocate for the Applicant
Susan Hornsby-Geluk, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 9 December 2021 from Applicant
9 and 10 December 2021 from Respondent

Determination: 13 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Association of Professionals and Executive Employees (APEX) and the Auckland District Health Board (ADHB) are currently engaged in bargaining for the renewal of the collective agreement between them.

[2] Bargaining was initiated on 18 December 2020, and despite multiple bargaining sessions, and mediation assistance, the parties have been unable to progress matters. Strike action has already occurred, and further strike notices have been issued.

[3] Against this background, APEX has made an application for facilitation, and a further application that this be granted urgently.

[4] The grounds for the applications are:

- a. Bargaining has been unduly protracted, and extensive efforts have failed to bring about a resolution; and/or
- b. In the course of bargaining, there have been strike/s which have been protracted or acrimonious; and/or
- c. Further proposed strikes would be likely to affect the public interest substantially.

[5] ADHB supports the application for facilitation as well as the application for urgency.

The Authority's investigation

[6] This matter was determined "on the papers" by the consent of the parties, following the filing of a Statement of Problem and supporting documents by the applicant, a Statement in Reply by the respondent, legal submissions from both parties, and an affidavit of Katherine Burson, Industrial Relations Manager from ADHB setting out key facts.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[8] Given the nature and urgency of this matter, I held a teleconference with the representatives for the parties on 10 December 2021, and conveyed my decision to refer the matter to facilitation with urgency. This determination records my reasons.

Findings

[9] I have considered the material before the Authority, and whether any of the grounds required for reference to facilitation exist, as set out in section 50C of the Act. In my view, the grounds set out in section 50C(1)(b), and (c), and (d) of the Act, all apply in the present case.

Section 50C(1)(b)

[10] Bargaining has been unduly protracted and extensive efforts to resolve difficulties have failed. It has been almost a full year since the start of this process, and both sides agree that little significant progress has been made towards resolution. This has not been for want of trying. The parties have engaged in notable efforts to bargain, despite the challenges posed by various lockdowns occurring. The parties have engaged in 4 separate days of unassisted bargaining. A formal settlement offer was made by the DHB. This was rejected. The Association responded with a counter-proposal, which was rejected. This shows the parties are attempting to bargain and are engaged in the process. The parties sought mediation assistance. Another offer of settlement was proposed by the DHB. A second mediation was held, (totalling 5 days of bargaining¹) but there has been no progress.

[11] Both parties now state that the point has been reached where the parties are unable to resolve matters by themselves without assistance. I agree that this ground has been made out.

Section 50C(1)(c)

[12] During this time, there have been 8 periods of strike action, involving a total withdrawal of labour. More are proposed, and are in fact imminent. The strikes have been for a limited number of hours, but given the specialist nature of the medical work performed by members of the Association, have significant patient impact (which I also refer to below).

[13] In the present circumstances, I find that there has been more than one strike, and the strike action has been protracted, and this ground is also met.

Section 50C(1)(d)

[14] Every time there is a strike, the DHB's ability to perform cardiac operations is impacted. This means much needed surgeries have to be postponed, or rescheduled. This adversely impacts both patients and their families, in terms of both physical and mental health. At the least, further strike action, which has the effect of delaying cardiac

¹ Noting that the Authority has previously found a similar amount of bargaining had become protracted, see *Association of Professionals and Executive Employees Incorporated v Chief Executive of the Waikato District Health Board*, [2020] NZERA 464.

surgeries, is likely to affect the health of persons, and is therefore likely to affect the public interest substantially, as defined in subsection (2) of s 50C of the Act².

[15] Further strikes are already scheduled, and more industrial action is likely to occur after this. If these strikes were to occur, they would be likely to affect the public interest substantially, as set out above, so this ground is also made out.

[16] For the above reasons, the matter has been referred to facilitation on an urgent basis.

Costs

[17] There is no order as to costs.

Claire English
Member of the Employment Relations Authority

² See also *Association of Professionals and Executive Employees Incorporated v Auckland District Health Board*, [2019] NZERA 649.