

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 29

3161702

BETWEEN CAPITAL AND COAST
DISTRICT HEALTH BOARD
First Applicant

AND FIVE DISTRICT HEALTH
BOARDS (as listed in the Schedule
to the Statement of Problem)
Second to Sixth Applicants

AND ASSOCIATION OF
PROFESSIONALS AND
EXECUTIVE EMPLOYEES
(APEX)
Respondent

Member of Authority: Eleanor Robinson

Representatives: Susan Hornsby-Geluk and Barnaby Locke, counsel for
Applicant
David Munro, Lachlan Balfour, and Abbey Trewavas counsel
for Respondent

Investigation Meeting: Friday 28 January 2022 by Zoom

Submissions: Tuesday 25 January 2022 from the Applicant
Tuesday 1 February 2022 from the Respondent

Determination: 8 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for facilitation pursuant to s50B of the Employment Relations Act 2000 (the Act), in respect of the collective bargaining currently underway between the Applicants, Capital and Coast District Health Board and Five District Health Boards (as listed), and the Respondent, the Association of Professionals and Executive (APEX) employees.

[2] The Applicants claim pursuant to s50A(1) of the Act that the parties are having serious difficulties in concluding a collective agreement and facilitation would assist in resolving these difficulties.

[3] The Applicants' application for facilitation is made relying on the following grounds:

- a) The bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties (section 50C(1)(b)); and/or
- b) In the course of bargaining there have been one or more strikes which have been protracted or acrimonious (section 50C(1)(c)); and/or
- c) The Respondent has proposed a strike (or strikes) which, if it were to occur, would be likely to affect the public interest substantially (section 50C(1)(d)).

[4] The Respondent opposes the application on the basis that the application does not meet the threshold under the Act for facilitated bargaining on any of the grounds that:

- a) There has only been one formal offer from the employers and the opportunities to resolve the dispute are not at an end;
- b) Only five of the strikes were full withdrawals of labour; and across three of the six DHBs, all other strike notices were for partial strikes that either limited the tasks the members were carrying out or reduced the hours worked in a day;
- c) There have been few instances of Life Preserving Services (LPS) being required.

Background

[5] The Applicants employ approximately 80 Medical Physicists and Medical Physicist Registrars who provide services to the general public through their hospitals and associated facilities.

[6] The Respondent represents approximately 90 per cent of Medical Physicists and Medical Physicist Registrars who are employed by the Applicants.

[7] The Applicants and the Respondent are party to a Multi-Employer Collective Agreement (the MECA) which commenced on 1 September 2018 and expired on 31 August 2021. The MECA continues in force by virtue of section 53 of the Act.

[8] Bargaining was initiated by the Respondent by notice dated 7 July 2021 for a MECA covering the Applicants' employees. The Respondent's notice of initiation purported to extend coverage to include Medical Physics Technicians but was not supported by a ballot as required by s 45 of the Act.

[9] On 21 July 2021 the Respondent sent a further letter initiating bargaining for a MECA covering the Applicant's employees, which included the same coverage provision as the current MECA.

[10] A Bargaining Process Agreement has been agreed between the parties in parallel to the substantive bargaining.

[11] The first bargaining meeting took place on 17 August 2021. It was intended to last for two days, but the community outbreak of the Delta variant curtailed the second day of bargaining.

[12] A further five days of bargaining has taken place by Zoom, two of which were mediated bargaining conducted by a mediator of the Ministry of Employment, Innovation and Business (MBIE) on 18 November and 15 December 2021.

[13] The mediated bargaining took place after the Applicants had made a formal offer of settlement on 27 October 2021 which was rejected by the Respondent.

[14] Since bargaining was initiated, the Respondent has issued in excess of 40 notices of strike action across the DHBs, and engaged in 40 days of strike action.

[15] On 14 and 19 January 2022 the Respondent issued a further ten notices of strike action, which included partial strike action across five DHBs, varying in nature and timing at each DHB.

[16] On 1 February 2022, the Respondent issued further notices of strike action to all six Applicants, notifying a full withdrawal of labour for a 48-hour period commencing at 12.01 a.m. on 16 February 2022.

Section 50C(1)(b): Unduly Protracted and extensive efforts made

[17] The Applicants submit that:

- a) the bargaining has been ongoing for seven months and the parties have reached an impasse in that there has been no substantive movement since mid-December;
- b) the parties have attended seven days of bargaining, including two days of mediated bargaining; and one offer of settlement has been made by the Applicants and rejected by the Respondent.

[18] It is submitted by the Applicant that this duration of the bargaining between the parties and the number of bargaining meetings that have occurred meet the threshold typically applied by the Authority in granting a facilitation. Bargaining has reached an impasse, there are no further bargaining meetings set down, and there is no agreed way forward.

[19] The Respondent submits that the parties last met on 15 December 2021 and since that date the availability of stakeholders has been limited by the Christmas and New Year break, with both parties' advocates not returning to work until mid-January 2022. The bargaining period includes the entire Covid lockdown in Auckland, Christmas and New Year, and now in the Covid red setting

[20] It is submitted that the opportunities to resolve the dispute at mediation have not been exhausted and it is possible for the parties to achieve an agreed proposed settlement without the assistance of the Authority, noting that the MBIE mediator is briefed and remains available to assist the parties.

Section 50C(1)(c) Protracted or acrimonious

[21] The Applicants submit that the strikes have been protracted in that since bargaining was initiated the Respondent's members have engaged in 40 days of strike action across six

DHBs, nine of the days involving a full withdrawal of labour, with the remaining strikes constituting partial strike action which was varied in nature and timing across each DHB.

[22] It is submitted that the Respondent's strike action has been ongoing continuously over two months and has been designed to cause maximum disruption to the Applicants as evidenced by the fact that the times during which the Respondent's members will not be working varies across each DHB and the range of strike action has varied considerably.

[23] Accordingly the Applicants submit that the nature and degree of the strike action more than meets the test under section 50C(1)(c) of the Act.

[24] The Respondent submits that the fact that the nature of the strikes varies and is complex does not mean that they have been protracted or acrimonious. In all cases LPS have been agreed after professional and robust discussion between the parties without the need for the assistance of the clinical expert.

Section 50C(1)(d): Public Interest Affected Substantially

[25] The Applicants submit that the proposed strikes are likely to substantially affect the public interest so as to meet the threshold set out in s 50C(1)(d) due to the likelihood that the strikes will endanger the safety and health of the public and the risk to widespread social disruption, noting:

- i. The nature of the partial strike action, and the fact that there are broad variations in the nature of the partial strike action at each DHB, create significant difficulties in planning for, and maintaining, life preserving services (LPS) pursuant to the Code of Good Faith for the Public Health Sector.¹
- ii. The variation and timing of the partial strike action, and the sheer volume of strike notices issued, means that it is difficult for the Applicants to maintain effective communication with health professionals as to the impact of the industrial action at any given hour on any given day;
- iii. The risk to other health professionals who are not striking, and are required to operate in an environment without their usual diagnostic and operational support;

¹ Schedule 1 B of the Employment Relations Act 2000

- iv. The sheer volume and variation in the strike notices received, which has resulted in difficulty in assessing and requesting the LPS required to mitigate the potential harm to patients within the tight timeframe required by the Code; and
- v. The fact that the service provided by Medical Physicists and ancillary roles are in many cases highly specialised, and unable to be performed by other professional groups (such as nurses or doctors)

[26] The Respondent submits that LPS has always been provided and to date there has been no need to involve a clinical expert to adjudicate. Should the strikes proceed, LPS will be discussed, considered, and agreed upon thereby ensuring that 'life, safety and health of persons' is not engendered.

[27] It is also submitted that the assertion that future strike action will risk widespread social disruption' is denied.

Should facilitation be granted?

[28] The Applicants have applied for facilitation on an urgency basis.

[29] Section 50C(1) of the Act provides grounds for the Authority to accept a reference for facilitation. It must be satisfied that one or more of the grounds below exist:

Grounds on which Authority may accept reference

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

(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 bargaining, there have been 1 or more strikes or lockouts; and

(ii) The strikes or lockouts have been protracted or acrimonious:

(d) that-

(i) in the course of 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

[30] I have considered all the submissions filed in this matter.

[31] I note the submissions of the Respondent that the MBIE mediator has been briefed and remains available to assist, and that the bargaining period has encompassed the Christmas and the New Year period.

[32] However the bargaining has extended over a seven month period and no date for further bargaining meetings has been set down and no progress made towards resolution. On that basis I accept that there is an impasse between the parties despite the efforts made by both parties to the dispute.

[33] Since bargaining ceased, I observe that ten further notices of strike action, including partial strike action, were issued by the Respondent on 14 and 19 January 2022, and on 28 January 2022 a further five notices were issued and strike action is currently underway.

[34] In these circumstances I accept that there have been a significant number of strikes. Although some have been partial, I note the Applicant's submissions and affidavit evidence that nonetheless these have caused disruption due to the variation and range of the strike action.

[35] Turning to the public interest aspect of the submissions, I am persuaded that the proposed strikes are likely to substantially affect the public interest for the reasons submitted by the Applicant and in the affidavit evidence.

[36] Whilst I accept that no LPS adjudication has been required to date, I find there may be potential harm to patients by the ongoing and proposed strike action.

[37] I further observe that the proposed strike action may occur at a time when the health service is under pressure due to the potential Omicron outbreak impact.

[38] It is my view that the grounds on which facilitation may be granted under s50C(1) (b), (c) and (d) of the Act have been met. In all the circumstances I grant the application for facilitation which I believe will assist the parties.

[39] The parties will shortly be contacted by an Authority Officer to make arrangements for the facilitation to occur shortly.

Costs

[40] There is no order for costs..

Eleanor Robinson

Member of the Employment Relations Authority