

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 205  
3222919

BETWEEN                      TE WHATU ORA - HEALTH  
NEW ZEALAND  
Applicant

AND                              ASSOCIATION OF  
PROFESSIONALS AND  
EXECUTIVE EMPLOYEES  
Respondent

Member of Authority:      Claire English

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

Investigation Meeting:     On the papers

Submissions received:     21 April 2023 from Applicant  
20 April 2023 from Respondent

Determination:              24 April 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Te Whatu Ora and the Association of Professionals and Executive Employees (APEX) are currently engaged in bargaining for the renewal of a collective agreement between them. A Bargaining Process Agreement was signed on 7 July 2022, and bargaining commence promptly thereafter on 11 July 2022. The parties engaged in bargaining including with mediation assistance, however, the parties have been unable to progress matters. APEX members have been on strike continuously since December 2022, with strikes still on-going. The parties have attempted to continue bargaining during this time, with no success.

[2] Against this background, Te Whatu Ora has made an application for facilitation, and a further application that this be granted urgently, stating that the parties are having serious difficulties in concluding a collective agreement.

[3] Te Whatu Ora says that the grounds for the application for facilitation are that:

- a. Strike action has occurred during bargaining which has been protracted or acrimonious; and/or
- b. Further proposed strikes would be likely to affect the public interest substantially.

[4] APEX supports the application for facilitation as well as the application for urgency. APEX states that it agrees that the two grounds for referral to facilitation relied on by Te Whatu Ora apply, and also that a further ground applies, namely:

- a. That the bargaining has been unduly protracted.

### **The Authority's investigation**

[5] This matter was determined “on the papers” with consent of the parties, following the filing of a Statement of Problem and supporting documents, a Statement in Reply, and legal submissions from both parties. In addition, Ms Eve Martin filed an affidavit on behalf of Te Whatu Ora, and Mr Omar Hamed filed an affidavit on behalf of APEX as the respondent's advocate in collective bargaining.

[6] 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.

### **Findings**

[7] The Authority may facilitate collective bargaining where the parties to that bargaining have sought the assistance of the Authority, and the Authority accepts that they are having serious difficulties in concluding a collective agreement<sup>1</sup>.

---

<sup>1</sup> Section 50A of the Act.

[8] The Authority must not accept a reference for facilitation unless it accepts that certain grounds exist. Those grounds are set out at section 50C of the Act, and may be summarised as follows:

- a. There has been a failure to comply with the duty of good faith, that was serious and sustained and undermined the bargaining (section 50C(1)(a));
- b. Bargaining has been unduly protracted, and extensive efforts towards resolution have failed (section 50C(1)(b));
- c. There have been strikes or lockouts that have been protracted or acrimonious (section 50C(1)(c));
- d. A proposed strike or lockout (if it were to occur) would be likely to affect the public interest substantially (section 50C(1)(d)).

[9] Accordingly, I have considered the material before the Authority, and whether any of the grounds required for reference to facilitation exist, as set out above.

[10] In my view, the grounds set out in section 50C(1)(c), and (d) of the Act, apply in the present case, and I set out my reasons below. That being so, I have not set out a view on the respondent's position that the ground in 50C(b) of the Act, that bargaining has been unduly protracted, also applies.

[11] I also record that I have considered and granted the application for urgency, which was made by Te Whatu Ora and supported by APEX, given that strike action is on-going.

*Section 50C(1)(c) -strikes or lockouts have been protracted or acrimonious*

[12] APEX members have been on strike continuously since 19 December 2022. Twenty-one notice of strike action have been issued. Strikes continue as at the time of this application, with the most recent round of strikes not due to finish until 12 May 2023. I was advised that at the time of this application, some 103 days of strike action had already occurred, out of 125 strike days in total.

[13] It is also relevant that the striking workforce represents all of the tradespersons employed at the property and infrastructure department at Waikato Hospital. Te Whatu Ora notes that not only is the strike action continuous, it has caused significant disruption. The affidavit evidence of Ms Martin sets out the specific types of

withdrawal of labour which are occurring, which are extensive and far-reaching. They cover a wide range of different duties performed by APEX members, which would have undoubted impacts on others working at Waikato Hospital, and patients (including by way of example, the withdrawal of labour associated with ordering spare parts, using ladders, using power tools, and the withdrawal of all labour associated with an inpatient mental health facility).

[14] I am satisfied that there has been strike action that is protracted, as required by section 50C(1)(c) of the Act.

*Section 50C(1)(d) – public interest*

[15] Both parties submit that strikes have occurred and/or are proposed that would be likely to affect the public interest substantially.

[16] There are two main reasons for this. First, APEX members maintain and service the facilities and buildings at Waikato Hospital. The maintenance of buildings and facilities, particularly those that are large and heavily-used by staff, patients, and members of the public, may be described as an on-going labour. The wide-ranging and continuous strike action means that necessary maintenance has been deferred, impaired, or not carried out at all. The longer the strikes continue, the greater the likelihood that there could be endangerment to the safety and health of the public, and/or social disruption as a result.

[17] Second, labour has been withdrawn relating to an inpatient mental health facility. There is obvious potential for the inpatients to be affected. The Authority has previously found that the public interest was substantially affected where the needs of vulnerable members of society were affected<sup>2</sup>, and my view is that this is also the case here.

[18] I am satisfied that a strike and/or proposed strike is likely to affect the public interest substantially, as required by section 50C(1)(d) of the Act.

**Orders**

[19] I am satisfied that grounds exist under s 50C (1)(c) and (d) of the Act which enable me to accept Te Whatu Ora's application for facilitation.

---

<sup>2</sup> *E Tu v Idea Services Ltd* [2019] NZERA 381

[20] Accordingly I refer to facilitation the current bargaining between Te Whatu Ora and the Association of Professionals and Executive Employees Incorporated. The matter should be progressed urgently.

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

[22] As there is no application for costs, no orders are made.

Claire English  
Member of the Employment Relations Authority