

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 357
3231439

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| BETWEEN | NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PŪKENGĀ HERE TIKANGA MAHI INCORPORATED First Applicant |
| AND | E TŪ INCORPORATED Second Applicant |
| AND | ACCESS COMMUNITY HEALTH LIMITED Respondent |

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| Member of Authority: | Shane Kinley |
| Representatives: | Caroline Mayston, counsel for the First Applicant Emily Griffin, counsel for the Second Applicant Barnaby Locke, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions received: | 15, 16 and 30 June 2023 and 4 July 2023 from the Applicants 23 June 2023 from the Respondent |
| Determination: | 5 July 2023 |

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated (PSA) and E Tū Incorporated (E Tū) are engaged in collective bargaining with Access Community Health Limited (ACH). The PSA, E Tū and ACH have not been able to conclude a collective agreement.

[2] The PSA and E Tū lodged an application for reference to facilitation under s 50B of the Employment Relations Act 2000 (the Act) on 23 May 2023, based on the grounds set out in s 50C(1)(b) of the Act being 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:

[3] ACH denies that the grounds in s 50C(1)(b) of the Act have been met and opposes the application for reference to facilitation.

The Authority's investigation

[4] The Authority held a case management conference on 1 June 2023 on this matter where it was agreed that it be investigated and determined on the papers, based on the Statement of Problem, Statement in Reply, the parties' submissions and supporting affidavits.

[5] Submissions were received on behalf of the PSA and E Tū, supported by affidavits from George Hollinsworth and Jocelyn Pratt, and ACH, supported by an affidavit from Donna McGarvey. Submissions in reply were received on behalf of the PSA and E Tū, supported by affidavits from George Hollinsworth and Jocelyn Pratt.

[6] As permitted by s 174E of 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.

History of bargaining and other matters before the Authority

[7] A collective agreement between the parties expired on 31 March 2021. Bargaining was initiated on 2 February 2021, with bargaining on nine days commencing in July 2021 (with a mix of in-person and Zoom bargaining), with one day of mediated bargaining in October 2022 and the last day of bargaining in April 2023. Six offers have been made to settle, with offers by both sides.

[8] The parties have starkly different views on the extent of bargaining that has occurred and whether this bargaining has been unduly protracted or that there have been extensive efforts to resolve the issues.

The union parties' submissions

[9] The PSA and E Tū say the extensive efforts include six bargaining sessions (over nine days), one mediated bargaining session and the exchange over email of numerous bargaining positions and terms of settlement.

[10] During bargaining there was a significant difference of views on the effect of the increase in the statutory minimum sick leave entitlement on the sick leave provisions in the collective agreement and the PSA and E Tū applied to the Authority to determine a dispute over the correct interpretation and application of the collective agreement in light of the increase to the statutory minimum sick leave entitlement.

[11] The Authority issued a determination on that dispute on 11 May 2023 (which has been challenged by ACH), finding that:¹

Union members continue to be entitled to an extra four days sick leave per annum in addition to the statutory minimum entitlement to sick leave provided for under the Holidays Act 2003.

[12] The PSA and E Tū say that there are a number of issues outstanding, including term, pay rates, split shift payment, rest breaks, union rights, hours of work and sick leave.

[13] Finally the PSA and E Tū point to ACH's proposal to modernise the collective agreement, stating:

[ACH] has now recently made a new claim to rewrite and “modernise” the clauses in the collective agreement. This making of this new and significant claim two years into already very difficult bargaining is concerning and cannot be seen as acting in a way that will assist the conclusion of a collective agreement.

The employer's submissions

[14] ACH say that there have been long periods where there was very little contact between the parties due to a lack of availability on the part of one, two or all of the parties, particularly from 28 February 2022 to 5 October 2022² and between 29

¹ *New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated and E Tu v Access Community Health* [2023] NZERA 236 at [34].

² ACH's submissions split this period into two by reference to 17 June 2022. ACH say this was the date that the PSA and E Tū advised that they intended to apply for mediation, with evidence also provided that the PSA and E Tū requested paid union meetings about the bargaining on that date.

November 2022 and 10 March 2023. ACH also point to a delay in commencing bargaining, with the first bargaining session occurring five months after bargaining was initiated. ACH say that this means the bargaining period has been approximately 21 months, with approximately 10 months where there was very little to no contact.

[15] ACH also say that there were a number of issues that impacted on the parties' ability to meet, including government restrictions due to the COVID-19 pandemic and regular turn-over in the union organisers negotiating on behalf of the PSA and E Tū.

[16] In addition to the Authority's determination on the sick leave dispute (discussed at paragraphs [10] and [11] above), ACH refer to a further dispute about "preferred times" and "guaranteed hours" and whether ACH's approach was consistent with the collective agreement. That dispute was determined by the Authority on 1 August 2022.³

[17] ACH consider that no evidence has been presented by the PSA and E Tū regarding the issues that they say are preventing the parties from concluding the collective agreement, and suggest that "... further meetings, with or without the assistance of a mediator, will go a long way to progressing the parties and concluding the collective agreement."

[18] Finally ACH submit that the parties have not met to explore other problem-solving approaches where bargaining ceases to make progress, as provided in the agreed bargaining process agreement.

The union parties' submissions in reply

[19] The PSA and E Tū say that this application falls within the parameters of previous cases where facilitation applications have been accepted noting that:

... both the number of months that the parties have been in bargaining and the number of bargaining meetings they have had are above the average in previous cases which have met the test for "unduly protracted" bargaining.

[20] The PSA and E Tū also:

- a. dispute that there have been very long periods with little contact between the parties;

³ *New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated and E Tu v Access Community Health Ltd* [2022] NZERA 354.

- b. consider that there is clear evidence of strongly held views on the issue of sick leave entitlements, which is contributing to serious difficulties in reaching settlement. As noted at paragraph [11], the Authority has made a determination on this matter, which ACH have challenged in the Employment Court. The PSA and E Tū submit that it is not usual or desirable that parties resort to legal proceedings to try and resolve a claim in bargaining;
- c. do not agree that progress is being made when meetings occur;
- d. do not agree that they were required to meet before seeking facilitation and point to what they considered was ACH's willingness to attend facilitation, should it be granted, as showing that the PSA and E Tū had no reason to believe the application for facilitation was not supported;
- e. consider ACH's refusals to attend mediation (in 2021) and raising of a new claim late in the bargaining process is not consistent with a willingness to conclude a collective agreement; and
- f. say that if this application is declined, they will be forced back into bargaining with an employer who has little desire to conclude a collective agreement.

Findings

[21] The measurement of whether bargaining has been unduly protracted or that there have been extensive efforts to resolve the issues is not intended to be precise. In *Service and Food Workers' Union Nga Ringa Tota Inc. v Sanford Ltd* the Employment Court observed:⁴

Whilst the Authority must ensure that the statutory grounds exist, it should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

[22] I have carefully considered the material before the Authority. For the reasons set out below, on balance I accept that the bargaining has been unduly protracted and that extensive efforts, including mediation, have failed to resolve it. I am satisfied that

⁴ *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [2012] NZEmpC 168 at [42].

the ground for referral in s 50C(1)(b) of the Act is made out. The referral to the Authority for facilitation is accepted.

[23] The number of bargaining interactions and the period over which they have occurred, notwithstanding the long periods where there is dispute over the level of contact between the parties and the impacts of COVID-19, suggest that bargaining on these issues has been unduly protracted. Bargaining was initiated on 2 February 2021, for a collective agreement that expired on 31 March 2001, with nine days of bargaining over the following 25 months. Section 53(3) of the Act indicates that 12 months should suffice to replace a collective agreement and more than twice that amount suggests bargaining has been protracted.

[24] I have reviewed the email correspondence provided by the parties between bargaining meetings. This shows there were periods where there were delays on the part of each of the PSA, E Tū and ACH in responding to proposed meeting or discussion times. Even disregarding those periods, the time over which bargaining has been occurring is a minimum of eleven months, which falls within the range of periods that the Authority has found in other matters represents unduly protracted bargaining.

[25] I am also satisfied that there have been extensive efforts, based on the nine days of bargaining and one day of mediated bargaining to resolve the collective agreement. These indicators also fall within the ranges where the Authority has found in other matters that there have been extensive efforts to resolve bargaining.

[26] In addition, I consider that while legal proceedings between the parties may have delayed bargaining, reflecting strongly held positions (particularly related to sick leave entitlements), those legal proceedings provide context to and can be viewed as part of extensive efforts to resolve the bargaining. Facilitation may assist the parties to resolve those issues.

[27] There also appears to be some merit in the PSA and E Tū's view that ACH's raising of a claim to rewrite and "modernise" the collective agreement at a late stage in bargaining may not be consistent with a willingness to conclude a collective agreement. This claim does not appear to have helped the parties to reach settlement.

Next steps

[28] An Authority officer will be in touch with the parties to arrange a case management call to discuss arrangements for facilitation of this matter. In accordance with s 50D of the Act, the member of the Authority who facilitates collective bargaining will not be the member who accepted the reference for facilitation.

Costs

[29] The Authority's presumption with referrals to facilitation is that parties will bear their own costs.⁵ Accordingly there is no order as to costs.

Shane Kinley
Member of the Employment Relations Authority

⁵ Employment Relations Authority, Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, 29 April 2022, para 5