

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 161
3362624

BETWEEN CHIEF EXECUTIVE OF
ORANGA TAMARIKI –
MINISTRY FOR CHILDREN
Applicant

AND PUBLIC SERVICE
ASSOCIATION TE PŪKENGĀ
HERE TIKANGA MAHI
INCORPORATED
Respondent

Member of Authority: Jeremy Lynch

Representatives: Susan Hornsby-Geluk, counsel for the Applicant
Caroline Mayston, counsel for the Respondent

Investigation Meeting: 14 March 2025 (by audio-visual link)

Submissions Received: 13 March 2025, and at the investigation meeting from
the Applicant
13 March 2025, and at the investigation meeting from
the Respondent

Determination: 17 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Oranga Tamariki – Ministry for Children (Oranga Tamariki) and the Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated (the PSA) are party to a now expired collective employment agreement, operational 10 March 2023 to 2 December 2024. They are currently engaged in bargaining for a new collective agreement, which they have not yet been able to conclude.

[2] On its website, Oranga Tamariki describes itself as a Ministry dedicated to supporting any child in Aotearoa whose wellbeing is at significant risk of harm now or in the future. Oranga Tamariki also works with young people who may have offended, or are likely to offend.¹

[3] The PSA is a national union, with approximately 2,700 of its members employed by Oranga Tamariki including at its care and protection residences, youth justice residences, residential homes, its National Contact Centre, and as social workers, youth justice workers and the like. The PSA represents approximately 78 per cent of workers employed by Oranga Tamariki in such roles.

[4] Oranga Tamariki has applied to the Authority under s 50B of the Employment Relations Act 2000 (the Act) for assistance by way of urgent referral to facilitation to resolve the difficulties the parties are having in concluding their bargaining. Oranga Tamariki says three of the four grounds on which the Authority may accept a reference to facilitation are made out.

[5] A significant impasse for the parties (as described in the bargaining Pānui issued by the PSA to its members) appears to be around “... the fundamental issues of safe and manageable workloads and caseloads, and a fair remuneration increase”.

[6] The PSA opposes the application currently before the Authority. It says that none of the grounds as set out at s 50C of the Act are established at this stage of the bargaining, and that Oranga Tamariki’s application has been made prematurely.

The Authority’s investigation

[7] The application for referral to facilitation was lodged on 6 March 2025, together with an application seeking urgency. A case management conference was held with the parties on 7 March 2025 to progress the application, and for timetabling directions to be made including as to the abridgement of time for the lodging of the PSA’s statement in reply, together with timetable dates for remaining affidavit evidence, and a date for the parties’ submissions to be lodged.

[8] The nature of the services (including those with a safety-sensitive element) provided by Oranga Tamariki, and the nature of the application, meant that it was

¹ Oranga Tamariki Ministry for Children “About Us” <www.orangatamariki.govt.nz>.

appropriate for the Authority to grant urgency to the matter.

[9] The following affidavits and attachments thereto have been considered by the Authority:

- (a) Affidavit of Nicolette Dickson affirmed 5 March 2025. Ms Dickson is Oranga Tamariki's Chief Social Worker and Deputy Chief Executive, Professional Practice;
- (b) Affidavit of Michael Prior affirmed 5 March 2025. Mr Prior is Oranga Tamariki's lead advocate representing the organisation in the current bargaining with the PSA;
- (c) Affidavit of Paula Attrill affirmed 10 March 2025. Ms Attrill is Oranga Tamariki's General Manager, Operations Delivery and Enablement;
- (d) Affidavit of Joseph McCrory affirmed 12 March 2025. Mr McCrory is an organiser at the PSA, and the lead advocate in the current bargaining;
- (e) Affidavit of Bronwyn Pegler affirmed 12 March 2025. Ms Pegler is Hinonga Māngai Māori for the PSA and is employed by Oranga Tamariki as a Senior Practitioner, Social Worker by Oranga Tamariki's Otago Youth Justice function based in Dunedin;
- (f) Affidavit of Helen Foley affirmed 12 March 2025. Ms Foley is the PSA's National Convener, and a registered social worker, and is employed by Oranga Tamariki. She is involved in the current bargaining;
- (g) Affidavit of Morrison Aldridge affirmed 12 March 2025. Mr Morrison is an organiser with the PSA, and is involved in the current bargaining.

[10] Written submissions were received on behalf of both parties on 13 March 2025. An investigation meeting was held (by audio-visual link) on 14 March 2025, for the parties to speak to their written submissions.

[11] 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 the evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including the evidence of the parties and their submissions.

Background

[12] The PSA initiated bargaining for a new collective agreement by notice dated 3 October 2024.

[13] A bargaining process agreement (BPA) was agreed and signed by the parties on 15 October 2024.

[14] Since the BPA was signed, the parties have met 10 times (including one day of mediated bargaining provided by the Ministry of Business, Innovation and Employment). The PSA does not accept that all 10 occasions were for the purposes of “active bargaining”, instead preferring to distinguish the first four occasions on which the parties met as “pre-bargaining” sessions. However, both parties accept that even at the first four meetings, the parties engaged in presenting and responding to claims.

[15] I find that all 10 of the parties’ meetings since the BPA was signed are at least broadly related to the bargaining, and therefore any distinction between ‘pre-bargaining’ and ‘active bargaining’ is artificial. The parties have met on 10 occasions for the purposes of bargaining.

[16] It is not disputed that the parties’ collective agreement covers employees employed by Oranga Tamariki across a broad range of roles. Oranga Tamariki says that the social workers it employs are a key part of its workforce, and provide highly specialised services ensuring the care and protection of tamariki and rangatahi, as well as responding to youth offending and delivering adoption services. Oranga Tamariki provides an emergency response function to ensure the health and safety of tamariki and rangatahi in its care.

[17] On 11 December 2024 Oranga Tamariki proposed to the PSA that the parties agree a framework for the provision of essential services to reduce any possible risk of harm to the health and safety of tamariki and rangatahi in its care, in the event that PSA members engaged in industrial action. This was declined by the PSA.

[18] Similar requests were made by Oranga Tamariki on 29 January and 17 February 2025. To date, the parties have been unable to reach any such agreement.

[19] On 20 February 2025, the PSA issued four separate notices of strike action on behalf of all employees working in care and protection residences, youth justice

residences, residential homes and the National Contact Centre, for partial strike action from 3.00 pm on 7 March 2025 until 11.59 pm on 18 April 2025.

[20] In addition, on 20 February 2025 the PSA also issued four separate notices of strike action to Oranga Tamariki on behalf of all employees, except for those working in care and protection residences, youth justice residences, residential homes and the National Contact Centre, for partial strike action from 5.00 pm on 28 February 2025, continuing until 11.59 pm on 18 April 2025.

[21] On 20 February 2025, the PSA issued a notice of strike action to Oranga Tamariki on behalf of all of its members, notifying of a full withdrawal of labour from 3.00 pm to 5.00 pm on 7 March 2025.

[22] As at the time of this determination, one group of PSA members has taken a total of 17 continuous days of strike action. For other PSA member employees, there have been 10 continuous days of strike action. For both groups, the partial strike action notified to Oranga Tamariki on 20 February 2025 remains ongoing.

Facilitation

[23] The purpose of the Authority facilitating bargaining is set out at s 50A of the Act, which provides:

The purpose of sections 50B to 50I is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

[24] In considering a reference for facilitation, the Authority must be satisfied that one or more the grounds in s 50C exists.² Those grounds reference the statutory framework for collective bargaining established under the Act and the good faith obligations to which parties engaged in bargaining must adhere. The overall circumstances of the bargaining are to be assessed in light of this statutory framework. Whether the assistance of the Authority by way of facilitation is appropriate, requires a balancing of all these factors.

² Employment Relations Act 2000, s 50C(1).

[25] In *Service & Food Workers Union Nga Ringa Tota Inc v Sanford Limited*, the Court held in respect of the approach to the interpretation of the bargaining facilitation sections of the Act, that:³

The bargaining facilitation sections are therefore to be seen as part of a scheme that allows, encourages and assists collective bargaining and the timely and orderly settlement of collective agreements. This will inform the approach of the Employment Relations Authority to a reference under s 50B. 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.

[26] In addition, s 3 is also relevant, with the object of the Act stated to include the building of productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship, but (inter alia) promoting collective bargaining.⁴

Discussion

[27] Section 50C(1)(c) of the Act provides as a ground on which the Authority may accept a reference for facilitation that:

- (i) in the course of the bargaining there has been one or more strikes or lockouts; and
- (ii) the strikes or lockouts have been protracted or acrimonious.

[28] For reasons that will become apparent, this ground is considered first.

[29] To meet the requirements of this ground, the Authority must be satisfied that in the course of the bargaining, there has been one or more strikes. There is no dispute between the parties that in the course of this bargaining, there has been strike action.⁵ Strike action remains ongoing. However, the PSA does not accept that the strike action has been protracted or acrimonious.

[30] In the circumstances of this matter, part of the function of some of the striking PSA members is related to an essential service, as that term is defined under the Act.⁶

³ *Service & Food Workers Union Nga Ringa Tota Inc v Sanford Limited* [2012] NZEmpC 168 at [42].

⁴ Section 3(a)(iii); see also *Sanford Limited*, above n 3 at [32].

⁵ There is no dispute that the industrial action being carried out meets the definition of strike under s 81(1)(a) of the Act.

⁶ Clause 14 of Schedule 1 to the Employment Relations Act 2000 includes as “essential services”, the operation of a residential welfare institution.

[31] Given the specialist nature of the work performed by the PSA's members, and the vulnerability of the tamariki and rangatahi they support, and in respect of the essential service provided, the Authority is satisfied that continuous strike action of such duration meets the threshold for 'protracted' under s 50C(1)(c) of the Act. This finding is made taking into account the divergent views of the parties.

[32] In circumstances in which an employer's business is not involved in the provision of essential services, or if health and safety issues were absent, strike action of such duration may not reasonably be described as protracted.

[33] However, in the circumstances of this matter, I am satisfied that strike action of such duration meets the threshold of protracted required under s 50C(1)(c) of the Act, and the acceptance of the reference for facilitation accords with the 'common sense assessment of the overall position' as set out in by the Court in *Sanford*.

[34] The ground for referral in s 50C(1)(c) of the Act is made out.

[35] Having found one ground for referral is established, it is not necessary to consider the remaining proposed grounds.

Reference for facilitation

[36] The ground under s50C(1)(c) of the Act relied upon in making the application is met. The Authority accepts the reference for facilitation for matters which remain unresolved in the parties' bargaining.

Next steps

[37] The Authority will convene a further case management conference to make the necessary arrangements to progress this matter.

[38] In accordance with the provisions of 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

[39] The Authority's presumption with referrals to facilitation is that parties will bear their own costs.⁷

Jeremy Lynch
Member of the Employment Relations Authority

⁷ Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5 at [6].