Determination Number: AA 11/05
File Number: AEA 1264/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Service & Food Workers Union Inc (Applicant)
AND	Air New Zealand Limited (Respondent)
REPRESENTATIVES	Tracey Gallagher for Applicant Graeme Norton for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	11 January 2005
DATE OF WRITTEN DETERMINATION	19 January 2005

DETERMINATION OF THE AUTHORITY

Request for facilitation in collective bargaining

[1] The applicant Service & Food Workers Union Inc. (referred to as "SFWU") has invoked provisions very recently added to the Employment Relations Act 2000 at s.50. The purpose of those new provisions is expressed by s.50A to be;

> *……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.*

[2] In its application, which was lodged in the Authority on 20 December 2004, the SFWU has stated that it is having serious difficulties in the course of collective bargaining it formally commenced with the respondent Air New Zealand Ltd (referred to as "Air NZ").

[3] Under s.50B of the Act the union has referred the negotiations to the Authority for facilitation by it with the aim of overcoming the difficulties and concluding a collective agreement.

Grounds for facilitation

[4] The reference to the Authority has been made, as required by s.50B, on grounds as provided in s.50C(1). Three of the four possible alternative grounds under s.50C(1) are relied upon by the union in support of its reference to facilitation. They are;

(b) – that the bargaining has been unduly protracted and extensive efforts, including mediation, have not resolved the difficulties preventing entry into a collective agreement.

(c) – that there has been a strike and that the strike has been acrimonious.

(d) – that a further strike by SFWU members has been proposed and that such further action is likely to substantially affect the public interest, as union members are employed by Air NZ in booking airline flights, checking in passengers and luggage, handling cargo and managing the employers finances.

[5] As a fourth ground for facilitation, it has not been claimed by the union that there has been a serious, sustained and undermining failure by Air NZ to comply with its statutory duty to deal with the SFWU in good faith.

Response of Air NZ

[6] The response of the employer to the request for facilitation has been a formal statement that it is not opposed to the reference for that process.

[7] The expressed lack of opposition by Air NZ to facilitation has not been taken by the Authority as a form of concession that any of the grounds at s.50C of the Act do exist.

Grounds for facilitation to be strictly present

[8] It is clear from the Act that facilitation in the Authority is not available merely by consent of the parties, for s.50C expressly states that the Authority may only accept a reference for facilitation if it is satisfied that one or more of the four grounds as set out in that provision exist.

[9] Also, I do not read the provisions of ss.50B and 50C as permitting cross-patching by combining grounds that may be only partially present in terms of the specific requirements of two or more of the four clauses set out at s.50C(1). Each ground is clearly intended to be constituted by a set of separate stand-alone circumstances. The initial role of the Authority as the gatekeeper to facilitation is to see whether any of these exist.

[10] As I stated to SFWU and Air NZ when we met on 11 January 2005, if the Authority determines that there exists between them the state of affairs as described in any of the four clauses under s.50C(1), it is not required to attribute blame for the presence of the defined grounds. The Authority must recognise what does exist rather than become too concerned with why that is so, and in doing that must accept the reference to facilitation as being the appropriate remedy for the situation.

Acceptance of reference to facilitation

[11] At the conclusion of the meeting the Authority convened with the parties and their representatives on 11 January 2005, I advised the parties that I was satisfied grounds were present for the reference and that this was the case in at least one of the three situations put forward by SFWU.

[12] The Authority intended that in accordance with the objective of the new provisions facilitation should take place as soon as possible. To this end, at the conclusion of the

meeting Mr James Wilson, member and Chief of the Authority, attended on the parties to discuss arrangements for urgent facilitation. I understand that the process will begin with him on Wednesday 19 January.

[13] Given the nature and purpose of facilitation and also given the expressed lack of opposition to that process by Air NZ, it seemed to me at the end of the meeting on 11 January to be unnecessary and indeed might even be unhelpful, for me to specify then to the parties the exact grounds and my reasons for accepting the reference. My intention was that although the parties were entitled to receive a determination in writing, this could be reserved until facilitation had taken place so that the parties would not become distracted during facilitation by any findings of the Authority, particularly any that might be read as critical of one or the other.

[14] However since the meeting on 11 January, Air NZ has requested my determination. Whether deliberately or by oversight, the amendments to the Act have not altered the rights of a party to challenge de novo a decision of the Authority to accept a reference to facilitation. This determination is therefore now recorded and issued in accordance with the requirements of the Act.

The bargaining - and what has taken place during bargaining

[15] I find the following to be the circumstances surrounding the bargaining. It was initiated on 26 April 2004 in relation to the Ground Staff Collective Employment Agreement which covered Air NZ employees and which was due to expire on 30 June 2004. As there were two union parties to the agreement, SFWU and the NZ Engineering, Printing and Manufacturing Union Inc. (referred to as "EPMU"), a set of claims was presented by them jointly to Air NZ. Resolution of an issue between Air NZ and SFWU about the terms of a proposed bargaining process agreement delayed the eventual signing of that particular document by those parties until 10 May 2004. Drafts had first been exchanged several weeks earlier, on or about 14 April.

[16] At first the bargaining claims or counterclaims of Air NZ were confined to seeking the renewal of the terms of the existing agreement. Then it sought to have that agreement broken into six separate collective agreements, a proposal to which the two union parties were opposed. After bargaining had taken place over about nine days in May and June, Mr Terry Arnold, bargaining advocate for Air NZ, wrote to SFWU and advised that the employer intended to bargain separately with EPMU. He said this was because there were differences between those two unions which would hinder successful joint bargaining by them with Air NZ and also because EPMU itself did not wish to bargain alongside SFWU.

[17] SFWU rejected the move to separate bargaining and asked for the joint negotiations to be resumed as soon as possible. While it acknowledged that there were some differences between EPMU and itself, SFWU advised Air NZ that these were required to be addressed under the bargaining protocols the parties had previously signed up to. Air NZ then explained to SFWU why it disagreed with the union's views about this matter and offered dates in early July for separate bargaining with SFWU. After meeting Air NZ on 7 July, SFWU decided it would bargain separately with the employer but this did not take place for nearly a further month, on 5 and 6 August, after which a further six days of bargaining took place until 3 September. During this time several issues were taken up in correspondence between Mr Alastair Duncan, bargaining advocate for SFWU, and Mr Arnold of Air NZ. One of these was the extent to which the employer was committed to avoiding disparity in the terms and conditions it sought to settle with SFWU members and those it agreed to with other

non SFWU employees performing the same occupations. In addressing this with SFWU, Mr Arnold advised that while the employer could not guarantee there would be "no disadvantage" among competing unions bargaining separately for parallel terms, it was his preference to avoid "wide variation" in this regard.

[18] Negotiations continued with both Air NZ and SFWU actively bargaining over pay and other conditions until a major new issue arose out of the union's attempts to address concerns about disparity in settlements. This issue was the entitlement of the union to information it had requested from the employer about pay settlements made with Air NZ workers on both individual and collective agreements in occupations comparable to those of SFWU members employed by the airline. Although Mr Arnold advised SFWU that the company had met its obligations to supply such information, the issue grew. It escalated to a point where an application was lodged on 22 October with the Authority for its intervention to resolve the information request issue as an employment relationship problem. Although the application, while not withdrawn, was deliberately not pursued by SFWU for a period, the union has now restarted the case and a determination by the Authority is sought requiring Air NZ to provide the requested information. Regardless of the merits of this issue (which now seem destined to be decided by the Authority), the mere existence of it has cooled relations between the parties and their negotiators and slowed down if not stopped the bargaining.

[19] Between 13 and 17 September 2004 the union held meetings of its members to update them on progress with bargaining. By secret ballot members almost unanimously rejected a pay offer that had been made by Air NZ during bargaining and voted to take strike action against their employer. Mr Arnold was advised by Mr Duncan of the outcome of the ballot and the possibility of a strike, on 27 September. It is clear from the tone and content of correspondence between the two advocates after that date that relations between them and the parties they represented had deteriorated with regard to bargaining. This was only to be expected.

[20] In his letter of 27 September to Mr Duncan, Mr Arnold accused the union of acting in breach of good faith and of making inflammatory public statements containing "mis-information". He also accused the union of promoting or encouraging the strike by its members. He threatened legal action in relation to any misleading or deceptive statement made by the union about the consequences for the airline of a strike. Mr Arnold suggested that any strike would not be lawful because of the way the union had conducted negotiations for a collective agreement and because of breaches of good faith by the union, and he suggested that the union, its officials and its members might be sued for any financial loss suffered by the airline as a consequence of any strike. Finally Mr Arnold referred to the disruption strike action would bring to employee union members in terms of their suspension without pay and withdrawal of their staff travel privileges. He urged Mr Duncan to reconsider the unions stance and to resume bargaining with a view to settling the issues between the parties.

[21] Mr Duncan wrote back to Mr Arnold on 28 September, accusing him of making unsubstantiated allegations and threats. He also accused Mr Arnold in writing his letter of the previous day of behaving like a "schoolyard bully". Mr Duncan concluded by saying that the union was keen to meet again with Air NZ and he proposed that assistance from a mediator be sought by the parties.

[22] On 28 September 2004 a formal notice of strike action was signed by Mr Duncan on behalf of SFWU and delivered to Air NZ. The notice advised that there would be, at Christchurch and Auckland airports, a 22 hour "full and continuous withdrawal of labour" by

SFWU members who were employed by Air NZ and who were covered by the collective bargaining the strike related to. As the date of the intended strike was notified to be 15 October, the statutory requirement to give 14 days notice of such action in an essential service seemed to be satisfied and the intended strike seemed to be lawful. It has not been suggested otherwise to the Authority, which is not aware that any proceedings have been or are being brought by Air NZ challenging the SFWU members' right to strike.

[23] The parties met in mediation on 13 October to discuss the information request issue and the wider bargaining problems. No resolution was obtained and on 15 October the 22 hour strike proceeded in accordance with the notice given to Air NZ by the union.

[24] The parties resumed bargaining on 29 October, with a mediator providing assistance. There followed further meetings, all with a mediator assisting, on five days. During these the employer made a revised offer. This raised an issue as to whether the offer was the same as that made to EPMU or whether, as SFWU thought, the offer was markedly inferior and discriminated between members of the two unions. SFWU members were again balloted about the new offer and also about taking further strike action. A large majority of the members rejected the employers latest offer and approved another bout of direct action against Air NZ. The employer was advised of the ballot result on 8 December, but so far the union has held off giving formal notice of strike action. Mr Duncan has told the Authority that what is being contemplated is a very different form of action from that taken on 15 October. He said it will be something designed "to create maximum disruption" to Air NZ's business.

[25] The last bargaining meeting between the parties took place on 15 December. A meeting intended for 17 December was cancelled by Air NZ, apparently as a response to advice from Mr Duncan that the union was reactivating the proceedings it had brought to resolve the information request issue. This has become a major impediment to progress in the bargaining, as the union believes that only when it has obtained the information sought will it be able to satisfy itself and its members about what Mr Duncan referred to as the "equity, relativity and affordability" of the pay offers made by Air NZ. SFWU has an understandable and reasonable concern to see that its members are not treated disparately in bargaining merely because of the particular union they have chosen to belong to. Air NZ insists that it has complied with all legal obligations to provide information.

[26] In summary, bargaining which began in May last year has still not been concluded nearly eight months later. In that time there have been bargaining meetings on about 22 days, with the assistance of a Mediation Service mediator, Ms Judith Scott, given to the parties on seven of these days. There have also been various other facilitatory meetings been advocates and company and union officers in connection with the bargaining, and there has been considerable correspondence and other communications. There have also been four separate proceedings lodged in the Authority, one in connection with the information request issue and three as a result of disciplinary investigations commenced by the employer in relation to the alleged misconduct during the 15 October strike of SFWU members employed by Air NZ.

[27] SFWU contends that the bargaining has been not only prolonged but unduly so. Mr Duncan told the Authority that in his 28 years experience, this particular bargaining has been the longest and most intensive. SFWU also contends that the 15 October strike was acrimonious. Further, the union claims that the future strike action that has been approved or proposed by its members will substantially affect the "public interest", as that term has been defined in the new provisions of the Act.

Strike accompanied by acrimony

[28] I am satisfied this ground is present as a basis for accepting the reference to facilitation. The occurrence of a strike on 15 October is an undisputed fact. The only question is whether it was accompanied by acrimony – the Act uses the word "acrimonious", the meaning of which is defined in the Concise Oxford Dictionary as "bitter in manner or temper". It may be thought that few employers and employees who become directly involved in a strike (or lockout) will not be bitter or resentful about that situation. Consistent with the meaning of acrimonious however, what the Act requires is a display of bitterness by words or conduct, and not merely an experiencing of feelings of that kind.

[29] I find there was acrimony displayed after notice of the strike had been given and before it took place even. On 8 October Air NZ notified SFWU members who were proposing to strike that staff travel privileges would be withdrawn from them for the duration of the strike on 15 October. I will accept for the purposes of this case that this action was perfectly lawful (there is case law about the status of the staff travel privilege) however it seems to me to be a bitter and resentful response, while no doubt being a natural and understandable reaction. Also before the strike took place the employer published a notice to its staff saying "Air NZ was not prepared to enter into negotiations with a gun held to its head in the form of a strike notice".

[30] This may merely be the patois or rhetoric of industrial disputation (more common in a bygone era) but I consider that the attempt by use of these words to convey to other employees, quite inaccurately, the idea that the union was somehow bargaining illegally or even with threats of violence, displayed bitterness and anger on the part of the employer. It may safely be assumed that if the employer felt angry about having "a gun held to its head" it was outraged when that "gun" was eventually fired on 15 October.

[31] The statement was repeated the evening before the strike by a spokesperson for Air NZ on Checkpoint, a programme aired to the general public. According to the transcript of the interview with the programme presenter, the spokesperson also described the union as holding Air NZ and its customers to "ransom". Again this is an indication of the depth of feeling on the part of Air NZ that it attempted to convey, incorrectly, an impression to the public that the proposed strike was some form of illegal coercion.

[32] I do not consider that this use of language by the employer when representing the intended strike to other employees or to the public was innocuous, no matter how colourful. Air NZ itself had previously taken the union to task for apparently making statements to its members including one that management had "declared war" in relation to the bargaining. Mr Arnold advised the union that the company viewed such statements as "incorrect, inflammatory and the antithesis of good faith". He maintained that the union was not permitted to make such statements to the public. The airlines statements were no less inflammatory in my view and showed a degree of bitterness on its part.

Disciplinary investigations commenced and grievances raised, after the strike

[33] Evidence of acrimony on the day of the strike and afterwards, can be found in the claims subsequently filed in the Authority by three Air NZ employees who were members of SFWU. The rights and wrongs if any of Air NZ and its employees in relation to the events giving rise to these claims, are not matters for me to determine in the course of a facilitation application. What is relevant is that as a result of complaints about the conduct or alleged conduct of some SFWU members during the strike, Air NZ found it necessary to commence

disciplinary investigations and the employees in turn found it necessary to challenge those investigations by bringing claims to the Authority. This in my view also indicates the presence of acrimony in relation to the strike.

[34] In one case an employee complained to Air NZ that on the day of the strike a co-worker member of SFWU had approached her, spoken briefly to her and uttered the word "scab". Another employee complained that the same person had, by ignoring her, communicated with "body language" his contempt for her because she had not supported the strike. These incidents led Air NZ to commence a disciplinary investigation into allegations of "intimidation" and "bullying" made against the striking SFWU member. He was advised of the possibility that disciplinary action including dismissal could be taken against him as a result of the investigation. The union member reacted by raising a personal grievance, complaining that Air NZ was discriminating against him unlawfully under the Act, on the grounds of his involvement in union activities. He also claimed that Air NZ was applying duress and acting in breach of good faith in relation to the ongoing collective bargaining. Air NZ rejected the complaint and claims.

[35] In a second case there were complaints or reports to Air NZ from employees about the upsetting manner and tone with which an SFWU member had addressed them at or around the time of the strike in relation to their non-participation in it. On the face of what was written by the complainants the alleged misconduct was trivial, but Air NZ nevertheless commenced a disciplinary investigation into claims of what it called intimidation, bullying and failing to meet required standards of service to customers. SFWU reacted by raising a grievance making the same complaints against the company as in the first case outlined immediately above. The union also complained that the employers actions were designed to silence its member who was also a SFWU delegate and negotiator. Air NZ rejected the complaints made against it.

[36] The third case also concerned a disciplinary investigation commenced by the employer after the strike in respect of the conduct of a SFWU local President, delegate and negotiator – and 19 year servant of Air NZ - in connection with the strike. It was alleged that he had distributed notices about the strike to Air NZ customers three days before the strike. The content of the notices seem to be a temperate expression of opinion within the bounds of free and fair comment. Air NZ alleged that its own distribution network had been misused to communicate the unions view of the strikes. It alleged possible interference by the employee with contractual relations with its customers and that action had been taken by him against the employers interests and that he had possibly brought the company into disrepute with its customers. A fourth allegation for investigation was;

> *Allowing your role as President of the SFWU and as a delegate to come into conflict with your employment relationship with Air New Zealand and generally undermining the trust and confidence in the employment relationship.*

[37] This apparent Air NZ view of a benign and subservient role for company employee-union officials does not seem to reflect the purpose of unions as promoted and protected by the Employment Relations Act. The SFWU member raised a grievance, complaining of discrimination on the grounds of union activities by him, duress, and breach of good faith. He denied the alleged misconduct and claimed he had been targeted as an official of SFWU by the employer which wanted to silence him. Air NZ rejected the complaints upon which the grievance was founded. It is a matter of record that two of the above three cases have now been settled in mediation between the parties.

[38] I find from these cases that the 15 October strike, from the time notice of it was given and for a period afterwards, generated in connection with it complaints in the workplace, disciplinary investigations, grievances and allegations and denials of unlawful conduct. There was also resort to emotive and inaccurate claims made publicly about the strike. All of this arose from the inevitable tension between striking employees, non-striking employees and their employer. Looking broadly at the circumstances, I find that acrimony was the manifestation of this friction. It is not however a necessary feature of acrimony that anything unlawful must also have occurred, and I make no finding that it did.

Determination

[39] On this ground under s.50C(1)(c) of the Act, the Authority has accepted the reference to facilitation.

Unduly protracted bargaining

[40] I do not find this ground under s.50C(b) to be present. The bargaining has been protracted by comparison particularly with that carried on with EPMU and now apparently concluded. However that union did not strike Air NZ and neither did it apparently have an issue about information to be supplied by the employer. There is nothing to suggest that EPMU had an issue about disparity of terms of settlement between Air NZ and other groups or unions such as SFWU. A degree of prolonging of bargaining was due to these circumstances arising in the course of the SFWU bargaining. It must be expected that a strike in the course of bargaining may not speed up the negotiations but have quite the opposite effect, which as a matter of degree is not an undue consequence.

[41] I do however consider that there have been extensive efforts, including mediation, made by the parties to resolve the bargaining difficulties and obviously these efforts have so far failed. Further urgent mediation with Ms Scott was offered but declined, during the course of my meeting with the parties. SFWU wants now to have facilitation under the Act and Air NZ is not opposed to that. Urgent or early resolution of the information request issue should be considered by the parties as a way forward.

Proposed strike likely to substantially affect the public interest

[42] I do not find this ground under s.50C(1)(d) to be present either. I find that the strike of 15 October 2004 was not to any significant extent disruptive to social, environmental or economic interests, whether those of Air NZ, its customers or the general public. Air NZ it seems managed to provide adequate cover for its services during that strike. In any event such disruption as there may have been was not widespread, long-term or irreversible. A higher impact strike is contemplated for the next round of direct action proposed by SFWU and its members, but it seems to me, based on what has gone before, that such action is unlikely to meet the test of "substantially" affecting the public interest as set out in s.50C(2) of the Act. In particular, such disruption as may occur is unlikely to be "widespread, long-term or irreversible", I find.

A Dumbleton
Member of Employment Relations Authority