

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 375/07
5105756

BETWEEN SERVICE AND FOOD
 WORKERS UNION
 Applicant

AND AIR NEW ZEALAND LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Simon Mitchell for Applicant
 Andrew Caisley for Respondent

Investigation Meeting: 28 November 2007

Determination: 29 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination relates to a request for an adjournment.

[2] On 23 November, as previously agreed,¹ I conducted a telephone conference with the representatives. On that call Mr Caisley advised that the company was engaged in considering an offer from the union and was to respond through the mediator later that day. Mr Mitchell responded by saying that his instructions were for the facilitation application to proceed in case the outcome of the talks was not favourable. He advised that he did not think the matter could be determined “on papers” and felt that a meeting was required. It was agreed that this could be convened on the afternoon of 28 November and on that basis the matter was set down.

[3] On the morning of 28 November Mr Mitchell lodged an application for adjournment stating:

¹ My Minute of 20 November (attached) refers.

“A considerable amount is happening between the parties at this time. I am instructed to seek to adjourn the matter to a time next week. By that time, the parties will be clear as to the position with the bargaining, and the application for facilitation may be progressed if necessary.”

[4] It was attempted to arrange a telephone conference to discuss the adjournment application but the representatives were not available until shortly before the scheduled start of the meeting. I therefore advised that I would address the adjournment application at the start of the meeting.

[5] Meanwhile Mr Caisley had lodged a short written submission opposing the application for adjournment. It noted that significant progress had been made in resolving the issues between the parties. Subject to ratification, there had been an agreement that the collective agreement would be split into two documents. The ratification process was underway for terms of settlement for one of these documents (covering airport staff) and the parties had begun to discuss a document to cover the rest of the union’s members (ground staff.)

[6] Mr Caisley submitted that a *“facilitation application cannot be put aside in case there is a rainy day.”* He argued that if the applicant had proper grounds for making the application and a genuine belief that the threshold had been crossed it should proceed with its application, otherwise it should acknowledge that there could be no basis for the application at this time.

[7] He also asserted that the unresolved application for facilitation was undermining the credibility of the mediation process as well as deflecting time, resources and concentration from the negotiations.

[8] Finally Mr Caisley submitted that to adjourn the matter again on the basis that there were still no grounds for facilitation would undermine the credibility of the Authority. He said the application for facilitation should either be withdrawn or the Authority should proceed to hear and determine it.

[9] Mr Mitchell did not dispute that some progress had been made between the parties and confirmed that the union did not wish to proceed today “*in the face of the ratification meeting.*” He noted though that no proposal had yet been tabled in respect of the ground staff and that lockout notices were in place for next week. He argued that to adjourn the matter would be the most pragmatic way of assisting the negotiation process.

Determination

[10] Mr Mitchell’s argument would effectively require me to accept that a facilitation application can be made on a contingent basis, to be activated should the circumstances develop in such a way that the threshold in s.50 is reached. This is not consistent with a good faith approach to bargaining. Nor can the provisions of Part 5 be applied in this way. The grounds set out in sections 50 (b) are couched in the past tense and depend on certain preconditions *having been* met. It is not appropriate to put an application on hold in case the preconditions are met at some stage in the future.²

[11] I also note that even if a reference to facilitation is declined it is open to either party to make a fresh application at any time, should the circumstances change.

[12] As advised to the representatives at the meeting I therefore accept Mr Caisley’s submissions in their entirety and decline the application for adjournment.

[13] Mr Mitchell then advised that that the matter was withdrawn. The application for reference to facilitation no longer falls to be determined.

Yvonne Oldfield
Member of the Employment Relations Authority

[1] ² The fourth ground (50 (c) (1) (d)) does concerns matters which might occur in future however the applicant does not in this case rely on that ground.