IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 172/08
5116927

	BETWEEN	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA INC Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, counsel for Applicant Andrew Caisley, counsel for Respondent
Investigation Meeting:	8 May 2008
Determination:	9 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Service & Food Workers' Union Nga Ringa Tota Inc ("the SFWU") has applied to have accepted by the Authority a reference to facilitation made under s 50B of the Employment Relations Act 2000.

[2] The application was lodged with the Authority on 27 February 2008. An investigation meeting to determine it was held on 19 March 2008. The outcome then was that directions were issued by the Authority to the parties, the SFWU and Air New Zealand, requiring them to use mediation before the investigation proceeded any further.

[3] The Authority's Notice of Direction to mediation dated 19 March 2008 noted that the SFWU had wished to have the application adjourned to enable the use of mediation to resolve the difficulties that had precluded the parties from entering into a

collective agreement. The Directions noted that it was also the expressed wish of Air New Zealand to use mediation for that purpose.

[4] Without determining the matter the Authority suspended the investigation of the reference until the parties had attempted in good faith to reach an agreed settlement of their differences using mediation.

[5] On 24 April 2008, counsel Mr Mitchell advised the Authority that agreement had not been reached in mediation and that the parties were seeking to reconvene the investigation. The meeting resumed on Thursday 8 May 2008.

[6] At the conclusion of the meeting I gave a determination orally, with confirmation in writing to follow.

[7] The application by the SFWU to have the reference to facilitation accepted was expressly made on the grounds found at s 50C(1)(b) of the Act.

[8] Air New Zealand neither supports nor opposes the application but reminds the Authority of the statutory test that must be met before the application can be granted.

[9] The union expressly accepted that in order for that test to be met the Authority must be satisfied that the bargaining has been unduly protracted and that extensive efforts, including mediation, have failed to resolve those difficulties which have precluded the parties from entering into a collective agreement.

[10] It is accepted by the Authority that the applicant SFWU is a party that is having serious difficulty concluding a collective agreement. That is why it has taken the step of applying for facilitation. A year has gone by since bargaining was initiated by the union with Air New Zealand and in the last four months there has been little or no advance towards settlement of a collective agreement.

[11] The Authority is satisfied that efforts made by the parties, apart from having facilitation, have been extensive but have failed to resolve the bargaining difficulties. Those efforts include mediation undertaken on a number of days with a Department of Labour mediator. The most recent mediation was undertaken on 4 April for about half a day, after the Authority had directed the parties to undertake mediation.

[12] The key issue in this case for the Authority is whether the bargaining has been unduly protracted.

[13] Bargaining is defined under s 5 of the Act as meaning all the interactions between the parties to the bargaining for a collective agreement that relate to that bargaining. It includes negotiations and communications or correspondence between the parties that relate to the bargaining, whether had before, during or after negotiations. Any periods of inactivity in relation to bargaining are not to be counted as bargaining. By itself the mere passage of 12 months since bargaining was initiated is not a reason for finding that bargaining has been unduly protracted.

[14] One of the difficulties in the bargaining has been the settlement in 2007 of a collective agreement covering other workers performing the same or similar work to members of the SFWU, by the New Zealand Amalgamated Engineering, Printing and Manufacturing Inc. In opposite ways the SFWU and Air NZ in their proposals have sought to reflect the settlement of that 2007 agreement or particular terms of it. Protracted bargaining must be expected in that situation.

[15] In determining whether the bargaining has become unduly or excessively protracted, part of the standard set by the Act at s 50C(1)(b)(i), the Authority has had regard to the occasions on which bargaining has taken place, as well as the background to the negotiations themselves.

[16] The union puts the number of days during which negotiations have taken place as nine and in addition says that on a further seven days the parties attended mediation, this too by definition being part of bargaining. In addition, there has obviously been considerable interaction between the parties by telephone, in writing or in person, on other occasions apart from the scheduled negotiations and mediation meetings.

[17] Air New Zealand, considers that since bargaining was initiated on 2 May 2007, there were 17 days, or half days, spent in negotiations before the new collective agreement for Airports Staff was settled at the end of November, and then a further two days in bargaining with a mediator in December 2007, and the half day spent in 2008 after the parties had been directed to return to mediation. On that basis, the airline considers there were about 20 days on which the parties have bargained, some of them half days, in the last 12 months.

[18] As a matter of fact and degree, even at the slightly higher level the employer considers it to have occurred, I find that this bargaining while it might have been prolonged has not been excessively so.

[19] There has been very little bargaining of any kind since the beginning of 2008 and it is clear that bargaining has stalled and would benefit from some outside influence to restart it, hopefully then to continue until the settlement of a collective agreement. Both parties may seek facilitation and that process may constructively assist them to move towards settlement of a collective agreement, but the test is clear as to the requirements before a reference under s 50B can be accepted by the Authority.

Determination

[20] I am satisfied that the test is not met in the circumstances of this case. The application must therefore be declined.

A Dumbleton
Member of the Employment Relations Authority