IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 67/10
File Number: 5300893

	BETWEEN	Service & Food Workers Union Nga Ringa Tota Inc Applicant
	AND	IHC First Respondent
	AND	Idea Services Limited Second Respondent
	AND	Timata Hou Ltd Third Respondent
Member of Authority:	Denis Asher	
Representatives:	Peter Cranney and Anthea Connor for the Union Paul McBride for the Respondents	
Investigation Meeting	Wellington, 14 April 2010	
Submissions Received	On the day of the investigation	
Determination:	14 April 2010	

DETERMINATION OF THE AUTHORITY: Application for Facilitation

The Problem

[1] Should the Union's application for facilitation under s. 50B of the Employment Relations Act 2000 (the Act) be granted?

The Investigation

[2] This application was filed on 29 March 2010: after an inquiry by an Authority support officer, an oral application for urgency was confirmed. A telephone conference promptly followed. The respondents opposed urgency. A timetable was agreed for submissions as to whether urgency should or should not be granted. On the agreed date, and by way of directions dated 9 April, I granted urgency and directed the matter to an investigation on Wednesday 14 April.

[3] Consistent with my directions, the respondents' statements in reply were received on 12 April. Further material was received from the parties on 13 and 14 April.

Background

[4] Bargaining in respect of the collective employment agreement central to this employment relationship problem was initiated in September 2009. A bargaining process agreement was concluded in October 2009. Negotiations took place later that month. Agreement was not reached in respect of wages, the term of the collective, allowances and long service leave.

[5] The union commenced industrial action on 27 November.

[6] Mediation took place on 29 March 2010 but settlement was not achieved.

[7] As is made clear above, the Union shortly thereafter filed an application for facilitation per section 50B of the Employment Relations Act 2000 and sought urgency: the respondents opposed the latter.

[8] During the period agreed by the parties for filing submissions in respect of their competing positions, the Employment Court granted an urgent, interim injunction application by the third respondent restraining the Union from strike and anticipated strike action: *Timata Hou Limited* v *Service and Food Workers & Anor*, unreported, [2010] NZEMPC 38, WRC 10/10, Colgan C J, 8 April 2010.

[9] After providing in some detail the basis for granting the interim injunction, including a finding of significant public interest, the Chief Judge made the following comment at par 19 of his decision:

I encourage the Employment Relations Authority to consider and determine promptly the application for facilitated bargaining so that all parties can know where they stand as soon as possible.

[10] As is made clear above, I agreed with that view and directed the matter to an urgent investigation.

Union's Position Summarised

[11] The application relies on ss 50C (1) (d) (ii) & (2) (a) and, to a lesser extent, (2) (b) of the Act. It says its strike action will *"… affect the public interest substantially"* and *"… is likely to endanger the life, safety or health of persons"*.

[12] It makes the claim in particular in reliance on the nature of the strike action that has been advised to the third respondent, as supported by affidavit evidence provided to the Employment Court by that employer (in particular the email of 24 March 2010 from Collette Ellison-Hack attached as doc A1 to the affidavit of 'Ross' Maden, and pars 20 & 21 of Ms Ellison-Heck's own affidavit).

[13] The Union's application facilitation was prepared only after mediation failed.

[14] In *McCain Foods (NZ) Ltd* v *Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28, the Chief Judge of the Employment Court, at para 266, described comparison with other, protracted collective bargaining as:

> *… of some but limited value. That is because of the particular circumstances of each bargaining example that is, even if not unique as all will be almost inevitably, nevertheless highly individual. In the instances cited … only one of the parties had tested whether the bargaining may be unduly protracted by seeking a reference to facilitation. Ironically, in that case, there was a reference to facilitation. … Until this case was determined in the Employment Relations Authority, that body approached* (the relevant) *questions conservatively, erring on the side of non-*

> *intervention in many cases referred to it. … I am not assisted greatly by comparative references to other negotiations in other industries between different unions and employers and covering different sorts of employees.*

[15] This comment should be interpreted as a view that the Authority had been too conservative in its past approach to interpreting the statutory tests for granting applications for facilitation, and reliance should not therefore be placed on previous Authority determinations declining facilitation requests.

[16] A significant reason for referring this matter to facilitation lies in the respondents' own written submissions, provided today, at pars 17-21 inclusive, namely those matters listed under the heading, *"Futility of facilitation on funding issues"*. Facilitation should be provided because, as the respondents say, the respondents are substantially dependent on Government funding to cover wages and no increase of funding has been provided to meet the Union's claims, and because the respondents face a multi-million dollar liability (which it admits it currently cannot meet) arising out of the sleepover matter that is currently before the Court of Appeal.

[17] Union members do not want to proceed to strike action if an alternative way through exists.

Respondents' Position Summarised

[18] The cumulative grounds set out by the Act are not met: the parties have not encountered serious difficulties in concluding a collective agreement (s. 50A); there is no evidence the action proposed is likely to affect the public interest let alone substantially (ss 50C (1) (d) (ii)); there is no evidence that the strike is likely to endanger the life, safety or health of persons (ss 50C (2) 9a)) or that it will disrupt social, environmental or economic interests and the effects are likely to be widespread, long-term or irreversible (ss 50C (2) (b)).

[19] Common threads in the respondents' positions are:

a. A collective agreement has not been concluded. There has been limited bargaining between the parties. The notified strike action and the more

limited action actually undertaken have not impacted or had only limited impact on the respondents and on public interest.

b. The mediation on 29 March was the first use of that service in relation to bargaining; it was brief and the respondents question the Union's good faith in that regard.

c. The respondents are charities and substantially dependant upon Government funding to meet wage increases. The combination of Government imposed costs and funding in the current environment does not allow a wage increase as sought by the Union.

d. There are good, discretionary reasons for not accepting facilitation including the Union's approach to mediation on 29 March and immediately thereafter filing for facilitation, and – the second respondent says – the political and economic factors at play.

Other Factors

[20] The first respondent has not encountered any strike action by its 6 employees who are members of the Union. The second respondent has approximately 5900 employees, half of whom are members of the Union: the limited actual action to date has not impacted substantially on the operations of the employer let alone public interest. The third respondent has approximately 200 employees, half of them being Union members.

[21] Services provided are not substantially disrupted (or threatened). Contingency measures are in place hence the health or safety of service users and the public will not be endangered.

Discussion and Findings

[22] Just as all bargaining examples are highly individual if not unique, so too are facilitation applications.

[23] This application has the distinctive feature that the party initiating strike action is, at the same time, also seeking facilitation.

[24] The parties effectively accept that, if granted, facilitation will apply in respect of all three respondents.

[25] There is no evidence the parties have not acted in good faith toward each other.

[26] The nature of the strike action notice sent to the third respondent (dated 9 April and stated as effective from 0700 on 24 April) is a ban on the use of computers and writing by union members, including in respect of recording progress notes.

[27] As Ms Ellison-Hack makes clear in her affidavit of 6 April to the Employment Court, at pars 20-23 inclusive, and as was accepted by the Court (see par 13) in its judgement granting interim injunction orders, progress notes in respect of the third respondent's clients (the vast majority of whom have criminal records, and who are supervised in secure facilities) are compiled so as to monitor their mental state and risk, not only for their sake but also for the staff and the community at large. They are supposed to be completed at least three times a day so as to ensure up to date risk assessments can be obtained.

[28] Like the Employment Court, and notwithstanding the assurance the third respondent has in place appropriate contingency measures, I find there is a public interest arising out of the maintenance of current and accurate records, which stands to be compromised by the (now lawful) proposed industrial action.

[29] Having regard to the above, and on the basis of ss 50C (1) (d), I am satisfied this is an appropriate instance to exercise the Authority's discretion in favour of facilitation. That is because of the irresistible force (the Union members' commitment to strike action) and unmovable object (the real and total restriction on the employers' funding situation) nature of this problem which, I find, will sooner or later impact inevitably and substantially on public interest because of the likelihood of endangerment to *"… the life, safety, or health of persons"*: ss 50C (2) (a) of the Act, as a result of the risk of incomplete progress notes.

[30] The respondents' position is that, subject as they are to Government funding and the risk of exposure to a multi-million dollar liability, it cannot afford – and therefore cannot agree – to pay increases.

[31] What this means, amongst other things, is that the industrial action, particularly if protracted, is ultimately pointless but will likely – and equally pointlessly – test the contingency measures relied on by the respondents.

[32] I also accept that, "*the strike … if it were to occur, would be likely to affect the public interest substantially*" because of a likelihood it would "*… disrupt social … interests and the effects of the disruption are likely to be widespread* (and) *long-term"*: ss. 50C (2) (b) of the Act. The public interest extends to tax-payers who have an interest deserving of due care and proper consideration.

[33] I am satisfied that the reasoning set out above outweighs the arguable conclusion that negotiations to date have not been unduly protracted, and there have not been extensive efforts including mediation to resolve the differences precluding a settlement. The risk to the public interest outweighs this consideration.

[34] I am reinforced in this conclusion by regard to the self-evident reality of the respondents' financial circumstances and the Chief Judge's observations in *McCain* (above) as to the limited value of comparative references to other negotiations, and the unique circumstances of this case.

Determination

[35] The application is granted and this matter is directed to facilitation. I will be asking that urgency be given.

[36] As requested, costs are reserved.

Denis Asher
Member of the Employment Relations Authority