

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 122/10  
5296186

BETWEEN	TERTIARY EDUCATION UNION Applicant
AND	CHIEF EXECUTIVE WESTERN INSTITUTE OF TECHNOLOGY First Respondent
AND	CHIEF EXECUTIVE, UNITEC NEW ZEALAND Second Respondent
AND	CHIEF EXECUTIVE, WHITIREIA COMMUNITY POLYTECHNIC Third Respondent
AND	CHIEF EXECUTIVE, NORTHLAND POLYTECHNIC Fourth Respondent
AND	CHIEF EXECUTIVE, BAY OF PLENTY POLYTECHNIC Fifth Respondent
AND	CHIEF EXECUTIVE, WAIKATO INSTITUTE OF TECHNOLOGY IN TARANAKI Sixth Respondent

Member of Authority: Dzintra King

Representatives: Peter Cranney, Counsel for Applicant  
Sherridan Cook, Counsel for Respondents

On the Papers: 2 March 2010 from Applicant  
4 March 2010 from Respondent  
8 March 2010 from Applicant

**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, the Tertiary Education Union (“the TEU”), makes an application for facilitation regarding the collective bargaining currently occurring between the applicant and the respondents (“the ITPs”).

[2] The ITPs have adopted a neutral stance on the application and have chosen not to make submissions, but Mr Peter Wulff, the Director, Human Resources, Unitec, has filed an affidavit on behalf of the respondents. The ITPs have given a commitment to participate in good faith if facilitation is ordered.

[3] The TEU relies upon each of the grounds contained in s 50C (1) (b) (c) and (d) Employment Relations Act 2000.

[4] The TEU initiated bargaining for a new collective agreement on 12 January 2009. The collective agreement to be renegotiated was to expire on 1 March 2009.

[5] About 850 employees are covered by the collective.

[6] The ITPs wish to make changes to what the TEU views as a core condition, namely the entitlement to an additional four weeks’ discretionary leave per annum.

[7] Bargaining has taken place on 11 days: 28 to 29 May 2009, 9 June 2009, 23 June 2009, 6 August 2009, 9 October 2009, 27 October 2009 and 7 to 8 December 2009.

[8] Mediation assistance has been provided on three occasions.

[9] There have also been informal discussions.

[10] Stop work meetings were held on 21 August to 2 September 2009, 28 to 30 October 2009, 30 October to 3 December 2009 and 8 to 12 February 2010.

[11] Strike action has taken place on 16,17,21,22 and 23 September 2009; 2,3,4,5 and 6 November 2009; and 10, 11, 12 and 13 November 2009.

[12] The TEU says the strike action has been accompanied by acrimony, namely numerous accusations of allegations of breaches of good faith on the part of the TEU and its members and complaints about the deleterious effect of the strikes on students and the institutions.

[13] Ms Irena Brorens, the advocate for the TEU, deposed that the TEU had proposed an escalation of the strike action and if that were to occur the public interest would be likely to be seriously affected. Strike action had already disrupted and was likely to further disrupt the significant social and economic interest served by the institutions; and the effect was likely to be widespread, long term or irreversible.

[14] However, Mr Wulff said the strike action had been of a limited nature. There had been few full day strikes; a number had been of one to two hours' duration. The strike action had not involved a complete withdrawal of labour by all TEU members. In his view, the strike action had not been protracted or acrimonious and had generally been fairly orderly. It was "within the level of discord expected in such industrial action."

[15] He noted that the ITPs had not been provided with any details of the proposed escalation of strike action and disputed that it had had or would be likely to have the serious effects contended for by the TEU.

[16] Section 50C(1)(b) requires that the bargaining has been unduly protracted and that extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. These are cumulative requirements.

[17] Bargaining must have been not merely protracted but "unduly protracted". There must have been efforts, which must be "extensive" to resolve the difficulties that have precluded the parties from entering into a collective agreement, which efforts have failed.

[18] If it is shown that there have been real attempts to bargain and settle, but that the parties' strongly held positions have precluded settlement, the bargaining may be said in that sense to have been unduly protracted. Undue protraction is excessive or disproportionate protraction.

[19] The participation by a mediator in three of the eleven bargaining meetings parties goes towards constituting "extensive efforts" under s 50C(1)(b)(ii).

[20] The "efforts" required by s 50C(1)(b)(ii) that have failed to resolve the difficulties and have precluded the parties from entering into a collective agreement, must also have been "extensive". In *McCain Foods (NZ) Ltd v SFWU Nga Ringa Tota Inc* [2009] ERNZ 28 Colgan J noted that this implied "having a wide scope, being far-reaching or comprehensive, covering a large area or time range of activities."

[21] The parties have had a number of bargaining meetings, have sought the assistance of a mediator, have had informal discussions and there has been industrial action.

[22] I find that the bargaining has been unduly protracted and that despite extensive efforts the parties have not been able to conclude a collective agreement.

[23] Any one or more of the grounds set out in s 50C(1) will suffice for a referral to facilitation. I will comment briefly on the other grounds claimed.

[24] The second ground, under s 50C(1)(c), is that in the course of the bargaining there have been one or more strikes or lockouts and these have been protracted or acrimonious. While there has been strike action on a number of occasions I do not find they have been protracted or acrimonious. The strike action has been of limited duration and while there have been accusations regarding lack of good faith, I cannot see that there is anything in the relationships between the parties relating to the strike that would merit the term "acrimonious." Acrimony denotes bitter, sharp animosity, rancorousness, harshness or asperity. The dissension has been carried out in a civilised and courteous manner.

[25] The third alternative, under s 50C(1)(d), is that in the course of bargaining a party has proposed a strike or lockout and, if it were to occur, such strike or lockout

would be likely to affect the public interest substantially. Section 50C(2) defines when the public interest is likely to be affected substantially.

[26] The nature of the proposed industrial action has not been specified. While there may be circumstances in which strike action in the education sector would disrupt social, environmental and economic interests and the effects of such disruption could be widespread, long-term or irreversible I am not satisfied that the evidence I have shows that any one of these scenarios is likely at this stage.

[27] I have found that the bargaining has been unduly protracted and that extensive efforts have been made to resolve the difficulties impeding a settlement. I therefore accept the reference for facilitation.

### **Costs**

[28] If the parties are unable to resolve the matter of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondents should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of the Employment Relations Authority