IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 99
533 5874

	BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA
	AND	PACIFIC FLIGHT CATERING LTD

Member of Authority: Yvonne Oldfield

Representatives: Tim Oldfield for applicant
Rob Towner for respondent

Determination: 14 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns an application for a reference to facilitated bargaining in relation to bargaining between the applicant ("the Union") and the respondent ("Pacific Flight," a flight catering business.) The bargaining relates to a proposed collective agreement for Union members employed by Pacific Flight as ground stewards and in scullery. The Union has alleged that there are grounds for facilitation pursuant to Section 50 C (1) (a), (b), and (c) of the Employment Relations Act 2000. The Union also requested that the matter be given urgency.

[2] Pacific Flight disputes the existence of the grounds set out in Section 50 C (1) (a) and (c). It does not dispute 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. It accepts therefore that there are grounds for a reference pursuant to Section 50 C (1) (b) and shares the Union's view that the Authority should refer the matter to facilitation.

Issues

[3] The Authority currently has before it only the statement of problem and the statement in reply. Pacific Flight has confirmed its agreement with key parts of the chronology set out in the statement of problem and like the Union, it wants the matter to be dealt with as expeditiously as possible. Both parties say that the Authority should not need evidence in order to determine whether the ground set out in Section 50 C (1) (b) has been made out.

[4] To this end the parties have requested that the Authority proceed (without more) to determine whether the threshold in Section 50 C (1) (b) has been met. I now do so, reserving all other issues in the application, including those relating to whether the alternative grounds are made out.

Determination

[5] The relevant circumstances are set out in the statement of problem as follows:

> *"2…*
>
> *(c) On 27 April 2009 the applicant initiated bargaining with the respondent for a collective agreement covering employees employed as ground stewards and in scullery.*
>
> *(d) On 1 September 2009 the applicant began to attempt to set up bargaining dates but the respondent delayed arranging bargaining dates.*
>
> *(e) On 15 December 2009 the applicant sent to respondent its bargaining process arrangement ("BPA").*
>
> *(f) On 20 December 2009 the applicant presented its claims to the respondent.*
>
> *(g) On 23 December 2009 the parties met to bargain and discussed a BPA.*

(h) On 21 January 2010 the parties met again to bargain and discussed the BPA.

(i) In February 2010 the parties communicated in writing bargaining about the content of the BPA and the coverage of the intended collective agreement.

(j) The parties met to bargain again on 4 and 24 March 2010.

(k) The applicant attempted to arrange bargaining dates in April, May and June 2010 but the respondent would not confirm dates.

(l) On 16 June 2010 the parties met with the Department of Labour's partnership Resource Centre ('PRC'). The parties discussed the bargaining, among other issues.

(m) The parties met to bargain again on 29 July 2010.

(n) The parties met separately with the PRC on 5 August 2010. The PRC's involvement did not assist the serious difficulties the parties were having in concluding a collective agreement.

(o) The parties met to bargain with a mediator present on 17 September 2010.

(p)The parties met to bargain again on 24 September 2010.

(q) The applicant's members covered by the bargaining went on strike on 3 October 2010…[1]

(r)The parties met to bargain again on 26 November and 9 December 2010."

---

[1] The statement in reply records agreement with "*paragraphs 2(c) to (r)*" but goes on to record specifically that it disputes that the bargaining was acrimonious. The remaining parts of paragraph 2 (r) detail the allegations of acrimony and are not therefore included here.

[6] The parties remain unable to conclude a collective agreement. Indeed they have been unable even to agree on bargaining process arrangements.

[7] Issues during the bargaining also led in a claim by the Union that Pacific Flight had breached its obligations of good faith with the intention of undermining the bargaining. In separate proceedings [2] the Authority found:

> *"a penalty may be imposed on* [Pacific Flight] *if its failure under s 4 (1)…was intended to undermine bargaining for a collective agreement. I am satisfied that* [Pacific Flight]*'s conduct amounted to a breach… The intention to undermine bargaining can be reasonably inferred from the actions of* [Pacific Flight] *and the consequences …* [Pacific Flight] *obviously hoped would follow."*

[8] Section 50 C (1) (b) provides as follows:

"Grounds on which Authority may accept reference

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

1. that-

(i) the bargaining has been unduly protracted; and

(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement."

[9] It is clear from this provision both that the Authority cannot accept a reference simply by agreement of the parties, and that the threshold for acceptance is a high one. Three elements must be present before the ground is made out. The bargaining must

[2] *Service and Food Worker's Union NGA Ringa Tota Inc & Pacific Flight Catering Limited, [2011] NZERA Auckland 23*, paragraph [49].

be unduly protracted, there must have been serious difficulties in concluding a collective agreement, and extensive efforts need to have been made to overcome those difficulties.

[10] In this case, two years have elapsed since bargaining was initiated. Two years might not be an "unduly protracted" timeframe in all cases. If for example parties were engaged in a major overhaul or rewrite of a complex document covering many different occupations it might not be unreasonable for negotiations to take two years or more. In this case, however, negotiations have not even begun in earnest. Two years have elapsed without the parties even having been able to agree on the bargaining process they will adopt. I am satisfied that the negotiations to date have been "unduly protracted."

[11] I am also satisfied that there have been serious difficulties in the bargaining for the following reasons:

i. there have been numerous delays and difficulties for the applicant in arranging to meet with the respondent in bargaining;

ii. the respondent's breach has by definition affected the good faith between the parties. It has also deflected resources from the bargaining into the proceedings in the Authority. Whether or not the breach amounts to grounds pursuant to Section 50C (1) (a) (that question having yet to be determined) it has nonetheless created a serious difficulty that has hindered the negotiations;

iii. it is the assessment of both parties that there have been serious difficulties. While their assessment is not determinative, it carries some weight in combination with the other factors identified above.

[12] In order for this reference to facilitation to be accepted "extensive efforts" must also have failed to resolve the difficulties. I have given particular consideration

to whether this element is present because the parties have on only one occasion used the help of the mediation services. As well, however, they have drawn on the PRC for third party assistance in both joint and separate meetings. In all the circumstances, I am satisfied that extensive efforts have been made.

[13] In summary while this is not a case where the threshold for a reference to facilitation (pursuant to Section 50C (1) (b)) has been passed by a significant margin, it has nonetheless been passed. The matter is referred to facilitation.

Costs

[14] The question of costs is reserved.

Yvonne Oldfield
Member of the Employment Relations Authority