

However, it seems that the application more correctly must be assessed pursuant to s.50C (3) of the Act.

[2] Indeed, FARSA opposes the application for facilitation on the ground that pursuant to s.50C (3) of the Act, the Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator, because:

- (i) The circumstances relating to bargaining have not changed since the previous facilitation; and
- (ii) The bargaining since the previous facilitation has not been protracted.

[3] Following a conference call convened by the Authority, the parties have agreed that this application should be determined “on the papers.” In addition to the *Statement of Problem* and the *Statement in Reply* and supporting documents, the Authority has received affidavits from both parties, all of which have been taken into consideration in determining this matter, albeit they may not be specifically referred to in this determination.

Background

[4] Air NZ and FARSA are parties to the *Flight Service Managers Collective Employment Agreement 2006-2009* (the CEA). This agreement covers all FARSA members employed by Air NZ as flight service managers. The CEA expired on 7th September 2009. FARSA initiated bargaining for a new CEA on 1st September 2009. Between 1st September and 14th September 2009 the parties met to negotiate a *Bargaining Process Agreement* and this was signed by the parties on 14th September 2009.

[5] From 16th September 2009 to 13th August 2010, the parties engaged in a bargaining process for a new CEA. This process included several mediation meetings with a Department of Labour mediator but the parties remained unable to reach agreement on the overall terms for a new CEA.

The first facilitation

[6] On 4th June 2010, Air NZ applied for facilitation with the Authority on the ground that the bargaining had been unduly protracted. Air NZ says that by that time,

the parties had met to progress negotiations on 25 occasions. FARSA opposed the application. The parties subsequently agreed to attend further mediation and did so for a total of 7 days in the period 23 June to 13 August 2010 without a successful outcome.

[7] Via a determination dated 18th August 2010¹ the Authority (Member Oldfield) allowed the reference for facilitation on the basis that the criteria under s.50C (1)(b) had been met in that the bargaining had been unduly protracted and extensive efforts (including mediation) had failed to resolve the difficulties that had precluded the parties from entering into a collective agreement.

[8] On 31st August and 1st September 2010 the parties attended a facilitation meeting with an Authority Member (Member Campbell). At the conclusion of the facilitation meeting the parties signed a *Record of Settlement*. This confirmed that the facilitation was complete and the agreed outcome included a proposed new CEA which was taken to FARSA members for ratification on 24th September 2010. The proposed agreement was rejected by FARSA members. Air NZ says that FARSA advised that the reason the proposed agreement was not ratified is that “the offer was not high enough.” However, FARSA says while its members considered that the salary increase being offered was too low, other conditions were also unacceptable.

Bargaining subsequent to the first facilitation

[9] Between 30th November 2010 and 4th May 2011, the parties have had 9 days of scheduled negotiation meetings. Additionally, following the current application for facilitation on 17th May 2011, the parties attended further mediation on 9th June 2011; without success. I understand that the parties were scheduled to attend a further day of mediation on 10th June 2011 but this did not occur and there is conflict in the evidence of the parties about whether a “stalemate” was reached. The conflict in the evidence could, perhaps, be seen as a matter of different perceptions, but nonetheless it is apparent that there are fundamental differences between the parties that will require conciliation before there is any realistic possibility of a new CEA being ratified.

¹ AA 363/10

The criterion that has to be met pertaining to further facilitation

[10] Section 50C (3) of the Act provides that:

The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless –

- (a) circumstances relating to the bargaining have changed; or
- (b) the bargaining since the previous facilitation has been protracted.

Therefore, in order for the Authority to accept the reference for further facilitation, one of two conditions must be met. That is, either the circumstances relating to the bargaining have changed or, the bargaining since the previous facilitation has been protracted.

Have the circumstances relating to the bargaining changed?

[11] It seems to me that this condition is so broad that one can only assume that Parliament intended that it should be easily satisfied. This is particularly so if one looks at a standard definition of the word “change.”² And, on the evidence available to the Authority, it is clear that that the circumstances have changed in that the parties have modified their respective positions. Firstly, at the conclusion of the first facilitation, the parties reached a position whereby proposed terms for a new CEA were available to go to FARSA members for ratification. It then transpired that the members elected not to ratify the proposed agreement because there were several conditions that were unacceptable.

[12] From 22nd October to 9th June 2011 there has been further bargaining and the common evidence is that both parties have changed their respective positions since the facilitation that took place on 31st August and 1st September 2010. Indeed, both parties have (via sworn affidavits) told the Authority that they have changed their negotiating positions, albeit ironically, their respective evidence is weighted towards convincing the Authority of how the approach they have adopted is ultimately the most reasonable and why further facilitation is, - or conversely - is not, required.

[13] In summary, I find that the circumstances have changed since the Authority last acted as a facilitator; hence that condition of s.50C (3) of the Act is satisfied.

² *Concise Oxford Dictionary* – a) the act or instance of making or becoming different.
b) an alteration or modification.

Has the bargaining since the previous facilitation been protracted?

[14] Given the previous finding, it is not really necessary to analyse whether the alternative condition relating to whether the bargaining has been protracted since the last facilitation is met. Nonetheless, it seems to me that there is also a low threshold in regard to meeting this criterion. I note that the condition for initial facilitation under s. 50C (1)(b)(i) of the Act is that the bargaining must have been “*unduly protracted*” but under s.50C (3)(b) the “active” word relating to the bargaining is simply “*protracted.*” And of course under s.50C (1)(b), there is an additional criterion that must be satisfied in that the parties must establish that they have attempted to resolve the bargaining difficulties by “*extensive efforts (including mediation)*” but this is not required under the latter subsection of the Act.

[15] The circumstances of the current application are that the parties have been attempting to reach final agreement on a new CEA since 22 October 2010. They have met on 9 different occasions and have had further mediation assistance for one day. The position of FARSA appears to be that this is not enough to establish that the bargaining has been protracted. But it seems to me that, by any definition, a time lapse of a further seven months (to application date), viewed in the light of the fact that the bargaining has been taking place since September 2009, must be seen as being protracted and hence this criterion under s.50C (3)(b) is also met.

Determination

[16] I am satisfied that the circumstances relating to the bargaining since the Authority previously acted as a facilitator have changed to a sufficient degree that s.50C (3)(a) is satisfied. I am also satisfied that s. 50 (3)(b) is established in that the bargaining since the previous facilitation, has been protracted. It follows that the reference for facilitation is accepted. The facilitation should commence as soon as practicable and accordingly, a copy of this determination will be made available to the Chief of the Employment Relations Authority who will appoint another Authority member to enable facilitated bargaining to be arranged. Costs are reserved.

K J Anderson
Member of the Employment Relations Authority