

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 201
5365618

BETWEEN NEW ZEALAND MEAT
 WORKERS & RELATED
 TRADE UNION INC
 Applicant

AND CMP RANGITIKEI LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Simon Mitchell for Applicant
 Glenn Jones for Respondent

Investigation meeting: On the papers by consent of the parties

Determination: 14 December 2011

DETERMINATION OF THE AUTHORITY

A The grounds for referral for facilitated bargaining pursuant to section 50C(1)(c) have been met. The parties are referred under s50B of the Employment Relations Act to the Authority for facilitation of their bargaining for a collective agreement.

Employment Relationship Problem

[1] On 31 October 2011 the applicant (“the Union”) made an urgent application to have claims of breach of good faith against the respondent (“CMP Rangitikei”) heard before the Authority. An investigation meeting was scheduled for 14-15 December 2011 to hear those matters.

[2] On 5 December 2011 the Union made a further urgent application for referral for facilitated bargaining. A telephone conference was convened on 6 December 2011. It was requested and agreed that the days previously scheduled for an investigation would be vacated; the Union would apply to have the matters relating to good faith removed to the Court and the Authority would give priority to the Union's application pursuant to sections 50C(1)(a), (b) and (c) of the Employment Relations Act 2000 for referral for facilitated bargaining.

[3] CMP Rangitikei did not oppose the application for referral for facilitated bargaining on the grounds contained at s50(C)(1)(c) where industrial action in the form of lockout has been acrimonious.

[4] Alongside the papers filed in relation to the Union's first application the parties agreed to exchange further information to each other and the Authority, and the application for referral would be decided on the papers.

The Issues

[5] Sections 50B to s50I of the Employment Relations Act ("the Act") provide a process of facilitation assistance to parties who are having serious difficulties in concluding a collective agreement. However s50A stipulates that the Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds in s50C(1) of the Act exist.

[6] In order for a referral for facilitated bargaining to be granted the issues for the Authority to determine in this instance are:

- (i) Has either the Union or CMP Rangitikei failed to comply with the duty of good faith according to s4 of the Act and if so, was that failure serious, and sustained and did it undermine the bargaining?
- (ii) Has bargaining between the Union or CMP Rangitikei been unduly protracted and have extensive efforts by the parties failed to resolve the difficulties?
- (iii) Has there been one or more strikes or lock-outs between the Union and CMP Rangitikei during bargaining and has this industrial action been protracted or acrimonious?

Background to Application for Referral for Facilitated Bargaining

[7] CMP Rangitikei is primarily engaged in processing lamb for export at its plant in Marton.

[8] The Union and CMP Rangitikei were parties to a collective employment agreement (“CEA”) which expired on 30 September 2011.

[9] CMP Rangitikei sought significant changes to the CEA and discussions were commenced in April 2011 as to those proposed changes.

[10] CMP Rangitikei formally initiated bargaining for a new CEA on 22 August 2011. At that time approximately 280 of CMP Rangitikei’s employees were members of the Union.

[11] The parties met informally on nine occasions between April and August 2011 to discuss CMP Rangitikei’s proposals¹. They further met formally for the purposes of bargaining on four occasions between August and October 2011² and then obtained mediation assistance from the Department of Labour’s Mediation Services on five days during October and November 2011³.

[12] Following 14 days notice members of the Union have been locked out since 19 October 2011 and continue to be so.

[13] The Union contends the lockout is unlawful and this matter is before the Employment Court.

[14] At the time of the Lockout Notice, there were 111 members of the union remaining. Some employees have since left the Union. It is estimated 70 to 80 workers remain locked out.

¹ 14 & 28 April 2011, 3 & 17 May 2011, 7 & 27 June 2011, 12 July 2011, 4 & 8 August 2011.

² 22 August 2011, 28 & 30 September 2011, 30 October 2011.

³ 18, 21 & 22 October 2011, 9 & 23 November 2011.

Analysis

[15] It is clear from the statutory provisions that the threshold at which a reference for facilitated bargaining will be granted is high. In this regard facilitation is reserved for situations of the most serious bargaining difficulties. The Authority cannot accept a reference for facilitation simply by agreement of the parties. Nor can a party making an application 'cherry pick' between the different criteria ascribed to the four separate possible grounds contained in the Act which provide for referral. Each ground has a number of specific factors which must be met before a referral on a particular ground will be granted.

S50C(1)(a): serious and sustained breaches of good faith undermining bargaining

[16] The Union, in its Statement of Problem dated 31 October 2011, alleges CMP Rangitikei has approached members either through meeting personally with them and/or telephoning or writing, to discuss the proposed new CEA and/or offer individual employment agreements. It says that in this way CMP Rangitikei has bargained with members directly.

[17] CMP Rangitikei in its Statement in Reply, claims the Union has misrepresented its proposals to the members. It says that the union's misrepresentations have misled, or are likely to, mislead or deceive those members. It says the Union further breached its obligation of good faith by the actions of its delegates and organisers on the picket line where it says the Union engaged in abusive, intimidatory and threatening behaviour towards staff who work at the processing plant and who are not members of the union.

[18] It is clear that both the Union and CMP Rangitikei allege that the other has breached obligations of good faith during bargaining. Both parties deny allegations that they themselves have breached obligations of good faith. There have been claims and counter claims of breach of good faith from both sides.

[19] The allegations of breach of good faith have not been supported by unquestionable documentary evidence by either party. Nor are the allegations able to be properly tested in circumstances where the application is being dealt with urgently and on the papers. As a consequence I am unable to make a finding that either party

has failed to comply with duties of good faith. Therefore I conclude that the limb at s50C(1)(a)(i) has not been met in this application.

S50C(1)(b): bargaining unduly protracted and unresolved despite extensive efforts

[20] The parties have been engaged in discussions relating to a new CEA for almost eight months, having met on 18 different occasions including five days in mediation.

[21] In *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc*⁴, the Court noted:

“Protracted” bargaining is allowed for by the legislation although this cannot constitute a ground for a reference to facilitated bargaining. Undue protraction (the statutory test) is excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.

[22] Extensive efforts evidenced by the assistance sought by the parties from the Mediation Service have been made to conclude the bargaining. However I do not consider bargaining has been unduly protracted. It is not uncommon for parties to bargain beyond eight months for a CEA.

[23] I find that the criteria relied on at section 50(C)(1)(b) have not been met.

S50C(1)(c): protracted or acrimonious strikes or lock-outs

[24] It is not disputed that in the course of bargaining members of the union have been locked out from their place of work since 19 October 2011.

[25] At the date of this determination members of the union have been locked out of the work place for 57 days. Each party has made serious claims of breach of good faith against the other. A picket has been held outside the processing plant since the industrial action started on 19 October 2011. During the course of industrial action demonstrations have been organised, including action taken outside customers of CMP Rangitikei such as McDonald’s restaurants, and the offices of the Mediation

⁴ [2009] ERNZ 28 at [64]

Service in Palmerston North during mediated negotiation meetings. These actions have been widely reported in the media. Both parties consider the lockout has been acrimonious but apportion responsibility for the acrimony to the other.

[26] I am satisfied that the industrial action between the parties is acrimonious.

Determination

[27] I find that the grounds set out in s50C(1)(c) of the Act have been met.

[28] The Union and CMP Rangitikei are referred under s50B of the Act to the Authority for facilitation to assist them in resolving the difficulties in concluding the collective agreement for which they have been bargaining.

Michele Ryan
Member of the Employment Relations Authority