IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 400
5332262

	BETWEEN	NZ PROFESSIONAL DRIVERS AND TRANSPORT EMPLOYEES ASSOCIATION INCORPORATED Applicant
	AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED Respondent

Member of Authority:	Dzintra King
Representatives:	Paul Carrucan, Advocate for Applicant Jo Douglas, Counsel for Respondent
Investigation Meeting:	19 April 2011
Submissions and Correspondence received:	19 April, 9 June 2011, 29 July 2011from Applicant 19 April 2011 from Respondent
Determination:	15 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, the NZ Professional Drivers and Transport Employees Association Incorporated (the "PDI" or the "Union"), and the respondent, Transportation Auckland Corporation Limited ("TACL" or "the company"), have been attempting to negotiate a collective agreement. They have been unsuccessful in doing so.

[2] The applicant wishes the matter to be facilitated.

[3] The applicant says that the referral should be made on the grounds set out in s50C (1) (a) and s50C (1) (b).

[4] The respondent does not oppose a referral to facilitation but only on the basis that the provisions of s50C (1) (b) are applicable and not the provisions of s50C (1) (a).

[5] Section 50C (1) (a) provides that a matter may be referred if a party has failed to comply with the duty of good faith in s4 and that the failure was serious and sustained and has undermined the bargaining.

[6] Section 50C (1) (b) provides that a referral may be made where the bargaining has been unduly protracted and extensive efforts, including mediation, have failed to resolve the difficulties.

[7] The applicant also seeks, pursuant to s50J, that the Authority fix the provisions of the collective agreement if facilitation is unsuccessful.

Background

[8] Negotiations were initiated in September 2007 but a Bargaining Process Agreement ("BPA") was not signed until 21 December 2008. This provided that Mr Brian Webb would be the advocate for the PDI and Mr Gavin Cook would be the advocate for the TACL. Mr Murray Forbes was on the PDI's negotiation team with Mr Robert Ratu as the reserve. For the respondent, in addition to Mr Cook unspecified other managers/directors were to be involved as required. If the identity of negotiators was to change this was to be notified at least 48 hours prior the commencement of the next meeting.

[9] Clause 14 of the BPA provides that if a party believes there has been a breach of good faith in relation to collective bargaining that party is to indicate such to the other party to enable rectification or an explanation.

[10] On 10 September 2009 Mr Webb emailed Ms Emma Butler, Head of People, with an attached revised proposed collective saying he would take it to ratification on 16 September.

[11] Ms Butler replied the following day saying there were still areas that were not agreed or needed explanation and it was therefore premature to attempt to ratify the document.

[12] Mr Webb replied, asking that the contentious areas be identified.

[13] On 25 May 2010 Mr Webb asked Ms Butler to email him the company's proposed collective for consideration.

[14] Mr Webb was unable to continue as the advocate and was replaced by Mr Paul Carrucan, the Secretary of the Union. Changes also took place on the respondent's side.

[15] Mr Darek Koper, the General Manager, Southwest was designated the company's advocate and assisting him was Mr David Gould, the National Human Resources Manager, who was the lead technical advisor. When Mr Gould joined TACL he was made aware by the then General Manager, Human Resources that an outstanding matter was the conclusion of bargaining with the PDI. She indicated that that set of negotiations should pass to him.

[16] On 29 June 2010 Mr Carrucan met with Mr Gould who asked that he provide a signed authorisation that he was the representative.

[17] Mr Gould said that prior to his first meeting with the PDI negotiators he became aware that the Union only had 15 members and he asked Mr Carrucan to provide a list, which was for the purposes of ensuring that the company was dealing with a properly constituted union and that Mr Carrucan had been authorised by the members.

[18] On 12 July 2010 Mr Carrucan sent a memorandum which contained an authorisation by 13 members that he was to act as their advocate, given that Mr Webb was unavailable due to family ill health. The Union bargaining team was identified as being Mr Carrucan, Mr Tom Bower, Mr Noah Kaitaeifo and Mr Webb.

[19] A meeting took place on 27 September 2010 between the negotiating teams. The PDI's position was that the PDI negotiation had been 'sidelined' as the company had delayed negotiating with the PDI until it and the Combined Unions had renegotiated a collective.

[20] Mr Koper said there had been a brief discussion about the possibility of PDI members moving to individual employment agreements. That idea was introduced because the previous Union head had been taken ill and there were relatively few members. The Union indicated it wished to continue collective bargaining and that was accepted by the company.

[21] The company suggested that in the interests of not getting bogged down it might be preferable for the PDI to operate as an Association and have individual employment agreements that were negotiated at the same time rather than have a collective bargaining situation.

[22] The issue of wages was raised. There was a forty minute adjournment. The PDI presented two scenarios. The company team undertook to present these to the Management Team for a response. If they were considered to have merit the matter could proceed to ratification for the consideration of PDI members.

[23] The Union says that an agreement was reached at this point and that the company later reneged on the agreement.

[24] On 12 October Mr Carrucan emailed Mr Gould asking for the company's response.

[25] Mr Gould responded on 12 October saying that they had agreement in principle with the only outstanding matter being the relevant date for back pay, and proposing a date of 1 April 2010, saying he would formalise the offer by way of a letter.

[26] Mr Carrucan replied on 20 October stating that the back pay offer was not acceptable and was considered an act of bad faith. The rationale for this was that on 27 September it had been agreed that back pay would be considered from 5 July 2009

and the new position created an unfair disadvantage for PDI members. The letter referred to clause 14 of the BPA. He asked for a meeting the following week. An offer was made by the company on 12 November 2010. Mr Carrucan recommended that the offer be accepted but the offer was rejected.

[27] The parties attended mediation on 20 December 2010.

Section 50C (1) (a)

[28] The breaches of good faith are alleged to be that:

- Pursuant to s4 (1A) (b) the company was obliged to be responsive and communicative and that it had failed to respond to representations and communications in a timely manner, which unnecessarily prolonged the bargaining process.
- Pursuant to s32 (1) (d) (i) the company failed to recognise the role and the authority of Mr Carrucan.
- Pursuant to s32 (1) (d) (iii) the company undermined the Union by advising members that to obtain a pay increase they needed to join another union and after bargaining resumed on 27 September 2010 advised the membership it wanted individual agreements and not a collective.
- Pursuant to s3 (a) (iii) the company did not support collective bargaining as it did not support the PDI taking part in the Combined Union negotiations and postponed bargaining with the PDI until the Combined Union collective was settled.
- Pursuant to s4 (1) (b) (i) and (ii) the company misled the PDI either by failing to put the respondent's position on the back pay issue honestly and fairly or, alternatively, it changed its position following the agreement reached on 27 September.

[29] There has been no breach of s 4(1A) (b). Unfortunately, there were changes in the negotiating teams for both sides, which resulted in delays.

[30] The company did not fail to recognise the role and authority of Mr Carrucan: it simply sought clarification.

[31] On 27 September the matter of individual agreements was raised, rejected and the discussions proceeded. There was no undermining.

[32] Postponing of the bargaining until the Combined Union was settled is not an act that can be categorised as failing to support collective bargaining.

[33] There was no misleading and no backtracking as no agreement had been reached.

[34] Section 50C (1) (a) provides that there must be both a failure to comply with the duty of good faith and, additionally, that the failure was serious and sustained and has undermined the bargaining.

[35] The facts in this matter do not satisfy these criteria.

[36] The applicant seeks that the Authority fix the provisions of the collective agreement. This remedy is not available because the provisions of s50J have not been satisfied.

Section 50C (1) (b)

[37] Section 50A states that the purpose of facilitation is to provide a process whereby the parties to collective bargaining, if they are having serious difficulties in concluding a collective, can seek the assistance of the Authority.

[38] Section 50C (1) (b) provides for facilitation if bargaining has been unduly protracted and extensive efforts, including mediation, have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

[39] In *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Incorporated* [2009] ERNZ 28 the Court said that facilitation was to take place only if there were "serious" difficulties, not mere difficulties. It also noted that there must have been "extensive" efforts, not merely efforts and that the process must have been "unduly" protracted, not merely protracted.

[40] From the time that a draft agreement was sent to the respondent in September 2009 few meetings have taken place.

[41] I do not accept the applicant's contention that the respondent has failed to comply with the duty of good faith and that the failure was serious and sustained and has undermined the bargaining: s50C (1) (a).

[42] In *PMP Print Ltd v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* (2005) 7 NZELC 97,778 an application for facilitation was rejected. At para [35] the Authority said:

> *[Facilitation] is to be provided where there are serious difficulties in concluding a collective agreement, not simply ordinary difficulties that arise during collective bargaining. It is not enough for the Authority to be of the view that facilitation may be of assistance to the parties in their collective bargaining because section 50C(1) provides that the Authority must not accept a reference for facilitation unless satisfied that 1 or more of the grounds set out in that section exist. The words used in the four grounds support that there must be serious difficulties between the parties with phrases such as serious and sustained, unduly protracted, extensive efforts (including mediation) have failed, protracted and acrimonious and affect the public interest substantially."*

[43] In *NZ Meat Workers and Related Trades Union v Crusader Meats NZ Ltd*, ERA Auckland, AA 157/07, 24 May 2007 the Authority said at para [19] that the threshold for reference was very high.

[44] Having considered the history of the bargaining, while I accept that the bargaining has been protracted it has not been unduly protracted. There has been a single mediation and a limited number of meetings. It cannot, therefore, be said that there have been extensive efforts to reach a resolution.

[45] While the respondent may not be averse to the matter being referred to facilitation, the legislative criteria must be met; and they have not.

[46] The application for referral to facilitation is declined.

Costs

[47] Costs are reserved. If the parties are unable to reach agreement on costs, the respondent is to file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority