IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 88
5334848

	BETWEEN	PUBLIC SERVICE ASSOCIATION INC Applicant
	AND	THE ACCIDENT COMPENSATION CORPORATION Respondent

Member of Authority:	G J Wood
Representatives:	Peter Cranney for the Applicant Susan Hornsby-Geluk for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	By 24 May 2011
Determination:	26 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pursuant to s.50B of the Employment Relations Act 2000, the applicant union (the PSA) applies to have bargaining for a collective agreement between it and the respondent (ACC) referred to facilitation by the Employment Relations Authority. It does so on the grounds under s.50C(1)(b) that the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the differences that have precluded the parties from entering into a collective agreement. ACC opposes the application.

Factual discussion

[2] The essential facts required to determine this matter (barring differing perceptions as to the motivations of the parties) are essentially agreed. Bargaining commenced on 5 May 2009 to replace the parties' collective agreement that was to expire on 30 June 2009. Seven hundred and eighty employees are covered by the negotiations out of around 2,700 employees (being approximately 29% of its workforce).

[3] The parties entered into a bargaining process agreement. There have been no indications of any breaches of it.

[4] Four bargaining meetings took place over the course of nine days between 30 July 2009 and 23 July 2010. In addition, there were two *short line outs* in July and September 2010. On 8 December 2009 and 11 February 2011, a Department of Labour mediator conducted mediation.

[5] There has been industrial action, namely shared breaks and a work to rule commencing on 26 April 2010, a strike from 3pm on 25 June 2010 and a full day strike on 8 November 2010.

[6] At the end of the mediation on 11 February 2011, the ACC claims it provided the PSA with a second offer to settle, to which it was due to respond. The Mediation Service was also asked by the PSA to make further dates available for mediation. On 14 February 2011, the PSA filed the application for reference to facilitation.

[7] Despite not agreeing that there was an offer on the table from ACC, the PSA subsequently agreed to have a further mediated bargaining meeting as requested by the ACC. The facilitation application appeared to be put on hold until its conclusion.

[8] Mediation was attempted on 15 April. Unfortunately, no settlement has followed.

[9] It appears that the key issue between the parties relates to the remuneration system. The parties appear to be at an impasse over the setting of ACC's whole remuneration system for PSA members. While the ACC remains open to further negotiation, the PSA considers the parties are at an impasse.

The law

[10] Referral to facilitation can only occur where parties have serious difficulties in concluding a collective agreement. Under s.50C(1)(b) the requirements are for unduly protracted bargaining and extensive efforts having been made that have failed to resolve the difficulties.

[11] In *McCain Foods (NZ) Ltd v. Service & Food Workers' Union Nga Ringa Tota Inc* [2009] ERNZ 28, the Employment Court addressed these questions at para.[62]ff:

> *[62] …When determining what is meant by "unduly protracted" under s50C(1)(b), the Act's provisions for the duration of a collective agreement are pertinent. … It is relevant (but certainly not determinative) that Parliament has said that collective agreements may be for up to 3 years' duration and has inferred that up to a year may be necessary for the renegotiation of these.*
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> *[63] Although the term of a collective agreement does not of course determine a reasonable period of time to bargain for it, collective bargaining that has stalled after 34 months, when compared to the maximum term of any agreement (36 months), may be seen to be unduly protracted. As the Employment Relations Authority concluded, however, other considerations affect the question of the passing of time. If, as here, it is shown that there have been real attempts to bargain and settle, albeit that the parties' strongly held positions have precluded settlement, the bargaining may also be said in that sense to have been unduly protracted.*
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> …
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> *[65] Similarly, the "efforts" required by s50C(1)(b)(ii) that have failed to resolve the difficulty and to have precluded the parties from entering into a collective agreement, must meet the qualification of having been "extensive". This implies having a wide scope, being far reaching or comprehensive, covering a large area or time range of activities.*
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> *[66] The reference to mediation as part of the extensive efforts to resolve the duties referred to in s50C(1)(b)(ii) refers to the mediation services conducted under ss144-154 of the Act. In relation to collective bargaining in particular, this is dealt with by s144(2)(e) that provides expressly that mediation services may include "services that assist persons to resolve any problem with the fixing of new terms and conditions of employment".*
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> *[67] I find that the participation by a mediator of no fewer than four (of 10) bargaining meetings held between the parties*

> *goes significantly towards constituting "extensive efforts" under s.50C(1)(b)(ii).*
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> *[68] So the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (the temporal element) and extensive efforts must have been made in the bargaining (the "activity" requirement) that have, nevertheless, failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. One constituent of those extensive efforts must have been mediation assistance. All elements of the test must have occurred before the grounds under s50C(1)(b) for a reference to facilitation are established.*

Determination

[12] I accept that the structure of a remuneration system is an issue upon which parties to a proposed collective agreement are quite entitled to negotiate over and take different views on. At this point, there appears to be an impasse on this fundamental issue. That, in itself, constitutes serious difficulties in concluding a collective agreement, let alone taking into account the length of time of over two years since the commencement of bargaining (especially in the context of collective agreements which can only last for a maximum of three years). For almost a year the parties have not been covered by any collective agreement. In this context, bargaining has also become unduly protracted (*McCain* applied).

[13] There have been real attempts to bargain and settle over eleven days of bargaining and three days of mediation. Clearly the requirement for mediation has been met. Furthermore, the efforts have been of a wide scope - involving full bargaining meetings, *short line outs,* contact between the chief executive of ACC and the national secretary of the PSA, mediation, and direct industrial action on several occasions. Furthermore, these efforts have gone on for a long period of time. I am thus also satisfied that there have been extensive efforts to try and resolve the bargaining (*McCain* applied).

[14] I am therefore satisfied that grounds for reference for facilitation do exist in this case. One is always hopeful that ACC's view that further negotiations may assist is correct, but this can be done equally under the supervision of an Authority Member conducting facilitation.

[15] I therefore refer for facilitation the bargaining for a collective agreement between the Public Service Association and the Accident Compensation Corporation

to another Authority Member to assist the parties in resolving difficulties in concluding the collective agreement.

G J Wood
Member of the Employment Relations Authority