IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 51
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	BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INCORPORATED Applicant
	AND	AFFCO NEW ZEALAND LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Peter Cranney Counsel for Applicant Rachel Webster Counsel for Respondent
Investigation meeting:	On the papers by consent
Determination:	1 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 18 April 2012, the New Zealand Meat and Related Trades Union Incorporated, ("the Union") filed a Statement of Problem requesting the Employment Relations Authority refer it and the respondent, Affco New Zealand Limited, ("the Company ") to facilitated bargaining.

[2] The referral for facilitation was sought on the grounds contained at s50C(1)(c) of the Employment Relations Act ("the Act), which provides:

> *S.50(C)(1)…*
>
> *(c) that-*
>
> *(i) in the course of bargaining there has been 1 or more strikes or lockouts; and*
>
> *(ii) the strikes or lockouts have been protracted or acrimonious;*

...

[3] The parties confirmed their agreement to have the application for referral to facilitation decided on the papers. As a consequence the evidence was not tested in an investigation meeting. On behalf of the Union, a sworn affidavit and attached documents were filed in support of the application on 23 April 2012. On 27 April 2012, the Company lodged a Statement in Reply and a sworn affidavit and evidence in support of its response.

[4] The Company does not oppose the Union's application to seek referral to facilitation on the grounds that there have been strikes and lockouts which have been protracted and are acrimonious. However the Company does not accept that the strikes and lockouts have been protracted, and with regards to the requirement that the strikes or lockouts are acrimonious, the Company states: *"the only actions that could be said to be acrimonious in relation to the lockout/strikes are the actions of the [Union's] members."* The Company further says the Union cannot rely on its own actions to justify escalating the industrial dispute so as to require facilitated intervention by the Authority.

The legal framework and issues

[5] Section 50B to s50I of the Act provides for a process where parties who are having significant difficulties in bargaining are able to obtain facilitation by the Authority to assist in concluding a collective agreement.

[6] Facilitation is reserved for situations of the most serious bargaining difficulties. It is clear from the statutory provisions that the threshold, at which a reference for facilitated bargaining will be granted, is high.

[7] The Union's application for a referral to facilitated bargaining has not been opposed by the Company, but the Authority is unable to accept a reference for facilitation simply on the basis that there is a lack of opposition to the referral by one of the parties. While s50B allows for matters relating to bargaining to be referred to the Authority for facilitation, s50A stipulates that the Authority must not accept a reference for facilitation unless it is satisfied that one of more of the grounds in s50C(1)(a) to (d) of the Act exist.

[8] In the circumstances of this application the Authority must determine:

- whether there has been one or more strikes or lock-outs, and if so,
- have the strikes and/or lockouts been protracted or acrimonious.

Background to application for referral for facilitated bargaining

[9] The Company owns and operates seven meat processing plants and two tanneries located across the North Island. The Union and the Company are parties to the 'Affco Process Employees Core Collective Agreement', ("10/11 CEA") which commenced on 1 January 2010 and expired on 31 December 2011. Pursuant to s53 of the Act, bargaining for a new collective employment agreement was initiated prior to the expiry of the 10/11 CEA. As a consequence the 10/11 CEA remains in force and the Company and the Union are bargaining for a new collective agreement.

[10] By way of background, the affidavits provided to the Authority on behalf of the parties both attest to growing tensions between the Company and the Union over the previous 18 months. The affidavits each separately refer to on-going disagreements during this period over the application, interpretation and operation of a range of core terms within the 10/11 CEA, which have resulted in an increased number of disputes either lodged with the Employment Relations Authority or filed at the Employment Court.

[11] The Company and the Union met on 14-15 December 2011 and 18-19 January 2012 for the purposes of bargaining a new collective employment agreement. The Company says during the meetings of December 2011 and January 2012, it made significant concessions but that the Union did not withdraw any of its claims.

[12] The Company and the Union met again on 14 and 15 February 2012. On 14 February 2012, the Company introduced new claims which it says the Union scorned and, in breach of the Bargaining Agreement, refused to respond to. The parties agreed to have a mediator attend bargaining on 15 February 2012.

[13] The Company reports that it became increasingly frustrated by the behaviour of the Union during mediation on 15 February 2012 and formed a view that the Union was disinterested in reaching agreement on the issues under negotiation and that it

was not bargaining in good faith. It says it appeared that the Union was *"just going through the motions"*.

[14] In contrast, the Union states that on 14 February 2012 the Company introduced significant new claims which the Union was not able to properly consider before the Company required a response. It says the Company concluded mediation by advising that it would only continue to bargain if the Union agreed to withdraw a number of legal proceedings.

[15] The Company wrote to the Union on 21 February 2012. It advised it was considering locking out members of the Union and offered the Union an opportunity to meet and discuss the matter. Representatives of the Company and the Union met on 24 February 2012. The Union informed the Company it was not willing to withdraw its claims before the Court and expressed surprise at the Company's tentative strategy to commence industrial action after only six days of bargaining.

[16] The parties were unable to reach agreement as to how to progress the current collective bargaining. Broadly speaking it appears there is a philosophical difference of approach to the bargaining, whereby the Company wants to clarify by negotiation the terms contained in the 10/11 CEA which it says have caused the recent disputes between it and the Union. The Company states it wants a collective employment agreement that provides for greater flexibility and, in a changed economic environment allows managerial prerogative to run the Company as it sees fit. The Union wishes to maintain the benefits it has accrued through previous bargaining and wants a collective employment agreement which reflects consultation and agreement between the Company and the Union on operational matters which affect their members.

[17] At the end of the meeting on 24 February 2012, the Company issued the Union with notice of a lockout. Approximately 700 union members were locked out on 29 February 2012 and a further lockout of approximately 200 union members commenced on 6 March 2012. It is common ground that not all Union members have been locked out although the Company and Union disagree as to the numbers of members who have been locked out.

[18] The Company asserts that it has locked out sufficient Union members so as to place pressure on the Union to properly consider the Company's claims. It says the purpose of the lockout is not to coerce the Union away from pursuing its legal claims but to *"drive forward its negotiating position"* for the purpose of concluding a new collective agreement. The Company states that while it and the Union have not yet agreed to a new collective agreement, it says the lockout has persuaded the Union to engage in further meaningful negotiation and the parties are scheduled to attend mediation on 30 April and 1 May 2012.

[19] The Union strongly disputes the Company's stated reasons for the lockout and contends the Company initiated the lockout to pressure Union members to leave the Union and enter into individual employment agreements with the Company. It says in this way any new collective agreement will cover far fewer employees than when bargaining commenced. The Union contends the lockout is unlawful and this matter is before the Employment Court for determination. At the time of this determination the lockout remains continuous and on-going.

[20] Following the Company's notices of lockouts, the Union has served three strike notices for total labour stoppages over the period of 13 April-4 May 2012 inclusive. Further partial strike action has occurred which has included refusal by Union members (who are not locked out) to take instruction to train, or to work overtime.

Have there been strikes and/or lockouts?

[21] It is not disputed that in the course of bargaining some Union members have been locked out or that there has been strike action. I am satisfied that there has been industrial action which has included lockouts and strikes.

Have the strikes and/or lockouts been protracted?

[22] The Company states that the lock out commenced two months ago and cannot be considered to be protracted. Conversely the Union states that the lockouts are ongoing, protracted and indefinite.

[23] At the date of this determination, some Union members have been locked out of their work place since 29 February 2012. Withdrawal of labour strikes by remaining Union members has continued for almost three weeks.

[24] Any application for referral for facilitation on grounds that strikes or lockouts are protracted must be considered against its own unique facts. There does not appear to be determinative case law which defines a period of time in which strikes or lockouts can be objectively regarded as having become protracted. However it is not at all unusual for strikes and/or lockouts to continue for up to six months or more.

[25] I am not persuaded that the present lockout of union members comprising of two months and/or the concurrent partial strike action increasing to full strike action over the same time period, in the context of industrial action, has yet become protracted in the sense that the time over which the action has occurred has been prolonged.

Are the strikes and/or lockouts acrimonious?

[26] In *Service & Food Workers Union Inc v Air New Zealand Ltd*[1] the Authority commented that the existence of acrimony should be evidenced by more than feelings of bitterness from one party towards another. There should be a display of the acrimony between the parties either by word or conduct. Both the Union and the Company provided a number of examples which each say evidence the acrimonious behaviour of the other, as follows:

[27] On 5 April 2012 the media reported that the Company lodged a complaint with the Serious Fraud Office which alleged mismanagement by the Union of its funds. The Union states the allegations are false and have been made as a means to undermine the Union's relationship with its members and the public in general. The Company denies that it has made a *"deliberated and false accusation against the Union about the alleged mismanagement of funds"* however it acknowledges that it made a complaint to the Serious Fraud Office, and states it continues to have serious concerns about the Union's financial reporting. The Serious Fraud Office did not find evidence of serious or complex fraud.

[1] AA11/05

[28] The Company says the Union has called for a boycott of the Company's products both nationally and internationally and has used foreign unions to (unsuccessfully) attempt to crash the Company's electronic mail server.

[29] Demonstrations of industrial action including picket lines have been held outside various Company processing plants since the lockout commenced on 29 February 2012. The Company alleges Union members have created placards which have been personally critical of the family who own the Company, and that these have been publically displayed on the picket line.

[30] All of the above actions have been widely and sensationally reported in the media.

[31] Both parties consider the lockout has been acrimonious but place responsibility for the acrimony with the other.

[32] The Authority is not required to ascertain which of the parties have caused the acrimony, or apportion liability for it.

[33] There is sufficient evidence of acrimony between the parties during the strikes and/or lockouts to meet the test for a referral to facilitated bargaining. I am satisfied that the industrial action between the parties has been significantly acrimonious.

Determination

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

[35] The Union and the Company 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