IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2012] NZERA Christchurch 184
5382194

	BETWEEN	THE SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED Applicant
	AND	SANFORD LIMITD Respondent

Member of Authority:	David Appleton
Representatives:	Timothy Oldfield, Counsel for Applicant Paul Tremewan, Counsel for Respondent
Investigation Meeting:	At Blenheim 23 August 2012
Submissions received:	At the investigation meeting
Determination:	29 August 2012

DETERMINATION OF THE AUTHORITY

A. Facilitation is declined on the basis that the statutory criteria have not been satisfied.

B. Costs are reserved.

Employment Relationship Problem

[1] The applicant (the SFWU) has applied to the Authority for facilitation in the bargaining between it and the respondent pursuant to s.50B of the Employment Relations Act 2000 (the Act), relying on the ground in s. 50C(1)(b).

[2] The application is opposed by the respondent on the basis that the statutory criteria have not been met.

The statutory framework

[3] Section 50A(1) of the Act provides as follows:

> ***Purpose of facilitating collective bargaining***
>
> *(1) The purpose of sections 50B to 50I is to provide a process that enables one or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.*

[4] Section 50B of the Act provides as follows:

> ***Reference to Authority***
>
> *(1) One or more matters relating to bargaining for a collective agreement may be referred to the Authority for facilitation to assist in resolving difficulties in concluding the collective agreement.*
>
> *(2) A reference for facilitation –*
>
> *(a) may be made by any party to the bargaining or two or more parties jointly; and*
>
> *(b) must be made on one or more of the grounds specified in s.50C(1).*

[5] Section 50C (1)(b)of the Act provides as follows:

> ***Grounds on which Authority may accept reference***
>
> *(1) The Authority must not accept a reference for facilitation unless satisfied that one or more of the following grounds exists:*
>
> *(b) that –*
> *(i) the bargaining has been unduly protracted; and*
> *(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement;*

[6] The Employment Court, in *McCain Foods (NZ) Limited v. Service and Food Workers Union Nga Ringa Tota Inc.* [2009] ERNZ 28, has held that s.50A, although

expressed as being a purposive section, sets the standard in the reference to *difficulties* in s.50B, which must be read as *serious difficulties … consistently with s.50A.*

[7] It is the position of the SFWU that facilitation should be provided by the Authority pursuant to the ground set out in s.50C(1)(b) as bargaining has so far been unduly protracted and that extensive efforts, including mediation, have failed to resolve the issues preventing the parties from concluding a collective agreement. It is also the position of the SFWU that the parties are having serious difficulties concluding a collective agreement.

A brief account of the facts

[8] The respondent operates a seafood business, including a mussel processing plant in Havelock. It employs staff in the Havelock plant on day and night shifts. The term of the last collective agreement between the SFWU and the respondent in relation to the Havelock operation was between 10 April 2007 and 9 April 2009. Bargaining was first initiated by the SFWU in early April 2009 to replace the collective agreement, before the then existing collective agreement expired, and accordingly, pursuant to s. 53 of the Act, the collective agreement continued in force for a further 12 months until 9 April 2010.

[9] The first negotiation meeting between the parties took place on 29 June 2009. Further meetings took place in late August and early September 2009 and on 23 September 2009 the Employment Court issued a judgment resolving a dispute regarding interpretation of the collective agreement.

[10] Further meetings took place in October and November 2009 and again in April 2010. The SFWU states that, in June 2010, bargaining stalled because of a significant drop in membership. Around this time, however, discussions started between the respondent company and its staff regarding a major upgrade to the plant, necessitating a shut down. The plant shut down between 1 October 2010 and January 2011. The plant recommenced production on 20 January 2011.

[11] The Union reinitiated the collective bargaining on 5 July 2011 by issuing a fresh section 42 Notice, and the parties met in September and October 2011.

[12] Three short strikes took place in October 2011, during two of which the plant was able to continue to operate with reduced capacity. In total, 1,020 hours were lost, amounting to $16,650 in lost wages.

[13] On 5 December the parties met again, as they did on 24 January 2012. On 31 January 2012 the respondent company's manager of the Havelock branch addressed all the staff.

[14] On 26 April 2012 the parties met for half a day with the assistance of a mediator. The statement of problem applying for facilitation was lodged on 18 May 2012.

[15] The three major issues in contention between the parties have always involved a change from a 40 to a 45 hour week, the retention of a night shift allowance for new night shift staff and the amount and scope of wage increases. Various other issues have been the subject of claims over time and various concessions have been made and withdrawn as part of the negotiating process. The parties have not managed to reach agreement on the basis of the three major outstanding matters however, and so the terms of a replacement collective agreement have not been agreed.

The issues

[16] The issues that the Authority must determine are as follows:

(1) Whether the bargaining has been *unduly protracted;*

(2) Whether *extensive efforts* have been made to resolve the difficulties (including mediation); and

(3) Whether the parties are having *serious difficulties in concluding a collective agreement*.

Determination

Has the bargaining been unduly protracted?

[17] Mr Oldfield, Counsel for the SFWU submits that over three years have passed since the bargaining was first initiated in April 2009, and that clearly indicates an unduly protracted process when one considers that the negotiations have had as their purpose the replacement of a collective agreement, rather than the putting in place of a

green fields collective (where the parties negotiate a brand new agreement), which one would expect to take longer.

[18] Mr Oldfield also points out that the operation is not a complex one, and that the membership, at around 70 members, is not a large one, so there are no objective factors that may explain why the process has taken as long as it has. Furthermore, the collective agreement being negotiated is not a MECA or an agreement covering lots of different occupations in diverse geographical areas.

[19] I might add that the issues in dispute are not particularly complex inherently, and, whilst it appears that they have been played off against one another to an extent over time, they do not appear to be insoluble.

[20] I agree with Mr Oldfield that, when assessing whether the bargaining has been unduly protracted, it is relevant to take into account the inherent complexities of the circumstances surrounding it. A length of time that may be viewed as unduly protracted in one set of circumstances may not be so in a more complex situation.

[21] However, there is another factor to consider in this particular case, and that is whether the stalling of negotiations that took place in June 2010 acted to break the bargaining process so that the present round should be viewed as having started in July 2011, when a new s. 42 Notice was served by the union. Not surprisingly, the parties' views differ markedly in this respect.

[22] Mr Oldfield argues that it would be artificial to view the process as having started again from scratch, as the same collective agreement is being negotiated, the main issues are the same and the s. 42 Notice being served was done so unnecessarily. Mr Tremewan argues that the first round of bargaining died a death in June 2010, and so should be seen as having started afresh in July 2011.

[23] The reason the first round of bargaining stalled in June 2010, according to the SFWU, was because of a significant drop off in membership. The sworn affidavit (and untested) evidence of Mr Donaldson, the Assistant National Secretary of the SFWU stated that the union members resigned from the union to sign individual employment agreements. The evidence of the respondent is that, in September 2009 the company offered employees on individual employment agreements (IEAs) a partially backdated pay deal worth a total of 4% if they agreed to a 45 hour week. All staff on IEAs agreed to this offer and a number of SFWU members also chose the

IEA and accepted those conditions. Whilst there is no direct evidence on the point, I infer from this evidence that the drop off in membership causing the negotiations to stall in June 2010 was largely due to the offer by the company to employees on IEAs.

[24] Therefore, as pay increases and the 45 hour week formed two of the *big three* issues being negotiated about, both before and after the stalling of negotiations, I believe it would be artificial to view the stalling as having killed off the negotiations as it arose indirectly from the core issues being negotiated.

[25] Furthermore, whilst it is conceded by the SFWU that, when it initiated bargaining again in July 2011, it put in a number of new claims, the bargaining was still being initiated to replace the expired collective agreement and still revolved around the three big issues.

[26] Overall, therefore, I am satisfied that it would be artificial to view the current bargaining process to have started in July 2011, rather than April 2009. I also agree with the applicant that, in the circumstances, this period has been unduly protracted.

Have extensive efforts been made to resolve the difficulties (including mediation)?

[27] Mr Oldfield argues that bargaining includes the communications between the parties and that these should be taken into account when an assessment is made as to whether the efforts of the parties to resolve the difficulties have been extensive. Mr Tremewan disagrees, and posits that it would only be where bargaining by correspondence has been expressly agreed that this should be the case.

[28] The definition of *bargaining* in the Act, at s.5, is as follows:

> ***bargaining****, in relation to bargaining for a collective agreement,-*
>
> *(a) means all the interactions between the parties to the bargaining that relate to the bargaining; and*
>
> *(b) includes-*
>
> *(i) negotiations that relate to the bargaining; and*
>
> *(ii) Communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.*

[29] I agree with Mr Oldfield. It would be very artificial to ignore efforts to resolve difficulties that have been made merely because they have not been formal face to face meetings or because they have not been expressly agreed as a means of negotiating. However, I am not convinced that extensive efforts have been made to resolve the difficulties, even if correspondence is taken into account. Very few emails or other copies of correspondence between the parties have been disclosed to the Authority, and the evidence of Mr Cumming, organiser for the SFWU, who gave the most comprehensive evidence, and of the two other witnesses for the SFWU does not detail that considerable correspondence has been entered into between meetings.

[30] *Extensive* is defined in the Oxford English Dictionary (Online edition, June 2012, of the second edition, 1989) as *far-reaching, large in comprehension or scope; wide in application or operation; comprehensive; also, lengthy, full of detail*. It appears that, since April 2009, the parties have met to bargain a total of 13 times, once with the assistance of a mediator from the Mediation Services. There have also been communications between the parties, but the evidence suggests that it has been rather exiguous over the 41 months since bargaining was first initiated.

[31] I agree with Mr Oldfield that I should take into account the strikes that occurred in October 2011 in assessing the efforts made to resolve the difficulties. These lasted for a total of 12 hours over three separate days and involved both day and night shift workers. On two out of three occasions, the plant was able to continue processing at a reduced capacity. However, even taking these strikes into account, I am not convinced that, overall, *extensive efforts* have been expended over a period of 41 months since bargaining was first initiated.

[32] In particular, I am mindful that no attempts have been made to continue bargaining since April 2012, and that mediation only took 4 hours, from around 10 am until around 2 pm. Whilst I agree with Mr Oldfield that the legislation does not require more than one session of mediation for that particular part of the test to be satisfied, when considering whether extensive efforts have been made, how and the extent to which mediation has been used does play a material role in my view. The SFWU gives evidence that it does not believe that further mediation would assist the parties, and that the last session caused the parties to move further apart. However, the mediation process has not been thoroughly utilised in my view.

[33] In conclusion, I am not satisfied that *extensive efforts* have been made to resolve the parties' difficulties.

Are the parties having serious difficulties in concluding a collective agreement?

[34] Self evidently, the parties are experiencing difficulties in concluding the replacement collective agreement. The parties agreed that there is no acrimony between them and that negotiations have largely been good humoured, with the individuals remaining on first name terms. However, acrimony is not part of the statutory test under s 50C(1)(b), and so the absence of acrimony (and the presence of good humour) do not indicate alone that there have not been serious difficulties. Having said that, the term *serious difficulties* connotes a degree of hindrance in concluding the collective agreement amounting to a series of significant hurdles to overcome. Whilst I accept that the parties have not moved together significantly over the extensive period of the bargaining, and may even be drifting apart, I do not see an *impasse* which extensive efforts could not overcome.

[35] Accordingly, I do not agree that the parties are currently having serious difficulties in concluding the collective agreement.

Conclusion

[36] I conclude that, at present, the statutory criteria have not been satisfied to trigger facilitation of the bargaining process by the Authority.

Costs

[37] The parties should seek to agree between themselves as to how costs are to be dealt with. If the parties cannot agree, any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the responding party shall have a further 28 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority