IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 106
5380705

	BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION – DUNEDIN INC. Applicant
	A N D	INVERCARGILL PASSENGER TRANSPORT LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Kevin O'Sullivan, Advocate for Applicant Janet Copeland, Counsel for Respondent
Investigation Meeting:	7 June 2013 at Dunedin
Submissions Received:	7 June 2013 from Applicant 7 June 2013 from Respondent
Date of Determination:	10 June 2013

DETERMINATION OF THE AUTHORITY

A.	**The union's application for facilitation is declined.**
B.	**Costs are reserved**

Employment relationship problem

[1] This is an application by the applicant (the Union) for facilitation by the Authority to assist in resolving difficulties in concluding a collective agreement pursuant to s.50B of the Employment Relations Act 2000 (the Act). The Union argues that bargaining has been unduly protracted and that extensive efforts, including mediation, have failed to resolve the difficulties that have precluded the parties from

entering into a collective agreement. Accordingly, they argue that the grounds at s.50C(1)(b) have been made out.

[2] The respondent resists the application for facilitation arguing that the grounds under s.50C(1)(b) have not been made out, and also that there have not been serious difficulties in concluding a collective agreement and that *one or more matters* have not been referred to the Authority for facilitation, as it is not clear where the parties' differences lie.

Brief account of the events leading to the application

[3] The respondent owns and operates a bus company which employs 25 of the Union's members in Dunedin. The Union is a registered union in terms of the Act.

[4] The passenger services operated by the respondent were previously operated by the Dunedin City Council through a limited liability company called Citibus Limited. The respondent purchased Citibus from the Dunedin City Council on 1 June 2011. The respondent agreed to employ all existing Citibus staff on individual agreements on the same terms and conditions of employment on the basis of what it then understood to be an expired collective agreement with the Union.

[5] On 27 May 2011 the Union had written to the respondent to initiate bargaining and enclosed a draft Bargaining Process Agreement (BPA). The initial response of the respondent through its legal advisers was that the request to initiate bargaining was invalid. It subsequently emerged that the respondent had been labouring under a misapprehension that the collective agreement had expired in June 2010 and had been unaware that the previous manager of Citibus had agreed that the collective agreement would roll over for a further 12 months. It was only when this roll over was explained to the new owners of the company that the respondent was in a position to accept that the request to initiate bargaining was validly made. It is not clear exactly when this acceptance took place, although it is agreed that the parties met on 30 and 31 August 2011 and that the BPA was signed on 30 August 2011.

[6] The Authority saw a copy of the, by then expired, collective agreement amended by the respondent's counsel on 31 August 2011. The Authority also saw a document setting out the key changes made to the collective agreement by the

respondent. It is fair to say that the proposed changes made in this first draft were significant and extensive and included:

a. The addition of a 90 day trial period clause, the removal of the concept of permanent shifts, driver grades, and recognition of prior service with recent ex employees;

b. The amendment or removal of several clauses relating, inter alia, to shifts, rostering and overtime;

c. The removal of overtime pay at time and a half;

d. The changing of pay rates;

e. The removal of eight different allowances;

f. The removal of long service leave;

g. The adding of the right to conduct random drug testing;

h. The removal of an indemnification; and

i. The addition of a new disciplinary procedure.

[7] It is understood that this draft amended collective agreement was sent to the Union and correspondence ensued whereby the parties tried to agree a date for the next meeting. The claim tabled by the respondent by way of the amended collective agreement was rejected by the members at a ratification meeting on 14 November 2011 and the parties met in their next bargaining session on 15 November 2011. At that meeting, the respondent rejected a new claim from the Union. The Union requested information of the respondent which was provided on 1 December 2011 together with further proposals from the respondent.

[8] The next bargaining session took place on 8 March 2012. The respondent states that it made a new offer as it had had no response from the Union to the offer it had made on 1 December 2011. The respondent agreed to pay for a Union meeting to take place on Sunday, 11 March 2012 although it is understood that this did not proceed. On 25 March 2012 the members rejected the respondent's offer made on 8 March 2012 at a ratification meeting.

[9] On 30 March 2012 Mr O'Sullivan, on behalf of the Union, wrote to Ms Copeland advising of the unanimous rejection of the respondent's latest offer, attached a counter proposal for the respondent to consider and stated that, if that proposal was unacceptable, then the Union would consider that bargaining had reached an impasse and would suggest mediation assistance.

[10] On 4 April 2012 Mr O'Sullivan wrote to Mediation Services effectively teeing up a mediation session, and on 12 April 2012 he emailed Ms Copeland giving the respondent until 5pm on 16 April 2012 to reply to the offer he had sent on 30 March 2012. On 17 April 2012 Mr O'Sullivan wrote again to the Mediation Services requesting mediation assistance. Mediation Services wrote to Ms Copeland the following day seeking to arrange dates for a mediation and Ms Copeland responded on 19 April 2012 advising Mediation Services that her client (presumably Mr Baas junior) had been overseas for several weeks and that the respondent was still working through many issues raised by the Union, including a proposal regarding bargaining.

[11] On 26 April 2012 Ms Copeland wrote substantively to Mr O'Sullivan raising objections to what she called a number of new claims raised by the Union which it said had never been raised or discussed before. Ms Copeland stated that, despite putting forward a significant revised proposal to the respondent, the Union seemed unwilling to meet, explain and discuss the proposal and bargain further. She stated that she believed that an impasse had not yet been reached and that the respondent was therefore not willing to attend mediation.

[12] The Union's response to that letter was to file a statement of problem with the Authority on 4 May 2012 in which it sought an order that the respondent attend mediation. The respondent lodged its statement in reply on 24 May 2012 and the application was treated as dismissed when the Authority directed that it did not have the jurisdiction to direct parties to mediation at that stage. However, on the recommendation of the Authority, the parties did agree to attend mediation.

[13] Before that mediation took place, a further bargaining meeting took place between the parties on 27 August 2012 in which a new offer was put by the respondent which was rejected by the members on the same day. During the mediation on 16 October 2012 a new offer was put to the Union by the respondent which was rejected by the members on 4 November 2012.

[14] The Union put a counter offer to the respondent on 12 November 2012 and on 22 November 2012 the respondent replied through Ms Copeland arguing that new matters had been introduced to the bargaining. Ms Copeland stated that significant time had passed since they had last met and the respondent renewed its offer to meet for a further bargaining session. She stated that the respondent remained optimistic that settlement could be achieved and that, in another bargaining session, they might well achieve settlement. The Union did not reply to that request for a meeting although another bargaining meeting did take place on 26 February 2013, at which time another offer was made by the respondent which was rejected by the members the same day.

[15] On 25 March 2013 the Union lodged a fresh statement of problem with the Authority seeking facilitation pursuant to s.50B of the Act and on 26 March 2013 the respondent wrote to the Union asking for another meeting to which, the respondent says, it received no reply. On 22 April 2013 a statement in reply was lodged. No further negotiations have taken place between the parties since that date.

The law

[16] Sections 50A–50C set out the statutory framework relating to applications for facilitation. They provide as follows:

> ***50A Purpose of facilitating collective bargaining***
>
> *(1) The purpose of sections 50B – 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.*
>
> *(2) Sections 50B – 50I do not:*
>
> *(a) prevent the parties from seeking assistance from another person in resolving the difficulties; or*
>
> *(b) apply to any agreement or arrangement with the other person providing such assistance.*
>
> ***50B 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 section 50C(1).*
>
> ***50C 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 exist:*
>
> *(a) that:*
>
> *(i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and*
>
> *(ii) the failure:*
>
> *(A) was serious and sustained; and*
>
> *(B) has undermined the bargaining:*
>
> *(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:*
>
> *(c) that:*
>
> *(i) in the course of the bargaining there has been one or more strikes or lock-outs; and*
>
> *(ii) the strikes or lock-outs have been protracted or acrimonious:*
>
> *(d) that:*
>
> *(i) in the course of bargaining, a party has proposed a strike or lock-out; and*
>
> *(ii) the strike or lock-out, if it were to occur, would be likely to affect the public interest substantially.*

[17] In the Employment Court case of *Service and Food Workers Union Nga Ringa Tota Inc. v. Sanford Limited* [2012] NZEmpC 168, a case that also considered an application for facilitation on s.50C(1)(b) grounds, Chief Judge Colgan states at [32] that consideration of s.3 of the Act is also relevant in the interpretation and application of the facilitation provisions. Section 3 of the Act sets out the objects of the Act which include the object *to build productive employment relationships through*

promotion of good faith in all aspects of the employment environment and of the employment relationship … by promoting collective bargaining (s.3(a)(iii)).

[18] His Honour also makes reference to s.31 of the Act which sets out the object of Part 5, which deals with collective bargaining. His Honour refers to the object at s.31 (aa) *to provide that the duty of good faith in section 4 requires the parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to* and at s. 31(d) *to promote orderly collective bargaining*.

[19] His Honour also referred to s.32 of the Act as relevant to the interpretation of the bargaining facilitation sections of the Act. Section 32 expands on the requirement of good faith collective bargaining and provides as follows:

32 Good faith in bargaining for collective agreement

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

(a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and

(b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and

(c) the union and employer must consider and respond to proposals made by each other; and

(ca) even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and

(d) the union and the employer—

(i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and

(ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and

(iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and

(e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

(2) Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.

(3) The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include—

(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and
(b) the provisions of any agreement about good faith entered into by the union and the employer; and
(c) the proportion of the employer's employees who are members of the union and to whom the bargaining relates; and
(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

*(4) For the purposes of subsection (3)(d), **circumstances**, in relation to a union and an employer, include—*
(a) the operational environment of the union and the employer; and
(b) the resources available to the union and the employer.

(5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.

(6) To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4.

[20] Colgan CJ also makes reference in *Sanford* to the requirement in s.33 of the Act for the parties to conclude a collective agreement unless there are genuine reasons not to. Section 33 provides:

33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

*(2) For the purposes of subsection (1), **genuine reason** does not include—*
(a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B

[21] His Honour summarised the statutory scheme for collective bargaining as follows:

> *[36] The statutory scheme for collective bargaining contemplates that parties will bargain collectively, progressively, and in good faith with the objective of settling a collective agreement, and that a collective agreement will be the outcome of their bargaining. The statute recognises that parties are to engage in the collective bargaining process themselves including deciding how their collective negotiations will proceed by requiring them to enter into a bargaining process arrangement or agreement. The statutory scheme also contemplates that external assistance should be*

> *available to parties who cannot continue to bargain collectively in this way and, more particularly, where a settlement (and therefore the opportunity to conclude a collective agreement) cannot be reached by the parties themselves within a reasonable time and after reasonable efforts to achieve a settlement in bargaining.*

[22] Colgan CJ makes reference to the mechanisms and hierarchy of interventions available to assist the parties, including the self help remedies of strike and lock-out, and the intervention of a mediator from the statutory Mediation Service, the statutory process of bargaining facilitation and, then, the ultimate sanction of the Employment Relations Authority fixing the terms and conditions of a collective agreement if all other attempts at settlement (including bargaining facilitation) have failed.

[23] Colgan CJ summarises the bargaining facilitation sections at [42] as follows:

> *The bargaining facilitation sections are therefore to be seen as part of a scheme that allows, encourages and assists collective bargaining and the timely and orderly settlement of collective agreements. This will inform the approach of the Employment Relations Authority to a reference under section 50B. Whilst the Authority must ensure that the statutory grounds exist, it should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.*

The issues

[24] The Union seeks to persuade the Authority that the grounds in s.50C(1)(b) have been satisfied. In considering the Union's application before accepting the reference for facilitation, I must be satisfied that:

a. the parties are having serious difficulties in concluding a collective agreement (s.50A(1));

b. there are one of more matters relating to bargaining that may be referred to the Authority for facilitation (s.50B(1));

c. the facilitation would assist in resolving difficulties in concluding the collective agreement (s.50B(1));

d. the bargaining has been unduly protracted (s.50C(1)(b)(i));

e. extensive efforts (including mediation) have been made to resolve the difficulties (s.50C(1)(b)(ii)).

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

[25] Section 50A requires that the parties are having serious difficulties in concluding a collective agreement before the assistance of the Authority can be given by way of the statutory facilitation process. *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] 6 NZELR 426 held that reference to *difficulties* in s.50B, should be read as a reference to *serious difficulties*.

[26] It was during the taking of evidence at the investigation meeting that it emerged that the parties had a mutual misunderstanding in respect of what the roadblocks were to them reaching an agreement. A key issue for the parties at the commencement of the bargaining was the respondent's desire to remove the right of members to receive time and a half pay rates for working overtime and the union's strong resistance to that. The union finally gave up their resistance to this towards the end of last year, but wanted some concessions in response from the respondent.

[27] The concessions that the union wanted concerned terms relating to broken shifts and daily and weekly working hours. The union's position was that it was not prepared to give up a significant right under the expired collective agreement (penal rates for working overtime) without getting something else back. Furthermore, the union said it just wanted terms that had been deleted by the respondent from the collective agreement to be reinserted.

[28] However, the evidence of the respondent was that it had already conceded earlier than the union's concession re overtime rates that the terms it had originally taken out of the collective agreement regarding broken shifts and daily and weekly working hours were to be reinserted. The parties, therefore, were labouring under a fundamental misunderstanding.

[29] Whilst it is not possible to ascertain exactly in what ways the parties differed, because they themselves did not know that at the time of the investigation meeting, it would appear that it boils down to pay rates. The respondent is concerned to remain competitive and makes the point that, if it cannot do so, it could go to the wall and the staff members lose their jobs. The union acknowledged this imperative for the respondent.

[30] Stepping back, it appears to me that the parties are much closer to settling their differences and therefore to concluding bargaining than they each believed they were

immediately before the investigation meeting started. Importantly, they acknowledge this proximity to a conclusion, as is confirmed by the fact that they continued talking after the investigation meeting concluded.

[31] The relevance of this revelation to the union's application is that, at the end of the investigation meeting, the parties were not, in my view, having serious difficulties in concluding a collective agreement. The parties had undoubtedly experienced difficulties hitherto, but that was based upon misunderstandings of their respective positions. I will comment on how I believe these misunderstandings arose below but, having established that the parties do not now appear to have intractable problems, I cannot find that the difficulties they now face are serious.

[32] Accordingly, I cannot accept that the first requirement of accepting an application for facilitation by the Authority has been satisfied. That first requirement is a necessary step, and is not the subject of discretion, and so I cannot grant the application. However, I shall look briefly at the other tests.

Are there one of more matters relating to bargaining that can be referred to the Authority for facilitation?

[33] The respondent argues that, as the union's application does not identify what matter or matters require resolution, this limb of the test, as set out in s.50B, is not satisfied. It is certainly the case that the wording of s50B suggests that there must be *matters related to bargaining* that are referred to the Authority for facilitation. The wording of the section does not simply say that *bargaining* may be referred to the Authority.

[34] As is explained above, the investigation meeting revealed that the parties were not clear as to exactly what matters remained unresolved between them. The question is, must the union be able to identify what the unresolved matters are before the Authority is able to accept an application for facilitation? When read in conjunction with s.32 (1)(ca), which refers to the requirement for the union and the employer to *continue to bargain .... about any other matters on which they have not reached agreement* even though they have *come to a standstill or reached a deadlock about a matter*, it does appear that the Act contemplates that the matters as yet unresolved must be identified.

[35] In the present case, the parties clearly know what discrete matters have been up for debate over the course of the bargaining. They also have a clear idea about the majority of the matters on which they which have reached agreement. Their uncertainty lies in exactly which matters remain unresolved and which is preventing the concluding of a collective agreement. This is a function of the way that the parties have undertaken their bargaining I suspect.

[36] However, whilst it is clear that the issue of wage rates is a matter for further discussion, it may be that further matters need to be discussed; the parties are not sure until they have bottomed that out in a further meeting. Section 50B does not contemplate only one matter may be referred for facilitation when there are other outstanding matters to be resolved, as the purpose of s.50B is to ask the Authority to resolve difficulties in concluding the collective agreement. Therefore, all unresolved matters need to be referred to the Authority.

[37] I therefore accept the submission of the respondent that the union cannot make an application under s. 50B when it is not clear generally what matters need to be referred to the Authority.

Would the facilitation assist in resolving difficulties in concluding the collective agreement?

[38] All other things being equal, I am satisfied that facilitation would assist the parties. I say this due to the moving together of the parties after just three and a half hours of the Authority's investigation into the unions' application for facilitation.

[39] However, all other things are not equal at this stage, due to the parties' inability at the investigation meeting to be clear as to what matters are unresolved. By the time of a facilitation meeting, they probably would be, but equally, by the time of a facilitation meeting, after having become clear what the issues are between them, it is likely that the parties will have resolved all outstanding issues and concluded a collective agreement by their own efforts in any event.

Has the bargaining been unduly protracted?

[40] Over two years have passed between the date when the union first wrote to the respondent initiating bargaining and the date of the investigation meeting. I have no doubt, given that fact, that the bargaining has been protracted, which the respondent does not deny. It does, however, argue that it has not been unduly protracted. *Unduly* carries the meaning of *excessively*, *immoderately* or *unreasonably*, and it is very important to examine the context here, to ascertain whether the delays have been justified.

[41] The respondent points to a number of factors making up that context. These include the change of ownership of the. bus operation from being council owned to being privately owned. This means, the respondent says, that there is no rate payer base to fund losses and the new owners need to make a profit. This is a substantial paradigm shift which, I accept, means that bargaining would be likely to take longer because of different managers and different imperatives being involved.

[42] Secondly, the new owners have been trying to align the terms of the Citibus collective agreement with those of other staff, which has increased the complexity of the bargaining. Thirdly, the respondent says that it has had to take part in tendering processes, which demand all of the time of the owners during those processes. In addition, I note that Mr O'Sullivan, Secretary of the Wellington branch of the union, and Mr Froggatt, the President of the union, are based in Wellington and Auckland respectively, and that they need to co-ordinate travel in order to attend bargaining meetings.

[43] However, I also note the relative paucity of the bargaining sessions that have taken place and, depending on whether one counts consecutive two day meetings as one session or two, there have been five or seven bargaining sessions over the period of two years, together with one mediation session. I also note the following:

a. a gap of two and a half months between the date the BPA was signed and first ratification meeting, with no substantive actions in the meantime;

b. a gap of over three months between an offer being made by the respondent on 1 December 2011 and the bargaining session on 8 March 2012 to discuss it;

c. a gap of around two months between the respondent's lodgement of the statement in reply to the first statement of problem and the next bargaining session, with no substantive actions in the meantime;

d. a gap of over three months between the respondent making an offer to the union on 14 November 2012 and the next bargaining meeting on 26 February 2013.

[44] In addition, the gaps between bargaining sessions, counting the two day meetings as one session each for these purposes, and including the mediation session, amounted to 2.5 months, 3.5 months, 5 months, 1.5 months and 4.5 months.

[45] It has been accepted in *Sanford* that negotiating activities outside of actual meetings count when considering the level of bargaining activities but, in this case, there appear to have been relatively few such negotiations. If there had been substantial activities of this kind, then that would have guided me in deciding whether the protracted nature of the bargaining had been unduly so. However, in the absence of such activities, I cannot find that the delays have been justified.

[46] Whilst I accept that the factors set out above have accounted for some of the delay in concluding the bargaining, I cannot accept that it accounts for all of it. The respondent has attributed some of the delays to that of the union being *lethargic*, a charge the union rejects. However, I am left with the impression that the respondent has largely been proactive in pursuing the bargaining whereas the union has, for the most part, but not entirely by any means, been more reactive.

[47] In any event, whatever the reason, I am not satisfied that the delay has been entirely justified by the circumstances. I am therefore prepared to accept the union's submission that the bargaining has been unduly protracted.

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

[48] The Employment Court in *McCain Foods (NZ) Limited v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] ERNZ 28, examined the concept of *extensive* and stated *this implies having a wide scope, being far reaching or comprehensive, covering a large area or time range of activities.*

[49] At [68] the Court in *McCain Foods* concluded:

> *So the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (a temporal element) and extensive efforts must have been made in the bargaining (the "activity" requirement) but 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 assisted. All elements of the tests must have occurred before the grounds under section 50C(1)(b) before a reference to facilitation are established.*

[50] Colgan CJ summarised some research undertaken for him of the (at that point) 21 recorded cases in which the Authority had accepted referrals for facilitation in collective bargaining under s.50C(1)(b). The research was summarised at paragraph [46]. The period from initiation of bargaining to the Authority's investigation meeting ranged from 9 months to 54 months, with the average period being 19.6 months, and the median being 19.5 months. The number of bargaining meetings or sessions ranged between 2 and 46, with the average number being 15 and the median being 8. In all cases, the parties have bargained with the assistance of a mediator at least once. The number of mediator assisted bargaining sessions ranged from 2 to 16, with the average number being 5, and the median number being 3.

[51] Colgan CJ stated, at paragraph [72] in *Sanford* that *extensive efforts, whilst these may include temporal elements, focus more upon the quality and dynamism of bargaining and the nature and quality of attempts that may have been employed by one or both of the parties to achieve settlement or a collective agreement.* The Chief Judge also states in *Sanford* that a qualitative analysis of the bargaining is a significant element of the *extensive efforts* test.

[52] Mr Baas junior states in his evidence that he does not believe that the Union have made extensive efforts to reach agreement. He states that some of the actions of the Union negotiation team have been *very frustrating as they appear disorganised, unprepared, lacking in direction and not motivated to do any work on our case or reach a resolution.* Mr Baas junior states in evidence that the respondent has:

> *.....continually been told by the* [Union] *negotiation team that they will recommend our offer for ratification, however no offer has been accepted. Almost every time the Union turned down our offer they fail to give us feedback as to why it failed, we struggle to get any constructive information from the negotiation team post a ratification meeting and prior to the next negotiation meeting. Most of the negotiation meetings have taken place with a totally new set of claims*

> *than was discussed at our last meeting with no prior warning of a new position, we therefore find ourselves having to try and second guess what it is that we need to do to get a settlement.*

[53] Mr Baas junior also gave evidence that he believes that the respondent has made extensive efforts to conclude the bargaining. From my perusal of the various offers put forward by Ms Copeland on behalf of the union, which tended to consist of a marked up collective agreement accompanied with a summary of the key elements of the offer, I would agree with this analysis. I understand that at least eight different marked up versions of the collective agreement were submitted to the union for its consideration over the life of the bargaining. I also understand, and accept, that the respondent has made several concessions (as has the union) during the bargaining, which demonstrate an eagerness to conclude the bargaining.

[54] The respondent submits that both parties to a bargaining have to have made extensive efforts for the second limb of the test at s.50C(1)(b)(ii) are satisfied. However, in *Sanford,* the Chief Judge states, at [72],:

> *As the judgment of this Court in McCain illustrates, the statutory requirement for bargaining being "unduly protracted" is a temporal consideration. "Extensive efforts", whilst these may include temporal elements, focus more upon the quality and dynamism of bargaining and the nature and quality of attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement.* [emphasis added].

[55] Whilst his remark is obiter, His Honour does clearly contemplate the possibility of only one of the parties having to have made extensive efforts. Ms Copeland argues that this interpretation would be counter to section 33 of the Act, which imposes a requirement upon both parties to conclude a collective agreement. She also argues that the interpretation would defeat the purpose and high threshold of the facilitation legislation by effectively rewarding a lethargic participant. However, conversely, on Ms Copeland's logic, a lethargic party who opposed facilitation would be able to avoid it by lethargic conduct in bargaining which falls just short of bad faith behaviour. I therefore prefer an analysis which finds that the s.50C(1)(b)(ii) test is satisfied when only one party has made extensive efforts.

[56] The test under s.50C(1)(b)(ii) is that extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. I have already found that, as at the date of the investigation meeting, the unresolved outstanding matters preventing agreement have not yet all been identified. Latterly, it is this failure to do so which constitutes the difficulties that have precluded

the parties from entering into a collective agreement. Whilst I am satisfied that the respondent has made efforts to identify what the roadblocks are, and to communicate with the union about them, sometimes with limited success, I am not satisfied that these efforts can be characterised as *extensive*. I reach this conclusion by examining the later correspondence from the respondent to the union. Whilst it does try to progress matters, it does not set out extensively its understanding of the respective positions of the parties and where they differ. This could well be because the respondent believed that the parties understood it. I am of the firm view that the union has not latterly made extensive efforts to identify the roadblocks.

[57] In conclusion, I am not satisfied that the test in s.50C(1)(b)(ii) has been satisfied.

Conclusion

[58] The union makes its application on the grounds of s.50C(1)(b)(ii) only. I am satisfied that, whilst the bargaining has been unduly protracted, the parties are not currently having serious difficulties in concluding a collective agreement, the matters to be referred to the Authority have not been able to have been identified at the date of the investigation meeting, and extensive efforts have not been made to resolve the difficulties that have precluded the parties from entering into a collective agreement. Thus the statutory requirements for the Authority to accept a reference for facilitation have not been satisfied.

[59] Accordingly, I decline the application from the union.

[60] I should like to take this opportunity to make some observations, and some non-binding recommendations to the parties. I am convinced that both parties wish to conclude bargaining and that both parties are acting in good faith towards one another. I also note that the relationship between the union officials on the one hand and Messrs Baas senior and junior on the other is largely good humoured and mature.

[61] I was also extremely heartened when the union approached me towards the end of the investigation meeting to signal that it wished to continue bargaining with the respondent under their own steam as a result of what it had heard during evidence. However, it is important, if that further bargaining is to succeed, for both parties to listen carefully to each other, to consider carefully offers and counter offers that are made, and to ensure they have understood each other's positions before reacting. I

believe that this is where the heart of the misunderstandings lie. My recommendations are:

a. That both sides become fully acquainted as a matter of urgency with each other's position, and identify and agree all areas where they are apart;

b. That each side formally acknowledges the other's core concerns, (which each in fact did during the investigation meeting);

c. That the union officials seek to meet with their members immediately prior to the next and any subsequent substantive bargaining sessions so they always come to the bargaining table with a clear indication of their members' position; and

d. That the parties embark upon another mediated session at which face to face bargaining occurs with the mediator present.

[62] Having said this, it is recognised by the Authority (and acknowledged by the union during the investigation meeting) that Mr Baas junior has urgent and important company business to attend to which may prevent him taking part in further bargaining sessions prior to the beginning of July.

Costs

[63] Costs are reserved. If the parties cannot agree how their respective costs are to be dealt with within 28 days of the date of this determination, each is to serve and lodge a memorandum setting out how they want their respective costs to be dealt with, and each party will have a further 14 days within which to serve and lodge any reply.

David Appleton
Member of the Employment Relations Authority