

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 403  
5521055

BETWEEN	FIRST UNION INC First Applicant
AND	THE NEW ZEALAND AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INC Second Applicant
AND	THE NEW ZEALAND REFINING COMPANY LIMITED Respondent

Member of Authority: Robin Arthur

Representatives: Peter Cranney, counsel for the first applicant  
Greg Lloyd, counsel for the second applicant  
Jennifer Mills and Andrew Horne, counsel for the respondent

Determination: 3 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. A proposed strike by members of the two applicant unions is likely to have a substantial effect on the public interest and establishes a ground on which the Authority may accept a reference for facilitation of the parties' collective bargaining.**
  
- B. The joint application of the parties for a reference to facilitation by the Authority of their collective bargaining is accepted.**

## **Employment relationship problem**

[1] In a joint application for facilitation lodged in the Authority on 2 October 2014 counsel for the parties advised that 131 members of FIRST Union (FIRST) and 35 members of the New Zealand Engineering Printing and Manufacturing Union (EMPU) are employed by the New Zealand Refining Company Limited (Refining NZ) under the terms of a collective employment agreement that expired on 21 June 2014. In the course of bargaining for a new collective agreement FIRST and EMPU gave Refining NZ notice of a proposed strike involving a complete withdrawal of their members' labour on 7 and 8 October 2014. Refining NZ applied to the Employment Court for an interim injunction of the proposed strike. During case management conferences convened by Chief Judge Colgan of the Employment Court to discuss the injunction application FIRST and EMPU representatives proposed withdrawing the strike notice on the basis that their collective bargaining with Refining NZ would be referred to facilitation by a Member of the Employment Relations Authority. The Chief Judge commended that approach to the parties who then jointly applied to the Authority for the referral on the grounds referred to at s50C(1)(d) and s50C(2)(d) of the Employment Relations Act 2000 (the Act).

[2] By consent their referral application was decided on the papers. As this was a joint application, mediation about the referral proposal was not necessary or appropriate, would have undermined the urgency of the application, and was not in the public interest.<sup>1</sup>

## **The grounds for referral to facilitation**

[3] Under s50C of the Act the Authority must not accept a reference for facilitation unless satisfied that at least one of certain specified grounds exists. One such ground, set out in s50C(1)(d), is that, during the course of bargaining, a party has proposed a strike and, if the strike were to occur, the public interest would likely be affected substantially. A strike is defined in s50C(2)(b) as likely to affect the public interest substantially if the strike is likely to disrupt economic interests and the effects of such disruption are likely to be widespread, long-term or irreversible.

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<sup>1</sup> Section 159(1)(b) of the Employment Relations Act 2000 (the Act).

[4] Among papers lodged with the parties' joint application for referral to facilitation were copies of affidavits that senior managers of Refining NZ, Z Energy, BP and Chevron had filed in support of Refining NZ's application to the Court for an interim injunction. Those sworn statements disclosed that the proposed two day strike would probably result in at least 11 days loss of production at Refining NZ's refinery at Marsden Point. The refinery produces 95 per cent of the country's jet fuel supply.

[5] An 11 day loss of production was said to be likely to create a real risk of inadequate supplies (and margins of supply) of jet fuel that could not be adequately mitigated by alternative arrangements in the short term. This predicted minimum period of lost production were said to be a necessary outcome of the particular technical requirements that had to be followed to shut down the plant and equipment before the strike and to re-start it after the strike. The anticipated period of at least 11 days' lost production increased the likelihood of widespread disruption to the economic interests of Refining NZ, its customers and sectors of the wider public. In summary those likely effects included:

- (i) Auckland Airport running short of jet fuel and thereby creating difficulties for the airport, airlines and customers of those airlines; and
- (ii) A real risk, based on previous experience, that restarting of production at the refinery after the strike could take longer than anticipated due to various technical problems that occur in the start-up process, which in turn would increase the risk of a shortage of supply of jet fuel and other fuels; and
- (iii) Customers of Refining NZ incurring substantial additional costs as they would need to arrange for alternative supplies of refined fuel at short notice, which was then likely to affect their own customers, airlines and the wider public using those airlines.

[6] I was satisfied that information established the elements of the ground stated at s50C(1)(d) to the level of likelihoods described in s50C(2)(b).

[7] If there was any doubt that were so I considered it should be resolved on the basis of approving the application as that was consistent with the Act's stated objects of promoting collective bargaining and particularly the orderly conduct of such bargaining.<sup>2</sup> Over several months since FIRST and EPMU initiated bargaining for a

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<sup>2</sup> Section 3(a)(iii) and 31(d) of the Act and *Service and Food Workers Union Nga Ringa Tota v Sanford Limited* [2012] NZEmpC 168 at [42] applied.

new collective agreement the parties have participated in bargaining on five days and met in mediation, with the assistance of a Ministry of Business mediator, on a further four days. Their joint application for a referral to facilitation indicated agreement that they may benefit from an Authority Member assisting their bargaining. Such assistance includes the ability of the facilitating Member to make recommendations to the parties about the process they should follow to reach agreement and the provisions of the collective agreement that they should conclude.<sup>3</sup>

[8] The application for a referral has been accepted and, as required by s50D of the Act, another Member will provide facilitation of the collective bargaining.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>3</sup> Section 50H of the Act.