

proceedings filed in the Authority on 4 September 2015 under file No 5559394 on the grounds that:

- (a) The proceedings raise the same issue and rely on the same facts as proceedings removed to the Employment Court in which the applicant seeks an order under s.50K of the Employment Relations Act 2000 (the Act) that bargaining has concluded;
- (b) To proceed would cause prejudice to the Meat Workers' Union, and would be frivolous or vexatious and an abuse of the Authority's process.

[2] The applicant, AFFCO New Zealand Limited (AFFCO), opposes the granting of the application for stay on the grounds that the proceedings before the Authority:

- (a) Are not prejudicial to the respondent;
- (b) Are not frivolous or vexatious nor an abuse of process;
- (c) Do not raise the same issues nor rely on the same facts as the proceeding removed to the Employment Court in which AFFCO seeks an order under s.50K of the Act, concluding bargaining;
- (d) A stay would be contrary to the interests of justice, and to the objects and purposes of the Act;
- (e) The application for stay fails to reach the required threshold for the Authority to exercise its discretion.

[3] It was agreed that the matter be dealt with on the papers. The Authority has considered the application for stay by the Meat Workers' Union together with the memorandum of counsel in support. The Authority has also considered the notice of opposition by AFFCO together with the submissions filed in opposition to the stay application.

Background

[4] AFFCO and the Meat Workers' Union are parties to a collective agreement which expired on 31 December 2013. By virtue of s53 of the Act, the expired agreement remained in force for 12 months until 31 December 2014.

[5] On 4 November 2013, the Meat Workers' Union initiated bargaining for a new collective agreement. A bargaining process agreement (BPA) was signed by AFFCO and the Meat Workers' Union on 4 February 2014. The parties have met on a number of occasions during 2014 and 2015 for the purposes of bargaining for a new collective agreement.

[6] A new collective agreement has not been concluded. Both parties allege various breaches of good faith against the other in relation to the bargaining.

Current proceedings in the Authority-5559394

[7] On 28 May 2015, AFFCO lodged a statement of problem with the Authority claiming that the Meat Workers' Union had:

- (a) Breached its statutory duty of good faith set out in s.4 of the Act;
- (b) Breached its duty of good faith in collective bargaining not to undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining set out in s.32 of the Act; and
- (c) Breached its contractual obligations as set out in the BPA.

[8] AFFCO is seeking that the Authority issue a compliance order under s.137 of the Act that the Meat Workers' Union (among other things) comply with its good faith obligations and refrain from undermining bargaining and AFFCO's authority in the bargaining.

[9] AFFCO also seeks a compliance order s.137 of the Act that the Meat Workers' Union comply with the BPA. Penalties are also sought.

[10] Alleged breaches of good faith by the Meat Workers' Union under ss.4 and 32 of the Act in essence relate to the publication and circulation of material which

AFFCO says is undermining the bargaining, AFFCO's authority in the bargaining and is in breach of the provisions of the BPA.

[11] The Meat Workers' Union in its statement in reply lodged on 15 June 2015 denies the alleged breaches of good faith and the remedies sought.

[12] On 24 August 2015, a memorandum was filed in the Authority on behalf of the Meat Workers' Union which referred to other proceedings between AFFCO and the Meat Workers Union filed in the Authority and in the Employment Court.

[13] The proceedings in the Authority referred to in the memorandum by Counsel for the Meat Workers' Union was an application on 27 July 2015 by AFFCO for determination as to whether bargaining has concluded under s.50K of the Act ("the s.50K proceedings").

[14] The Authority's file number is 5571687. This application alleges that the parties have been undertaking ongoing bargaining for a collective agreement but have been unable to reach agreement and that because of the Meat Workers' Union's alleged bad faith, further bargaining would be "*inappropriate and unconstructive*".

[15] In a determination dated 21 August 2015², these proceedings were removed to the Employment Court for determination. Reasons for removal included that proceedings brought by the Meat Workers' Union and which were already before the Employment Court alleging an unlawful lockout by AFFCO and the s.50K proceedings in the Authority involved similar issues between the same parties and in all likelihood much of the same evidence.

Proceedings before the Employment Court

[16] The matter before the Court referred to by the Authority in its removal determination, was an application by the Meat Workers' Union and others for an interlocutory and interim injunction restraining AFFCO from offering employees new terms and conditions of employment in individual employment agreements. The allegation was that doing so amounted to an unlawful lockout. In an interlocutory

² [2015] NZERA Auckland 253

judgment of Chief Judge Colgan on 17 June 2015³, the application for interlocutory and interim injunction was refused.

[17] Relevantly at para [97], Chief Judge Colgan states:

Despite their tactical denials, in the background to this case is the parties' inability to conclude a new collective agreement covering the work of union member employees at the Rangiora plant and, indeed, elsewhere at other AFFCO plants in New Zealand. Those collective negotiations are ongoing, albeit in a very prolonged way, and there are apparently separate proceedings challenging the employer's compliance with statutory and good faith obligations in bargaining. AFFCO is also very critical of the Union's bargaining tactics which may connote the first plaintiff's bad faith in bargaining ...

[18] This is the background to and a reference to the current proceedings before the Authority and to the s.50k proceedings which were removed to the Court by the Authority.

Jurisdiction

[19] Counsel for both parties accept that the Authority has the ability to determine its own procedure. Section 160 of the Act states:

160. Powers of Authority
(1) *The Authority may, in investigating any matter –*
...
(f) *Follow whatever procedure the Authority considers appropriate.*

[20] Section 173 of the Act states:

173. Procedure
(1) *The Authority, in exercising its powers and performing its functions, must –*
(a) *Comply with the principles of natural justice;*
and
(b) *Act in a manner that is reasonable, having regard to its investigative role.*

[21] Counsel for both parties accept that the Authority has the power to stay a proceeding in circumstances that are appropriate but in doing so must “...*comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative role*”.

³ [2015] NZERA Auckland 253

[22] In terms of the application for stay of proceedings, both Counsel referred the Authority to Rule 15.1 of contained in Schedule 2 of the Judicature (High Court Rules) Amendment Act 2008 (the High Court Rules), which states:

15.1 Dismissing or staying all or part of proceeding

- (1) *The court may strike out all or part of a pleading if it—*
 - (a) *discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or*
 - (b) *is likely to cause prejudice or delay; or*
 - (c) *is frivolous or vexatious; or*
 - (d) *is otherwise an abuse of the process of the court.*
- (2) *If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.*
- (3) *Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.*
- (4) *This rule does not affect the court's inherent jurisdiction.*

[23] Counsel for the Meat Workers' Union submits that the Authority should order a stay of the current proceedings on the grounds in Rule 15.1(c) and (d) that it is frivolous or vexatious or otherwise an abuse of the process of the Court.

[24] The Meat Workers' Union bears the onus of establishing proper grounds for a stay of proceedings. Both counsel referred me to decisions which make it clear that the threshold for establishing a stay of proceedings is high⁴.

[25] Counsel for the Meat Workers' Union referred the Authority to the High Court decision of *Bank of NZ v. Rada Corporation Ltd & Anor*⁵ in which the High Court considered a situation where there were two proceedings between the parties. The Court at p.66,225 stated:

It is vexatious and an abuse of the process of the Court where there are two proceedings that are identical, or sufficiently similar, or where the remedies sought in each are equally effective.

[26] Counsel for the Meat Workers' Union submits that the proceeding before the Authority is sufficiently similar to the s.50K proceedings that there is no useful purpose in both being heard and that the factual issues required for determination now

⁴ *Read v. NZ Trotting Conference* [1984] 1 NZLR 8 at p.9. [*Williams v. Spautz* [1992] HCA 32]

⁵ (1990) 5 NZCLC 66,221

in the Authority in this proceeding and in the Employment Court proceeding are the same.

[27] In support of this submission, counsel submits that the issues for determination by the Court and the Authority include:

- (a) The nature of a BPA;
- (b) Whether the BPA has been breached;
- (c) Whether any such action was a breach of the Meat Workers' Union's obligation of good faith;
- (d) Whether the Meat Workers' Union's communication with its members and the public amounted to a breach of its obligation of good faith.

[28] In the s.50K proceeding, AFFCO is seeking a determination that the bargaining be declared at an end. It is argued on behalf of AFFCO that this remedy is distinct from the remedies being sought in the proceeding before the Authority. The remedies being sought include a compliance order that the Meat Workers' Union comply with the BPA and a declaration that it has acted in breach of its obligations of good faith under ss.4 and 32 of the Act by acting in a manner which has undermined AFFCO in the bargaining process.

[29] The remedies being sought by AFFCO in the current Authority proceeding and in the s.50K proceeding are different. However, it is my view that the facts and the evidence which will require analysis by the Authority and the Court in deciding the respective proceedings before them, are almost identical and arise from the background of an inability to conclude a collective agreement referred to by the Chief Judge⁶. The Court will be required to decide whether the parties have acted in accordance with their respective obligations of good faith.

[30] The remedies sought in the current proceeding will require the Authority to consider the terms of the BPA and whether there has been a breach of it. The Authority will also be required to consider the actions of the Meat Workers' Union to determine whether there has been a breach of good faith under ss4 and 32 in relation to bargaining. This exercise will also have to be undertaken, in my view, in the

⁶ [2015] NZERA Auckland 253, para.97

Employment Court when it considers the s.50K proceeding and whether there should be a declaration that bargaining is at an end.

[31] Counsel for AFFCO has submitted that a stay of this matter:

... would not only constrain AFFCO's access to justice, a stay would be inconsistent with the objects of the Act and role of the Authority.

[32] It is clear that there are a number of current proceedings in the Authority and in the Court with the same background, based on similar facts and evidence. It is important that the Court first deal with issues which are similar to those in the proceedings before the Authority and which arise from a common background.

[33] The Authority has been asked to schedule a 5 day investigation meeting to deal with the current proceedings brought by AFFCO. At present the meeting is scheduled for 5 days from 20 October 2015. The s.50K proceedings are scheduled to be heard in the Court approximately 2 weeks later on 9 November 2015.

[34] I accept the submission by Counsel for the Meat Workers Union that it would lead to an abuse of process not to stay the current proceedings in such circumstances.

[35] As counsel for the Meat Workers' Union submits, AFFCO can still progress its current proceeding in the Authority in the event that the s.50K proceeding does not continue in the Employment Court or indeed if it is unsuccessful with its application.

[36] The application by the Meat Workers' Union for a stay of the current proceedings in the Authority is granted.

[37] Either party can apply for directions from the Authority regarding the stayed proceedings.

Costs

[38] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority