

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 35
5547681

BETWEEN FIRST UNION INC
 Applicant

AND ANZ BANK NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for Applicant
 Hamish Kynaston for Respondent

Investigation Meeting: 8 April 2015 at Wellington

Determination: 8 April 2015

ORAL DETERMINATION OF THE AUTHORITY

[1] The respondent, the ANZ Bank New Zealand (ANZ) is a major registered New Zealand bank. The applicant, the First Union (FIRST), represents 1,100 of the ANZ's around 4,400 employees in New Zealand, i.e. approximately 25% of staff. FIRST initiated bargaining for a replacement collective employment agreement with ANZ on 3 June 2014. Between then and today, there have been eight sessions of collective bargaining, of which four have been bargaining with the assistance of a mediator. Bargaining has therefore continued for over nine months even although the bargaining has not resulted in a new collective employment agreement. Non-union members had their pay increased in October 2014 and then with back pay. Union members have had no such pay increase.

[2] The collective agreement is currently deemed to be a collective agreement, even though it has expired, until 31 July 2015. Were the collective agreement not renewed by that date, the collective agreement would cease to have effect and employees previously covered are presumed to be on individual employment

agreements, the terms of which would reflect the expired collective agreement in all relevant respects.

[3] In this case the parties and their predecessors (considering that the union is an amalgam of the former FINSEC Union, together with other unions, and the ANZ Bank is a merger of the National and ANZ banks), have been bargaining collectively since 1991, with apparently no period during which there has been the cessation of coverage by a collective agreement, or collective contract, as these were previously known. No doubt before that period the unions and ANZ were party to numerous other awards and/or agreements.

[4] While the parties agree on the above points, they are in dispute about whether bargaining has been unable to resolve three main issues, as FIRST maintains, or simply one, namely the level of wages for employees who are on grand parented salary bands. The parties are agreed that resolution of the number of live issues (one or three) in dispute is not necessary in order to determine the claim before the Authority. It does, however, show a major difficulty in the bargaining if the parties cannot even agree on what matters they are in dispute over.

[5] The claim before the Authority by FIRST is for the Authority to refer bargaining for a collective agreement to the Authority for facilitation. The purpose of facilitated bargaining is to provide a process that enables 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. The ANZ does not oppose the application and will abide by the decision of the Authority.

[6] The Authority can only accept such a reference in certain circumstances. The circumstances that FIRST rely on are set out in s.50C(1)(b), namely that the bargaining has been unduly protracted and extensive efforts, including mediation, have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

[7] The focus for the Authority in this case must therefore be threefold. First, the Authority must determine that the bargaining has been unduly protracted. Second, the Authority must determine that extensive efforts including mediation have failed to resolve the difficulties, which must be serious difficulties. Third, the Authority has a residual discretion whether or not to refer a matter to facilitation and thus refuse to

grant the application. In such circumstances the Authority may direct the parties to what, in this case, would be further mediation of its collective bargaining.

The law

[8] The leading cases on reference to facilitation are *McCain Foods NZ Ltd v. Service & Food Workers Union* [2009] ERNZ 28 and *Service & Food Workers Union v. Sanford Ltd* [2012] ERNZ 525. In *McCain*, it was held at para.[54] that:

First, under s 50C(1)(b)(i) bargaining must have been not merely protracted but “unduly protracted”. There must have been efforts to resolve the difficulties that have precluded the parties from entering into a collective agreement, which efforts have failed. Under subparagraph (ii) the efforts (including mediation) that have failed to resolve the difficulties must be “extensive efforts”.

[9] At para.[62] it was held:

What is “unduly protracted” bargaining? The statute gives no explicit assistance. When determining what is meant by “unduly protracted” under s 50C(1)(b)(i), the Act’s provisions for the duration of a collective agreement are pertinent. The legislation contemplates that collective agreements must be for a specified term and a three year maximum term is provided for in the Act (s 52(3)(c)). There is a statutory mechanism by which the term of a collective agreement can be extended effectively during a period of subsequent bargaining between the same parties. Where further bargaining begins before the expiry of the term of a collective agreement and is for the purpose of replacing the collective agreement, the expired collective agreement is deemed to continue to operate as such for a further year while bargaining continues. Thereafter, a collective agreement ceases to have effect and employees previously covered who are still in employment are presumed to be on individual agreements the terms of which reflect the expired collective agreement in relevant respects (s 61(2)). It is relevant (but certainly not determinative) that Parliament has said that collective agreements may be for up to 3 years’ duration and has inferred that up to a year may be necessary for the renegotiation of these.

[10] At para.[63] it was held:

Although the term of a collective agreement does not of course determine a reasonable period of time to bargain for it, collective bargaining that has stalled after 34 months, when compared to the maximum term of any agreement (36 months), may be seen to be unduly protracted. As the Employment Relations Authority concluded, however, other considerations affect the question of the passing of time. If, as here, it is shown that there have been real attempts to bargain and settle, albeit that the parties’ strongly held

positions have precluded settlement, the bargaining may also be said in that sense to have been unduly protracted.

[11] At para.[64] it was held:

“Protracted” bargaining is allowed for by the legislation although this cannot constitute a ground for a reference to facilitated bargaining. Undue protraction (the statutory test) is excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.

[12] At para.[65] it was held:

Similarly, the “efforts” required by s 50C(1)(b)(ii) that have failed to resolve the difficulties and have precluded the parties from entering into a collective agreement, must meet the qualification of having been “extensive”. This implies having a wide scope, being far reaching or comprehensive, covering a large area or time range of activities. ...

[13] At para.[68] it was held:

So the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (the temporal element) and extensive efforts must have been made in the bargaining (the “activity” requirement) that 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 assistance. All elements of the test must have occurred before the grounds under s 50C(1)(b) for a reference to facilitation are established.

[14] In the *Sanford* case, the Court noted at para.[46]:

Research undertaken for me of the 21 recorded cases in which the Authority has accepted referrals for facilitation in collective bargaining under s 50C(1)(b) reveals the following statistics. ... The period of 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 range between two and 46 with the average number being 15 and the median being eight. In all cases, the parties had bargained with the assistance of a mediator at least once. The number of mediator-assisted bargaining sessions ranged from two to 16 with the average number being five and the median number being three.

[15] At para.[47] it was held:

None of these data addresses the important element of the quality of these events, their duration, or the intractability of the parties' positions at any stage.

[16] Dealing with the issue of *extensive efforts*, the Court noted at para.[72]:

... "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.

[17] In dealing with the issue of extensive efforts, the Court found that a broad approach should be taken to analyse such efforts, and that strike action was clearly a relevant form of effort and demonstrated difficulties in the bargaining. The Court also noted the benefit of directing further mediation as an option.

Determination

[18] I am not attracted to the use of averages from previous Authority determinations as a useful guide for determining matters on a case-by-case basis. Indeed I consider that the Court in *Sanford* makes it clear that such averages do not address some important issues. However, the Authority's practice is relevant to some extent. I note that the duration of bargaining and the number of bargaining meetings is at the lower end of the range within which referrals for facilitation have been accepted in the past.

[19] On the other hand, there is, as set out above, a significant bargaining history between the parties and FIRST bargains on behalf of a reasonable proportion of ANZ workers. This is not a *green fields* site agreement as had been the case in other cases. Given also that there are likely to have been no occasions in which bargaining has not resulted in a collective agreement in a shorter time than here this is clear evidence that bargaining has on this occasion been unduly protracted. There is also the risk of the parties' collective agreement ceasing to exist in less than four months' time, which makes the need for its replacement pressing. The corollary of that is that failure to settle the bargaining to date means that it has been unduly protracted. Otherwise, the need to renegotiate it would not be pressing.

[20] There have also been real attempts by the parties, including much mediated bargaining, to try and settle. This is further evidence of unduly protracted bargaining. Also non-union members have had their pay increased six months ago and then with back pay. Union members have received no such increase. This sets the above evidence that bargaining has been unduly protracted into context. In all the circumstances of this case, I conclude, for the reasons given above, that the bargaining has been unduly protracted.

[21] I also accept that there have been extensive efforts to attempt to resolve the difficulties the parties have faced. One prerequisite is mediation and that option has been pursued on a number of occasions. Other efforts have been made, including strike action over a period of time. These are sophisticated parties with a long history of bargaining. Ordinarily, matters are resolved earlier than this. In order to remedy matters, the parties have attended mediated bargaining at around the average for those cases where the Authority has referred the parties to facilitation.

[22] The information before the Authority discloses that while considerable efforts have been made by the parties to resolve matters (and indeed a lot of progress has been made), there remain one or more major sticking points, which demonstrate that there remain serious difficulties in this bargaining. This is supported by the unduly protracted length of the bargaining and the extensive efforts taken to try and resolve matters. In the context of the history of the parties' bargaining, the use of mediation and the sophistication of the parties' bargaining teams, I am satisfied that extensive efforts have failed to resolve the difficulties the parties face. It is also clear from the above findings that serious difficulties remain that have precluded the parties from entering a collective agreement.

[23] It therefore follows that FIRST has made out grounds under s.50C(1)(b) of the Act for referral to facilitation. There remains, however, the residual discretion for the Authority on whether or not it grants the reference.

[24] Certainly had the application been unsuccessful I would have directed the parties to further mediation. Mediation provides an effective method for assisting parties in resolving their differences and thus being able to enter into a collective employment agreement. However, in this case, I accept FIRST's claim that the use of a facilitator would be of additional assistance to the parties. Those reasons are well set out in the *Sanford* case. The parties, with the assistance of a facilitator, will

undoubtedly benefit from an audit of their bargaining and an opportunity to use problem-solving techniques to resolve their differences under the shadow of the potentiality for recommendations by a facilitator.

[25] I therefore refer the bargaining between First Union and the ANZ Bank New Zealand Limited to another Member of the Employment Relations Authority for facilitation. That is not to rule out the potential for further mediation to be considered, although that would be an issue for the facilitator.

Costs

[26] Costs are reserved.

G J Wood
Member of the Employment Relations Authority