

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 146
5617083

BETWEEN	MANUFACTURING & CONSTRUCTION WORKERS' UNION INC Applicant
A N D	OJI FIBRE SOLUTIONS (NZ) LIMITED Respondent

Member of Authority: James Crichton

Representatives: L Yukich, Advocate for Applicant
David France, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 16 May 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union applies to this Authority for a reference to facilitated bargaining in terms of s.50C of the Employment Relations Act 2000 (the Act).

[2] The respondent employer (OJI) does not oppose the granting of facilitation on one of the bases on which the Union now approaches the matter.

[3] The Union's request for facilitation is based first on the grounds set out in s.50C(1)(b) of the Act, that is that bargaining has been unduly protracted and that extensive efforts (including mediation) have failed to resolve the difficulties that have prevented the parties from settling a bargain.

[4] In the alternative, the Union pleads reliance on s.50C(1)(c) of the Act, namely that there have been one or more strikes or lockouts in the course of bargaining and that those strikes or lockouts have been protracted or acrimonious.

[5] For the avoidance of doubt, it is important that I record that OJI acknowledges only the basis for the first of the Union's pleadings, namely that bargaining has been unduly protracted and that extensive efforts have failed to resolve matters.

[6] OJI owns and operates Kinleith Mill and the Union has 12 members employed at the mill.

[7] There are three other unions representing workers at the mill, namely Etu, the Amalgamated Workers' Union of New Zealand Inc and First Union which for convenience I will refer to as "*the three unions*", and those three unions and OJI have entered into a collective employment agreement covering some 285 workers.

[8] That collective agreement contains a subsequent parties clause. The collective agreement was ratified in October 2015 and came into effect on 29 November 2015.

[9] Bargaining between OJI and the Union was initiated on 1 October 2015. From the outset, OJI indicated to the Union that the company wanted only one collective agreement on the site. Accordingly, OJI invited the Union to engage with the three unions about the Union joining the operative collective employment agreement.

[10] The Union duly approached the three unions and the request for the Union and its members to join the operative collective agreement was rebuffed by the three unions.

[11] The parties then continued with meetings in an attempt to undertake bargaining, a strike notice was issued in December 2015 and then withdrawn, there was bargaining with the assistance of the Mediation Service in February 2016 and terms of settlement were agreed on 3 February 2016 which would enable full settlement of all issues to be arrived at save for the reluctance of the three unions to welcome the Union and its members into the terms of the operative collective agreement.

[12] Although I do not propose to rely on this ground, I am also satisfied on the evidence before me that a strike notice was issued by the Union in January 2016,

immediately responded to by OJI with a notice of lockout and that over a period of some 10 days the industrial action continued.

[13] An affidavit in support of the Union's application for facilitated bargaining has been filed by James Edward Hastie. I have not found it necessary to rely on that affidavit as I note the factual basis of it is contested, at least in part, but I am satisfied on the material before me that I can consider the application for facilitated bargaining exclusively on the basis of the first ground, that is to say, that bargaining has been unduly protracted and that there have been extensive efforts including mediation to try to resolve matters without success.

The issues

[14] The only matter that falls for determination here is the question whether the Authority ought to grant the request for facilitation.

Should the request for facilitation be granted?

[15] I am satisfied this is a case where the legal test on the particular ground relied upon is made out and accordingly I propose to grant the request for facilitation.

[16] I reach this conclusion first because I accept that the factual matrix discloses that bargaining has been unduly protracted and that there have been extensive efforts to resolve the matter which include mediation.

[17] As is clear from decided cases, the issues that separate the parties and prevent resolution must be "*serious difficulties*" not simply "*difficulties*": *McCain Foods (New Zealand) Ltd v. Service & Food Workers' Union* [2009] ERNZ 28 per Chief Judge Colgan. For reasons I will refer to shortly, I am satisfied that the difficulties the parties had were serious ones.

[18] Bargaining in this matter was initiated on 1 October 2015 and there were six meetings between the parties (not all of them strictly speaking for bargaining per se) between that date and 29 February 2016. While that is not, of itself, a long period of time relative to some of the other cases where facilitation has been granted in reliance on this ground, it is nonetheless a fact that from an early stage in the negotiations between the parties, there was an agreement about the way forward and subsequently even an agreement about terms, but those understandings were not able to be

consummated because, in effect, a supervening event (the refusal of the three unions to contemplate the Union and its members participating in the operative collective agreement) prevented matters from being concluded.

[19] In my view, this is the opposite situation to the factual situation in *Service & Food Workers' Union Inc v. Spotless Services (NZ) Ltd* (NZERA Wellington, WA75/05) where the Authority found that one party (the employer) had not exhausted its negotiating position.

[20] In the present case, while the passage of time in which the parties have been endeavouring to resolve matters is at the lower end of the concept of “*unduly protracted*” bargaining, the reality is that there have been extensive efforts by the parties to try to resolve matters on their own terms and the apparent unwillingness of the three unions to contemplate an engagement with the Union and its members by allowing those latter parties into the terms of the operative collective agreement effectively creates an impervious barrier to the parties concluding a bargain.

[21] This is because the parties both accept that there should be one collective agreement on the Kinleith Mill site, the parties both accept that that document exists now, and yet there is a reluctance on the part of the three unions to contemplate an extension of the operative collective agreement to the members of the Union and to the Union itself.

[22] Unless and until that barrier can be removed, I am satisfied that there is no prospect of the parties coming to terms and I am equally satisfied that the assistance of a member of the Employment Relations Authority might well be able to assist the parties to conclude a bargain on the terms that have been provisionally agreed.

Determination

[23] I am satisfied that this is a case in which it is appropriate for the Authority to accept this application for facilitation because I am satisfied that bargaining has been unduly protracted given the particular circumstances of this case to which I have already referred, and that extensive efforts (including mediation) have been undertaken by the parties.

[24] A member of this Authority will be allocated to facilitate bargaining in this matter and an Authority officer will contact the representatives as soon as may be after the issue of this determination.

Costs

[25] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority