

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 161
5641330

BETWEEN THE NEW ZEALAND PUBLIC
SERVICE ASSOCIATION
Applicant

AND MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Michele Ryan

Representatives: Fleur Fitzsimons, Counsel for Applicant
Judith Manoa, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 31 October 2016, from Applicant
22 November 2016, from Respondent

Determination: 23 December 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The New Zealand Public Service Association (PSA) applies under s 50C(1)(b) of the Employment Relations Act for facilitated assistance with its bargaining for a collective employment agreement with the Ministry of Social Development (the Ministry).

Background information

[2] Alongside their respective pleadings the parties have each provided a detailed affidavit and corresponding documentary evidence.

[3] In 2010 the PSA initiated bargaining for a collective agreement for members who are employed as “Ministry of Social Development managers”¹ Following the Christchurch earthquake on 22 February 2011 the bargaining fell into abeyance.

The bargaining to date

[4] On 24 January 2014 the PSA initiated bargaining for members who hold positions that are not included in other PSA/MSD collective agreements and who work in management roles, with some exclusions based on the functions of some particular positions.

[5] Neither party provided detailed information as to how many days/hours the parties have engaged in bargaining, but it is common ground that over the course of 2014, 2015 and 2016 the parties have met and discussed terms on numerous occasions. The documentation provided indicates there have been additional informal discussions between the parties on an ongoing albeit irregular basis.

[6] The parties attended mediation on 30 June 2016.

The outstanding issues

[7] The PSA says there are issues surrounding remuneration that remain unresolved. The Ministry does not accept that assertion. There is no dispute between the parties however that they have been unable to reach agreement on whether a ‘completeness’ provision should be included in the collective agreement. It is this matter which appears to be the primary impediment to concluding a collective agreement between them.

Discussion

[8] Section 50C(1) states that the Authority must not accept a reference for facilitation unless one set of four possible grounds exist. Relevant to this application ss (b) provides:

- ... 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.

¹ Bargaining was initiated on 5 October 2010 and again on 3 December 2010



[9] The PSA says that bargaining between the parties has become unduly protracted and that despite extensive efforts the parties have not reached agreement.

[10] The Ministry does not expressly oppose facilitation but says further efforts can be made to resolve the matters which have precluded the parties from entering into a collective agreement. The inference I take from this information is that the Ministry does not accept facilitation is yet required.

[11] In *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc*², the Court addressed the requirements of s 50C(1)(b). It noted that ‘protracted’ bargaining is allowed under the legislation and that the statutory test requires ‘undue protraction’. That phrase was defined as meaning excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.³

[12] At [68] the Court concluded:

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 tests must have occurred before the grounds under s 50C(1)(b) for a reference to facilitation are established.

[13] I am mindful that the PSA initiated bargaining in 2010 for a collective agreement to cover materially the same positions as is sought in the current bargaining. Taking into account this background and that the parties have been bargaining for a collective agreement for almost 3 years I am satisfied that bargaining has become unduly protracted. The criteria at s 50(C)(1)(b)(i) have been met.

[14] Whether the efforts by the PSA and the Ministry to resolve their difficulties can be regarded as extensive is less clear on the evidence provided. It may be, as is suggested by the Ministry, that more effort can be made to resolve the parties differences although the statutory test is whether extensive efforts have been made – (but have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement) - not whether more effort could be made. As an

² [2009] ERNZ 28

³ Ibid at [64]



aside it appears the differences between the parties have not been progressed since this application was lodged almost four months ago.

[15] The judgement of the Court in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford*,⁴ was also concerned as to whether the test of “extensive efforts” had been sufficiently met. The Court noted at [42];

“The bargaining facilitation sections are 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 s 50B. While 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 indicated its desirability in light of the statutory scheme for collective bargaining and collective agreements”

[16] On balance I am satisfied that sufficient extensive efforts, including mediation, have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. Although the evidence was imprecise it is clear that that bargaining has occurred in face to face negotiations, mediation, and by other methods of communication (phone discussions and email) to resolve matters. The criteria at s 50(C)(1)(b)(ii) have been met.

Determination

[17] The PSA’s application is granted. The parties are referred under s 50B of the Act to the Authority for facilitation to assist them in resolving the difficulties in concluding the collective agreement for which they have been bargaining.



Michele Ryan
Member of the Employment Relations Authority



⁴ [2012] NZEmpC 168

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