

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 85
3012411

BETWEEN	MANUFACTURING AND CONSTRUCTION WORKERS UNION INCORPORATED
	First Applicant
AND	ELECTRICAL UNION INCORPORATED
	Second Applicant
A N D	UGL (NZ) LIMITED
	Respondent

Member of Authority:	T G Tetitaha
Representatives:	L Yukich, Advocate for Applicants D Langridge, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions Received:	7 to 8 and 13 December 2017 and 13 and 14 March 2018 from Applicant 7 and 15 December 2017 and 14 March 2018 from Respondent
Date of Determination:	14 March 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. There are no proven grounds for a reference to facilitation.**
- B. The application for facilitated bargaining is refused.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicants are both unions (the Unions). Their members include employees of the respondent, UGL (NZ) Limited (UGL). The parties initiated

bargaining for two collective agreements for hourly paid Electrical and Mechanical employee members based at Kawerau in 2015. There are now no longer any UGL employees operating from Kawerau.

[2] In June 2016 the Unions sought to widen the coverage of the bargaining to include all UGL employees. The parties were unable to conclude a collective agreement. The applicants seek a reference to facilitated bargaining pursuant to s.50 of the Employment Relations Act 2000 (the Act) to be determined on the papers.

Relevant Facts

[3] The parties have two collective agreements that cover Union members based at the Kawerau office that expired in 2015¹ (the agreements). There is no collective agreement between these parties for sites outside of Kawerau.

First Bargaining Notice – Second Named Applicants only – June 2015

[4] The second named applicants initiated bargaining for a collective agreement on 16 June 2015 (first bargaining notice). The first bargaining notice stated:

The intended coverage of the agreement is in accordance with the coverage clause of the existing agreement.

[5] The coverage clauses of second named applicant's collective agreement were "hourly paid employees based at its Kawerau office".²

Terms of Settlement

[6] A document titled "terms of settlement" was entered into with the second named applicant and respondent on or about 9 July 2015 (TOS). The TOS varied the agreement by extending the expiry date to 31 October 2015 and increasing "printed rates and allowances" by 1%.

Second Bargaining Notice – Both Unions – September 2015

[7] Both applicant Unions then served bargaining initiation notices on 24 September 2015. The first named applicant Union served their first bargaining notice stating the coverage was "the existing Mechanical Division Kawerau Branch

¹ Electrical Union Inc and UGL Kawerau Office Collective agreement (2013-2015) and Mechanical Division – Kawerau Collective Agreement (1 November 2013 – 31 October 2015).

² See above n1 clause 1(b).

collective agreement”. That Union’s collective agreement provided for coverage of workers in “the Mechanical Division – Kawerau Branch”.³

[8] The second-named applicant Union served a bargaining notice that repeated the coverage set out above in the first bargaining notice.

Outsourcing of Maintenance work

[9] In October 2015 UGL received notice that its head contractor intended outsourcing the maintenance work. This appears to have resulted in the decision to close the Kawerau office.

Bargaining Process Agreement

[10] By 26 November 2015 the parties had signed a bargaining process agreement (BPA) and met for the first time. The BPA set out the agreed arrangement between the parties approach “to negotiating the UGL (NZ) Limited Kawerau Office Collective Agreement and the UGL (NZ) Limited Mechanical Collective Agreement as initiated in the notices dated 24 September 2015.” The BPA included the process where the parties were unable to agree:

Inability to agree: If there is any dispute over the conduct of the bargaining or the parties have reached an impasse in the bargaining, they will discuss options for resolving their differences including whether mediation could assist, prior to resorting to other forms of action.

[11] From the evidence it appears at least one further meeting was arranged for 23 March 2016. There were two meetings in total.

[12] By 30 March 2016 the Unions’ advocate was seeking agreement for a reference to the Authority for facilitation. It alleged protracted bargaining and behaviour by the employer that undermined bargaining. UGL denied any breach of good faith.

[13] By 5 May 2016 the Unions asked UGL to draft terms of settlement for the Unions. In an email dated 5 May 2016 the Unions stated “we agree everything you have offered.” No draft TOS have been filed.

³ See above n1 clause 1(b).

Third Bargaining Notice – Both Unions – June 2016

[14] The applicant Unions then served a further bargaining initiation notice on 9 June 2016. This may have been in response to the closure of the Kawerau branch. This bargaining notice extended the intended coverage of the proposed collective agreement to “all work performed by employees of UGL (NZ) Limited.”

Strike

[15] The following day the applicant Unions issued a notice that they intended to strike. The strike action was to commence at 17:00 hours on Friday, 10 June 2016. It would cease at 07:00 hours on Monday, 12 June 2016. From the evidence the Unions gave one hour’s notice of their strike action. The strike notice also sought mediation for the first time.

Mediation

[16] Mediations were held between July and December 2016. An agreement was reached in mediation for an offer to be presented on 15 December 2016 to the Union’s members for ratification.

[17] By 27 April 2017 the Unions’ members rejected the mediated agreement. It is alleged the Union presented an alternative offer the same day but no copies of the offer or the outcome was provided.

Facilitation

[18] On 28 May 2017 the Unions’ advocate emailed UGL advising it intended seeking facilitation. It alleged UGL had acted in a deceptive or misleading manner.

[19] UGL replied on 1 June denying any such behaviour and advising an appropriate outcome could be achieved by further negotiations and it was willing to participate in further mediation

[20] On 7 June 2017 the Unions filed a statement of problem seeking facilitation.

[21] A statement in reply was filed on 22 June 2017 opposing the reference to facilitation.

Fourth Bargaining Notice – Both Unions – June 2017

[22] The Unions then sent a fourth bargaining initiation notice on 23 June 2017. The coverage of the proposed collective agreement was again “all work performed by employees of UGL (NZ) Limited.”.

[23] Following a case conference in August 2017, an investigation meeting was set down for 11 September 2017.

[24] On 21 August 2017 UGL advised it no longer objected to the reference to facilitation. It was directed to file an amended statement of reply.

[25] The amended statement in reply was filed on 25 August 2017. It noted UGL did not object to the facilitation but denied bargaining was protracted or that the applicant met the evidentiary threshold for the application.

[26] The parties accepted this matter could be dealt with on the papers. The hearing date was then set aside.

[27] It is accepted that from 22 September 2017 UGL had no employees located at Kawerau.

Law

[28] A reference to facilitation may be made upon certain grounds. These include

50C Grounds on which Authority may accept reference

(1) The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the following grounds exist:

- (a) that—
 - (i) in the course of the bargaining, a party has failed to comply with the duty of good faith in section 4; and
 - (ii) the failure—
 - (A) was serious and sustained; and
 - (B) has undermined the bargaining;
- (b) 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;
- (c) that—
 - (i) in the course of the bargaining there has been 1 or more strikes or lockouts; and
 - (ii) the strikes or lockouts have been protracted or acrimonious;
- (d) that—
 - (i) in the course of bargaining, a party has proposed a strike or lockout; and
 - (ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

(2) For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if—

- (a) the strike or lockout is likely to endanger the life, safety, or health of persons; or

(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

Has UGL breached the duty of good faith?

[29] There is little evidence to show a breach of the duty of good faith by UGL. While UGL may not agree with the Unions, this does not mean they have breached their duty of good faith. The evidence demonstrated a willingness by UGL to attend both mediated and face to face meetings with the Unions.

[30] There has been no evidence of a serious and sustained breach of good faith by UGL warranting a reference to facilitation.

Has the bargaining become unduly protracted?

[31] The Court has held that there must be serious difficulties to warrant a reference to facilitation.⁴ Undue protraction is excessive or disproportionate protraction, as opposed to reasonable or expected or common protraction.⁵

[32] The evidence shows bargaining by the second named Union started in June 2015. This was largely resolved by the TOS reached in July 2015. As a result, the bargaining around the June 2015 notice cannot have become protracted.

[33] Both Unions then issued a further notice in September 2015 specific to Kawerau. However the Kawerau UGL employees had been or were in the process of being made redundant due to the closure of the Kawerau office. One member transferred to another UGL work site and is currently on an individual employment contract. No other employees transferred to other UGL sites that were covered by the bargaining notices issued in 2015. By 2017 there was no group for whom the Unions could collectively bargain on behalf of under the 2015 bargaining notices.

[34] It is not until the third bargaining notice issued on 9 June 2016 that the Unions began bargaining for a different group of UGL employees whom were not covered by the previous Kawerau collective agreements. The Unions proposed a collective

⁴ *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28 (EmpC) at [61].

⁵ See above at [64].

agreement covering “all work performed by employees of UGL (NZ) Limited.” There are 15 UGL employees whom now fall within this category.

[35] Therefore the start date for the initiation of collective bargaining relevant to this application for facilitation is the date of the third bargaining notice of 9 June 2016. This bargaining started approximately 12 months prior to the facilitation application. From the evidence bargaining stopped in May 2017 approximately 11 months after the June bargaining initiation notices.

[36] Bargaining over 34 months has been considered by the Courts to be unduly protracted.⁶ Recently the Authority granted facilitation where bargaining occurred over 12 months⁷ but there were significant differences to what has occurred here.

Have there been extensive efforts to resolve difficulties?

[37] This looks at the quality and dynamism of bargaining and the nature and quality of the attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement. A qualitative analysis is a significant element of this test.⁸

Clarity of Issues

[38] The nature and extent of the issues that remained unresolved is unclear on the evidence and between the parties. No list of outstanding claims has been provided other than by UGL’s statement in reply. It identified there were two issues of term and wages increase that were outstanding. It also referred to an agreement with the Unions in April 2017 that resolved coverage. I directed the parties to confirm these were the outstanding issues. The Unions then disagreed that coverage had been resolved. This indicates the parties are unclear what issues remain outstanding for reference to facilitation.

Multiple Union involvement

[39] The Union has provided a copy of the disputed coverage clause. It seeks to include all of the employees of UGL. Another Union E Tū has member employees at

⁶ *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28 (EmpC).

⁷ *Taylor Preston Limited v New Zealand Meat Workers & Related Trades Union Inc* [2017] NZERA Wellington 9.

UGL worksites in New Zealand. There will be consequences for UGL in respect of any collective agreement with E Tū if it expanded the Unions coverage. If that is the case then multi-party bargaining is a more appropriate solution than facilitation. There is no evidence this has been attempted.

Comparative analysis

[40] Even if there are only three outstanding issues of coverage, term and a wage increase, the parties' efforts do not appear to have reached the point where the specialised assistance of an Authority member is required.

[41] Over the past 12 months the Authority have granted two facilitation applications where:⁹

- Bargaining took place over 12 to 22 months;
- The parties met between 12-15 times including 3-5 sessions using a mediator;
- In one case took strike action up to 5 times.

[42] In comparison these parties met six times including 3 mediation sessions over two years. The parties met face to face only once following mediation. No other face to face meetings have occurred since the June 2016 when the Unions sought to widen coverage.

[43] On its face the mediation was not extensive in number (3) or time taken (15 hours over 3 days spread over a six month period). Further it did result in an agreement to put to the Unions members that was unable to be ratified. This indicates mediation remains an option to resolve the parties' collective bargaining.

[44] There is no evidence the parties have not fully turned their minds to the other options to resolve their differences. This was an agreed part of the bargaining process under the BPA. These options could include further face to face meetings to resolve the issues for bargaining, involvement of other Unions such as E Tū in collective bargaining to and further mediation.

⁸ *Service and Food Workers Union Nga Ringa Tota Inc. v Sanford Limited* [2012] NZEmpC 168 at [72] and [73].

⁹ *First Union Inc v Brand Developers Ltd* [2017] NZERA Auckland 12; *Taylor Preston Limited v New Zealand Meat Workers & Related Trades Union Inc* [2017] NZERA Wellington 9.

[45] The evidence does not reach the high threshold required to show undue protraction or extensive effort to resolve difficulties.

Has there been a protracted or acrimonious strike in the course of bargaining?

[46] The Unions took strike action the day following the issuing of the bargaining initiation notice in June 2016. The strike does not appear to have affected the parties at all. It took place over a weekend when presumably the Unions Kawerau UGL employees were not usually at work.

[47] While there may have been a strike, it was not protracted or acrimonious.

Result

[48] There are no proven grounds for a reference to facilitation.

[49] The application for facilitated bargaining is refused.

[50] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority