IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 398
3026316

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

Member of Authority:	T G Tetitaha
Representatives:	D Langridge, Counsel for Applicant L Yukich, Advocate for Respondents
Investigation Meeting:	13 September 2018 at Rotorua
Submissions Received:	13 September 2018 from both parties
Date of Determination:	12 December 2018

DETERMINATION OF THE AUTHORITY

A. There was a failure by UGL (NZ) Limited to deal in good faith at directed mediation. Even if bargaining has concluded, I dismiss the application pursuant to s.50KA(1) of the Employment Relations Act 2000.

B. I decline to reopen the reference to facilitation because bargaining has concluded in fact and there are insufficient respondent employees to collectively bargain at all.

C. Costs are reserved. Either party has 14 days to file any application for costs. The responding party is to file its response within 14 days of receipt.

Employment relationship problem

[1] The applicant employer, UGL (NZ) Limited seeks an order concluding bargaining. It submits it no longer employs any respondent Union members and the Kawerau branch that was covered by the bargaining notices has closed.

[2] The respondent Unions submit there is no jurisdiction to grant the application because it had withdrawn the bargaining notices albeit two days prior to hearing. If there was jurisdiction, the respondent Unions allege there has been bad faith by UGL in mediation.

Relevant Facts

[3] The parties had two collective agreements that covered the respondent Union members based at the Kawerau office. These agreements expired in 2015[1].

Bargaining notices 2015

[4] Bargaining was initiated by a notice dated 16 June 2015 for the second respondent Union (June 2015 bargaining notice). The Union members covered by the June 2015 bargaining notice were "in accordance with the coverage clause of the existing agreement". The coverage clauses of the then existing collective agreement were "hourly paid employees based at [UGL's] Kawerau office".[2] The June 2015 bargaining notice pertained to Kawerau based UGL employees only.

[5] A settlement agreement was reached between UGL and the second respondent on or about 9 July 2015 (TOS).

[6] Both respondent Unions then served bargaining initiation notices on 24 September 2015 (September 2015 bargaining notice). The coverage for first respondent Union's September 2015 bargaining notice was stated as "the existing Mechanical Division Kawerau Branch collective agreement". The relevant collective

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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).

agreement covered workers in "the Mechanical Division – Kawerau Branch".[3] The second respondent Union served a bargaining notice that repeated the coverage set out above in the first bargaining notice.

Bargaining Process Agreement

[7] 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."

[8] The BPA also referred to the conclusion of bargaining as follows:

> **Conclusion of bargaining:** Bargaining shall be deemed to have concluded at the point the parties to this bargaining process agreement in accordance with s54 Employment Relations Act 2000 execute a collective agreement arising from bargaining under this bargaining process agreement.
>
> Both parties agree to expedite the execution of the collective agreement as soon as practicable from the date the employer advocate is advised of ratification.

[9] At least one further meeting was arranged for 23 March 2016.

[10] 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.

Bargaining notice, strike and mediation 2016

[11] The applicant Unions served a further bargaining initiation notice on 9 June 2016 (June 2016 bargaining notice). The bargaining notice extended the intended coverage of the proposed collective agreement to "all work performed by employees of UGL (NZ) Limited."

[12] The following day the 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.

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[3] See above n1 clause 1(b).

[13] 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. This was rejected.

Bargaining notice and closure of UGL's Kawerau office 2017

[14] 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.".

[15] It is accepted that from 22 September 2017 UGL closed its Kawerau office. Existing employees were transferred elsewhere. No UGL employees were left at Kawerau as a consequence.

Facilitation, conclusion of bargaining and redundancy of UGL employees 2018

[16] The Unions filed a statement of problem seeking facilitation. On 14 March 2018 facilitation was refused for the reasons set out in the earlier determination.[4]

[17] On 16 March 2018 the respondent filed an application to conclude bargaining pursuant s.50K of the Employment Relations Act 2000 ("the Act"). The grounds for seeking the order were:

(a) The collective agreement(s) that were the subject of negotiations, applies to employees employed by the applicant at its Kawerau branch;

(b) The applicant's Kawerau branch is closed and is no longer operational. Accordingly, effective from 22 September 2017 the applicant no longer has employees who are based at the Kawerau branch;

(c) All other employees of the applicant are on other employment agreements that are not within the scope or coverage of the collective agreement(s) that were the subject of current bargaining;

(d) Accordingly pursuant to s.50K of the Employment Relations Act 2000 and further to the above paragraphs, the applicant seeks a determination that bargaining has concluded.

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[4] *Manufacturing and Construction Workers Union Inc and Anor v UGL (NZ) Ltd* [2018] NZERA Auckland 85.

[18] The parties accepted a direction to mediation that occurred on 6 July 2018. It did not result in any settlement and the file was referred back to the member. The matter was then set down for hearing on 13 September 2018 in Rotorua.

[19] In July 2018 UGL had made all of its New Zealand employees redundant with the exception of four based outside of New Zealand. The redundant employees were transferred to the new sub-contractors.

[20] On 12 September 2018, the day prior to hearing, the Respondent Unions filed a Memorandum in the Authority advising the withdrawal of the bargaining initiation notices and advising the Authority had no jurisdiction to deal with this application as a consequence. Efforts to contact the respondent before hearing to advise of the development were unsuccessful.

[21] The matter proceeded to hearing on 13 September 2018.

The Law

[22] Part 5 of the Empoyment Relations Act 2000 (the Act) sets out a statutory scheme within which collective bargaining is to occur. The Act sets out a code of good faith for parties to collective bargaining and a process from initiation to facilitation to conclusion of bargaining.[5]

[23] The requirements for an order to conclude bargaining are set out in ss50K and 50KA of the Act below:

> **50K Authority may determine that bargaining has concluded**
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> (1) A party to bargaining for a collective agreement may apply to the Authority for a determination as to whether bargaining has concluded because of difficulties in concluding bargaining.
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> (2) Where an application is made under subsection (1), the Authority—
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> (a) must consider whether an attempt has been made to resolve the difficulties by the use of—
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> (i) mediation or further mediation under section 159; or
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> (ii) facilitation under sections 50B to 50I; and
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> (b) may direct the parties to try to resolve the difficulties by mediation or further mediation; but
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> (c) if any of the grounds in section 50C(1) exist, must direct that facilitation be used before the Authority investigates the matter, unless the Authority considers that use of facilitation—

[5] Sections 32ff of the Act.

(i) will not contribute constructively to resolve the difficulties; or

(ii) will not, in all the circumstances, be in the public interest; or

(iii) will undermine the urgent nature of the process; or

(iv) will be otherwise impractical or inappropriate in the circumstances.

(3) If the Authority determines that bargaining has concluded,—

(a) the Authority must make a declaration to that effect; and

(b) none of the parties to that bargaining may initiate further bargaining earlier than 60 days after the date of the declaration without the agreement of the other party or parties concerned.

(4) If the Authority determines that bargaining has not concluded,—

(a) the Authority may make a recommendation as to the process that the parties should follow to resolve the difficulties; and

(b) none of the parties to that bargaining may make another application under subsection (1) in respect of that bargaining until the process recommended by the Authority has been followed.

(5) If the Authority determines that bargaining has not concluded, but does not make a recommendation under subsection (4)(a), none of the parties to that bargaining may make another application under subsection (1) in respect of that bargaining earlier than 60 days after the date of the determination without the agreement of the other party or parties concerned.

(6) This section applies subject to section 50KA.

50KA Declaration or determination under section 50K not to be made if breach of duty of good faith by party seeking declaration

(1) The Authority must dismiss an application made under section 50K(1) and must refuse to make a declaration or determination under section 50K(3) or (4) if the Authority is satisfied that the party seeking the declaration has failed to observe good faith as described in subsection (3).

(2) However, the Authority is not precluded from making a declaration or determination if the party seeking the declaration has failed to observe good faith, but the Authority is satisfied that the party has rectified the failure.

(3) The failures to observe good faith are as follows:

(a) a failure to comply with the duty of good faith in section 4, if the failure—

(i) relates to the collective bargaining in respect of which the declaration is sought; and

(ii) has undermined the collective bargaining:

(b) a failure to deal in good faith in any mediation or facilitation directed by the Authority under section 50K(2) (whether in relation to the Authority or the other party or parties to the collective bargaining).

(4) To avoid doubt, for the purposes of subsection (3)(a), a failure may relate to a matter before or after the application for the determination is made.

(5) If the Authority is precluded by subsection (1) from making a declaration or a determination, the Authority may make orders or recommendations or issue directions about what steps the parties to the collective bargaining ought to or must take, including (but not limited to) how the party who has failed to observe good faith may rectify the failure.**]**

[24] Section 50K was introduced by the Employment Relations Amendment Act 2014. This was linked to the amendment to s 33, which states that the duty of good faith does not require a concluded collective agreement. The Explanatory note to the bill stated that:

> The Bill recognises that there are sometimes instances where agreement between parties is clearly not going to be reached, and requiring parties to conclude a collective agreement has led to protracted negotiations. The Bill will re-enact the previous position whereby the duty of good faith does not require a concluded collective agreement. The Bill recognizes that there is a need for parties to have certainty as to when bargaining has concluded, so it provides a clear process that allows parties to apply for a declaration from the Employment Relations Authority on whether collective bargaining has concluded.

[25] According to official advice at the time, "the policy intent is to allow for a declaration where the bargaining becomes fruitless" with the Authority assessing "whether all the parties are truly at an impasse". The authors of Mazengarb suggest this requires a more stringent requirement for exercise of the s 50K jurisdiction than the reference to "difficulties" in the provision itself.[6]

[26] The onus is upon UGL to prove bargaining has concluded on the balance of probabilities.

Have there been difficulties in concluding bargaining?

[27] In my view this bargaining has primarily been hindered by the multiple bargaining notices with different coverage and the imminent redundancies.

[28] However the grounds for the application have changed since it was filed in March 2018. The grounds focused upon the June and September 2015 bargaining notice coverage that referred to the Kawerau office only. This office had closed. The Respondents also had employees still employed by UGL at that time.

[29] Matters changed significantly post filing of the application. In July 2018. UGL no longer employed any more than possible one Respondent Union member due to redundancies. Then in September 2018 when the Respondent Unions withdrew all of the bargaining notices. The impact of these issues upon the difficulties in concluding bargaining now have become central to this decision.

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6 Mazengarb online http://www.lexisnexis.com/nz/legal/search/commentarysubmitForm.do

Lack of UGL employees whom are respondent Union members

[30] UGL submits by 22 September 2017 it no longer had any employees at the Kawerau office because it had closed. There was no collective agreement between the parties for worksites outside of the Kawerau branch.

[31] UGL has also ceased its operations in New Zealand. It currently employs four employees. Three of the four existing employees are not based in New Zealand. Therefore they are outside of the coverage of the current collective agreement and BPA. The remaining employee is based in Hamilton. All of the four employees are on individual employment contracts.

[32] UGL produced its payroll details for the four remaining New Zealand employees. The payroll extract showed no payment of Respondent Unions fees by any of those employees.

[33] Mr Yukich submitted at hearing that there was one Union member listed and he was not required to pay any Union fees. He refused to provide the name and contact details to allow contact with the person to confirm membership. He cited "privacy" and fears this worker may be "blacklisted".

[34] Even if there was a single UGL employee member of the Respondent Unions, it is accepted no binding collective agreement can be concluded. This is because a collective agreement by statutory definition can only be binding upon "2 or more employees".[7] Therefore no collective agreement can be concluded for one Respondent Union member employee.

[35] This is a significant difficulty in concluding bargaining.

Withdrawal of bargaining initiation notices

[36] The initiation of the bargaining process must occur by way of a bargaining notice.[8] There is no process set out in the Act for withdrawing a bargaining notice or the effect of withdrawing a bargaining notice upon the bargaining process.

[37] The Court has indicated that for parties who are still engaging in at least some bargaining after the application for declarations has been made, but before the

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7 Section 5 ER Act.
8 Section 44 of the Act.

investigation or hearing of the application, this may be a persuasive indicator that bargaining has not concluded.[9] The parties had initiated bargaining notices in June and September 2017 that covered all Respondent Union employees employed by UGL. There were bargaining notices under which bargaining could have continued.

[38] The act of withdrawing all of the bargaining notices must mean bargaining in fact has concluded in relation to those notices. No new bargaining notices have been given. There cannot be any bargaining taking place as a consequence.

Has there been a breach of good faith under s50KA(3)?

[39] The Respondent submits even if bargaining has concluded, UGL failed to deal in good faith at directed mediation pursuant to s50KA(3)(b) of the Act. It referred to the direction to mediation under s50K(2) made on 21 May 2018. It submits at mediation UGL refused to negotiate a BPA. It alleges this was bad faith behaviour. It sought dismissal of this application, costs and a reopening of the reference to facilitation.

[40] Section 4(1) of the Act requires the parties to be "active and constructive in establishing and maintaining a productive employment relationship."

[41] During submissions Mr Yukich sought leave to produce Mathew Verhaegh by telephone to give evidence about the parties dealings at mediation. He referred to s148(5) of the Act as an exception to confidentiality in mediation involving collective agreements. UGL did not object to the late production of the witness or him giving evidence about the mediation.

[42] Mr Verhaegh attended the July mediation with UGL. He stated UGL refused to bargain over the BPA because "it found it unnecessary because employees were to be made redundant." Five of the Respondent Union members were affected. The redundancies were due to take place in the next few weeks following mediation. He thought this was bad faith behaviour because there were no guarantees the redundancies were going to take place. He referred to the fact they had "been through this 4 times previously". This was extremely stressful for the affected Respondent Union members. He felt there was still something to bargain over. He also made reference to future work UGL was looking to secure in New Zealand.

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9 *New Zealand Public Service Association v Secretary for Justice* [[2010] NZEmpC at [11].

[43] Under cross-examination he accepted there may be a difference between refusing to accept a BPA and a refusing to negotiate at all. He also confirmed the respondent did not expressly state at mediation it would not negotiate a BPA. He confirmed no BPA was in fact negotiated.

[44] Mr Verhaegh presented as a truthful witness. He made concessions against the Respondent's interests where appropriate but was firm in his belief UGL was refusing to bargain due to the imminent redundancies occurring. His evidence was not undermined by the cross-examination. UGL did not produce any evidence in rebuttal.

[45] There is evidence UGL was not actively seeking to continue bargaining. At the time the application was filed, there were other bargaining notices with sufficient coverage for bargaining to continue; the application for facilitation had been refused only two days prior; the decision declining facilitation specifically referred to options for bargaining the parties had not turned their minds to[10]; and there is little or no evidence of bargaining attempts being made from the date of filing of this application in March until the directed mediation in July 2018.

[46] There were affected employees for whom bargaining could have been undertaken in July 2018. The fact of imminent redundancies should not have prevented the parties from seeking to conclude a BPA and further bargaining even if it was about the redundancies. A proposed BPA was given to UGL that it did not accept. UGL offered no alternative to the BPA presented. There was no evidence of efforts by UGL to negotiate any other collective bargaining issue. The mediation took a maximum of 1 to 2 hours.

[47] The above evidenced unwillingness by UGL to be active or constructive at mediation. There was no rectification of this behaviour before the redundancies occurred. This was "surface bargaining" at best. That is what s50KA was intended to prevent.

[48] There was a failure by UGL to deal in good faith at directed mediation. Even if bargaining has concluded, I must dismiss the application under s50KA(1) of the Act.

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[10] See note 4 above at [44].

[49] I decline to reopen the reference to facilitation because bargaining has concluded in fact and there are insufficient respondent employees to collectively bargain at all.

[50] Costs are reserved. Either party has 14 days to file any application for costs. The responding party is to file its response within 14 days of receipt.

T G Tetitaha
Member of the Employment Relations Authority