

stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Reference to facilitation

[3] Before a reference to facilitation can be accepted I must be satisfied there have been serious difficulties in concluding a collective agreement.¹ The Court of Appeal has held that reference to difficulties in section 50B of the Act should be read as a reference to “*serious difficulties*”.²

Background to application

[4] The Union and Ports of Auckland Limited (POAL) are parties to a collective agreement that covers work completed by stevedores and trades people employed by POAL at the port in Auckland.

[5] The current CA between the parties came into force on 18 February 2015 and expired on 17 August 2017. The Union initiated bargaining for a new CA by notice dated 19 June 2017.

[6] A number of issues have arisen during the bargaining which includes rostering, notification of shifts, hours of work policy, availability and remuneration. The issues of notification of shifts and the hours of work policy are the subject of separate litigation.

Grounds for reference to facilitation

[7] The grounds relied on by the Union for referral to facilitation are those contained in section 50C(1)(b) which requires me to be satisfied that:

- a) the bargaining has been unduly protracted; and
- b) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

¹ Employment Relations Act 2000, section 50B.

² *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] 6 NZELR 426.

[8] The focus of this test is upon 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.³

[9] An analysis of 13 cases since 2013 where the Authority has accepted a reference to facilitation shows that the period of initiation of bargaining ranged from seven months to 48 months with the average period being 20.8 months. This is comparable to the statistics relied on by the Court in 2012 which showed an average period of 19.6 months.⁴ The number of bargaining sessions ranged between 4 and 21 with the average being 7.8 and the number of mediator assisted bargaining sessions ranged from 1 to 4 with the average being 2.1.

[10] The parties have been involved in bargaining for just on twelve months. In total the parties have met a total of 15 times for the purposes of bargaining for the collective agreement with at least two of these sessions being conducted with the assistance of a mediator, including a private mediation:

- 30 August 2017
- 5, 12, 14 and 27 September 2017
- 10 and 18 October 2017
- 2 and 30 November 2017
- 15 December 2017
- 8, 9 and 27 February 2018
- 16 April 2018
- 5 July 2018

[11] There have been various telephone discussions and emails exchanged between the parties in relations to the bargaining. The parties also met on 22 February 2018 to discuss a particular aspect of the bargaining which had become an impasse between the parties and to explore possible ways of moving past this.

³ *Service and Food Workers Union Nga Ringa Tota Inc. v Sanford Limited* [2012] NZEmpC 168 at [72] and [73].

⁴ Above n 3 at [46].

[12] I am satisfied the bargaining has been unduly protracted and the extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. It is now time for the facilitation process to be used to assist in the conclusion of a collective agreement. The application for reference to facilitation is accepted.

[13] The matter will now be allocated to another Member of the Authority who will contact the parties to progress facilitation in due course.

Vicki Campbell
Member of the Employment Relations Authority