

Employment Relationship Problem

[1] This is an application for facilitated bargaining pursuant to s.50B of the Employment Relations Act 2000 (“the Act”). The applicant alleges that there are grounds under ss.50C(1)(a) to (c) of the Act. This is on the following basis:

- a) In the course of bargaining, the union has failed to comply with the duty of good faith in s.4 of the Act and the failure was serious and sustained in its undermine bargaining. This is evidenced by union statements to the media throughout the bargaining process which have been factually incorrect;
- b) The bargaining has become unduly protracted and extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. This is evidenced by:
 - i. The parties having met for bargaining 16 times over 17 months;
 - ii. Of these meetings five have been assisted by a mediator; and
 - iii. The parties issues becoming increasingly fraught as a result of substantial media coverage;
- c) There have been 1 or more strikes that have become acrimonious.

[2] The respondent Union has filed a Memorandum setting out its agreement to the reference to facilitation but only on the grounds under s50C(1)(b) and (c) of the Act. It denies any breach of good faith.

[3] The parties have sought a determination of the application without an investigation meeting being held. I have determined pursuant to s174D of the Employment Relations Act 2000 (Act) that no investigation meeting is required to be held to determine this application.

Relevant Facts

[4] The facts have been drawn from the pleadings and the applicant’s affidavit evidence.

[5] Bargaining was initiated by the union on 9 March 2017. A bargaining process agreement was signed by the parties between 31 May 2017 and 1 June 2017 (BPA). The BPA contained the below clause regarding communications:

Communication during bargaining

17. This shall take into consideration the requirements of section 32(1)(d) of the ERA, and in the case of the Employer exercising their rights under the provisions of section 4 of the ERA, it is agreed that in all cases where the Employer requests to report back to the Union members, the Union Advocate will be present.

18. All communications shall be in accordance with the ERA.

[6] The first bargaining meeting took place on 23 June 2017. Further bargaining meetings took place on 5 and 28 July, 11 August and 22 September 2017.

Stop work meetings

[7] On 26 September 2017 a stop work meeting took place in Tauranga and the union presented a petition to the Bay of Plenty Regional Council regarding living wage for workers.

[8] On 12 October 2017 a stop work meeting took place in Hamilton and the union presented a petition to the Waikato Regional Council regarding living wage for workers.

Auckland Area Collective Agreement

[9] Despite the above action, bargaining meetings occurred on 16 November, 6 and 7 December 2017 and on 26 January 2018.

[10] On 9 March 2018 further claims were submitted by the union. The union indicated at this meeting that strike action would take place if negotiations broke down.

[11] On 23 March 2018 further bargaining took place. An offer to settle the Auckland area collective agreement was made.

[12] On 12 July 2018 a collective agreement was entered into for the Auckland area.

[13] On 10 August 2018 Go Bus made further offers to the union to several of the collective agreement in the Hamilton, Tauranga and Napier areas. These offers were rejected.

[14] On 13 August 2018 a revised offer was made by Go Bus to the union.

[15] As at the date of this application no collective agreement has been resolved for the Hamilton, Tauranga and Napier areas. It is these areas claims that remain extant.

Breach of Good Faith

[16] On 11 August 2017 the union issued a press release which contained allegations regarding Go Bus's bargaining position and that Go Bus was harassing union members. These allegations were denied by Go Bus.

[17] On 22 September 2017 the union made further allegations that Go Bus was harassing its members. These allegations were also denied by Go Bus.

[18] On 27 September 2017 the union wrote letters to Go Bus copying in Auckland Transport alleging that Go Bus were breaching driving hours, had discriminated against union members, and had implemented unreasonable break times. Those allegations were denied.

[19] During October 2017, the union made a number of press releases which contained statements regarding Go Bus's position. Those allegations were denied by Go Bus.

[20] Despite these issues bargaining continued. Further mediated bargaining took place on 13 and 27 October 2017 and 6 and 20 June 2018.

[21] On 13 August 2018 press releases were made by both Go Bus and the union regarding the status of bargaining. The union's press releases made a number of statements regarding the health and safety of Go Bus's operations. Go Bus denied these matters issuing its own press statement.

[22] On 17 August 2018 further mediated bargaining took place. At this meeting the union advised it would keep the media updated regularly regarding the bargaining process and would seek to destroy Go Bus's reputation if it did not give union members a living wage.

[23] On 22 August 2018 the union issued a press statement in the media regarding working conditions of Go Bus employees, in particular the female employees being required to use a bucket for toilet facilities at the Hamilton depot. Go Bus issued its own press statement on 23 August 2018.

Strike action

[24] It is accepted strike action has taken place on the following dates and in the following places:

- (a) 8 May 2018 in Te Awamutu and Otorohanga
- (b) 14 May 2018 in Hamilton
- (c) 29 May 2018 in Auckland (following a stop work meeting on 24 May 2018) and
- (d) 14 August 2018 in Hamilton.

[25] The strike action has been acrimonious. This is because:

- (a) On 14 August 2018 the union delegates and members blocked the accessway to Go Bus's Hamilton depot (which is shared by other organisations);
- (b) Go Bus's operations were delayed for approximately one and a half hours until the police attended at which time the picket line was disbanded; and
- (c) As a result of the picket, Go Bus incurred penalties under its contract with the Hamilton Regional Council for those services it could not operate, or was late running on.

Reference to Facilitation

[26] Section 50C(1) provides a ground for the Authority to accept a reference for facilitation. It must be satisfied that one or more of the grounds it set out below exist:

- 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:

Section 50C(1)(a) - Failure to comply with a duty of good faith

[27] One example of what the applicant alleges was a breach of good faith is the Union's press release dated 22 August 2018. The press release was headed "It's not just the bus conditions, drivers are peeing in buckets." The press release went on to refer to drivers from a partially built depot having buckets instead of toilets in the female bathrooms. It attached a picture of a bucket sitting where the toilet would normally be. It expressed some disgust at making female employees use these facilities.

[28] Throughout Go Bus has acted immediately to correct what it perceived as factually incorrect or misleading statements with its own press releases. In respect of the 22 August 2018 statement it released its own that explained female drivers had two fully functioning toilet facilities at the new depot. Male driver toilets were under construction but they had been directed to use the existing toilets elsewhere in the building. The buckets were what the plumber was using to calculate the placement of the toilets to be installed in the bathrooms. Drivers had been verbally told about the situation and there was a notice on the entrance to the toilets explaining where the alternative location was. The union organiser had also been told.

[29] Go Bus also stated that this claim was "completely and utterly false. If anything it shows the stupidity and mischievous nature of those involved in making such claims and a motivation to deliberately mislead the media." This is also provocative language. From these two press releases, both parties appear to be engaging in what I would consider provocative behaviour towards the other.

[30] The parties have no agreement about communication with the media. The BPA does not restrict the manner in which these parties may communicate with the general public or the making of media statements during bargaining

[31] The factual inaccuracy of the Union's press releases did not mislead or deceive Go Bus Limited. The general public may have been misled but it is not a party to the duty of good faith under the Act.

[32] There has been no discernible impact upon Go Bus, other than extreme annoyance. The impact (if any) may have been damage to the Union's reputation for truthfulness as opposed to any damage to Go Bus in the circumstances.

[33] It is difficult to be satisfied there have been breaches of good faith by the inaccuracy of the press releases and if the breaches were deliberate serious or sustained, unless an investigation meeting is held. As a matter of pragmatism neither party sought a hearing. This is sensible given there are other grounds on which a reference to facilitation can be made. An investigation meeting will simply delay the collective bargaining.

[34] The grounds for a reference under s50C(1)(a) of the Act have not been met.

Section 50C(1)(b) – Bargaining Unduly Protracted

[35] Bargaining was initiated on 9 March 2017 17 months prior to this application. All of the collective agreements for the Hamilton, Tauranga and Napier areas have terminated. The Union employees are now on individual employment agreements.

[36] There have been 16 bargaining meetings, including 4 using the services of a mediator. The parties have been unable to conclude their bargaining. In these circumstances I find that the bargaining has become unduly protracted.

Section 50C(1)(c) – One or more strikes that have been protracted or acrimonious

[37] There is evidence that there have been 4 strikes. In respect of the strike on 14 August 2018 it became acrimonious. This is because it involved a picket line preventing use of a shared depot area and required police involvement to move the striking workers. These elements meet the test for acrimonious strikes.

Outcome

[38] The parties have met the grounds under s.50C(1)(b) and (c) of the Act to warrant a reference to facilitation.

[39] In the circumstances I grant the application for facilitation.

[40] Given this matter has largely proceeded by consent, costs should lie where they fall. If a party seeks costs it is to file its application within 14 days of the date of this determination. The other side shall have 14 days thereafter to reply.

T G Tetitaha
Member of the Employment Relations Authority