

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 115
3052952

BETWEEN THE ORDER OF ST JOHN
NORTHERN REGION TRUST
BOARD, THE ORDER OF ST
JOHN CENTRAL REGION TRUST
BOARD, THE ORDER OF ST
JOHN SOUTH ISLAND REGION
TRUST BOARD, THE PRIORY IN
NEW ZEALAND OF THE MOST
VENERABLE ORDER OF THE
HOSPITAL OF ST JOHN OF
JERUSALEM
Applicants

AND FIRST UNION INCORPORATED
First Respondent

AND AMALGAMATED WORKERS
UNION NEW ZEALAND
INCORPORATED
Second Respondent

NEW ZEALAND AMBULANCE
ASSOCIATION INCORPORATED
Third Respondent

AND THE AMALGAMATED
WORKERS UNION NEW
ZEALAND SOUTHERN
INCORPORATED
Fourth Respondent

Member of Authority: Anna Fitzgibbon

Representatives: David France, counsel for the Applicants
Peter Cranney and Grace Liu, counsel for the First
Respondent
Calvin Fisher, representative for the second, third and
fourth respondents

Investigation Meeting: 22 February 2019

Submissions Received: At the investigation meeting from the Applicant
At the investigation meeting from the Respondents

Date of Determination: 1 March 2019

DETERMINATION OF THE AUTHORITY

A. Referral to facilitation is accepted on the basis that the statutory criteria have been satisfied.

B. Costs are reserved.

Employment Relationship Problem

[1] The applicants (St John) have applied to the Authority for facilitation in the bargaining between it and the respondents (the Unions) pursuant to s 50B of the Employment Relations Act 2000 (the Act). St John relies on the grounds in s 50C(1)(b) and/or s 50C(1)(c) of the Act.

[2] The application is opposed by the respondents (First union and the unions) on the basis that the statutory criteria for facilitation have not been met, that facilitation, if granted, is premature, would be counter-productive and would undermine the bargaining.

The investigation Meeting

[3] The investigation meeting in respect of the application for facilitation took almost one full day in the Authority. Mr William Simon Walkinshaw, head of HR business partnering and reward at St John filed two affidavits in the Authority dated 31 January 2019 and 19 February 2019 in support of St John's application for facilitation.

[4] For the first respondent, (First Union), Ms Sarah Stone, union organiser filed two affidavits dated 12 and 21 February 2019 and Mr Neil Chapman, union organiser filed an affidavit dated 12 February 2019. Mr Walkinshaw, Ms Stone and Mr Chapman all attended the Authority's investigation and affirmed that their evidence was true and correct.

[5] Mr Calvin Fisher who represented the second, third and fourth respondent unions and who is the general secretary of the fourth respondent attended the Authority's investigation

meeting and responded to questions asked by the Authority as did Mr Mark Quin, representative of the New Zealand Ambulance Association Incorporated. Both Mr Fisher and Mr Quin affirmed that their evidence was true and correct.

[6] Each of the witnesses giving evidence before the Authority had the opportunity to provide any additional comments and information and did so.

[7] As permitted under s 174E of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to determine the application for facilitation brought by the applicants.

[8] The application by St John for facilitation was granted urgency by the Authority. Accordingly, this determination has been issued urgently.

The Statutory Framework

[9] Under s50C of the Act, the Authority must not accept a reference for facilitation unless satisfied that at least one of certain specified grounds exists.

[10] Grounds relied on by St John are that:

- the bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement: s 50C(1)(b)(i) and (ii) of the Act and
- in the course of the bargaining there have been 1 or more strikes and the strikes have been protracted or acrimonious: s 50C(1)(c)(i) and (ii) of the Act.

[11] The unions say that the statutory criteria in s 50C of the Act have not been met. They are of the view that there are difficulties between the parties in concluding a collective agreement. However, they say these are not serious difficulties, the parties are continuing to communicate and the application for facilitation in the circumstances is premature. The unions say bargaining has not been unduly protracted and disagree that the parties have reached an impasse preventing ongoing bargaining.

Relevant Facts

St John

[12] St John is a not for profit organisation. It provides ambulance services throughout New Zealand. The Priory Trust Board (the Board) oversees the day to day activities of St John, including the activities of the Regional Trust Boards.

[13] First union and the unions represent approximately 1600 members employed by St John in various roles.

Collective agreements – expired 30 June 2018

[14] St John's employees include ambulance officers, emergency medical communicators and dispatchers and patient transfer officers (operational roles). There are two separate collective agreements covering these operational roles at St John. One of the collective agreements is with First Union and the other with the other three unions.

[15] In addition, St John employs managers and support staff including station managers, shift managers/supervisors, clinical support officer roles and supervisory roles within the clinical control centres (management and support roles). These roles are covered by two separate collective agreements, one with First Union and the other with the three other unions. All four collective agreements expired on 30 June 2018.

Initiation of bargaining – May 2018

[16] Bargaining by the unions and the First Union in respect of both the operational and management and support officer collective agreements was initiated on 2 and 4 May 2018 respectively.

[17] Bargaining for the operational and management and support officer collective agreements was consolidated so that all the union parties are in bargaining with St John for a single replacement operational collective agreement and for a single replacement management and support officer agreement.

[18] There were delays in the bargaining teams commencing bargaining. Bargaining actually commenced on 4 September 2018, this was after mediation took place on 3 September to assist the parties in agreeing a Bargaining Process Agreement (BPA).

[19] The Authority was provided with the email exchanges between the parties after bargaining was initiated. The delays in commencing bargaining appear to have been largely related to the availability of the respective bargaining teams. The communication between the parties during this time was constructive. St John and the unions were both attempting to secure dates so that the bargaining teams could commence bargaining.

[20] There were some issues between the parties in relation to the terms of the BPA, including communication during bargaining, the number of representatives on the bargaining teams and the use of mediation during bargaining. These issues were settled, and a BPA reached following mediation on 3 September 2018.

Bargaining – September 2018 to February 2019

[21] After the BPA was agreed, bargaining between the parties occurred on 4 – 7 September, 21 September, 25 September and 8 – 9 October, 9 November, 3 December and 18 December 2018. Mediated bargaining continued on 16 and 17 January 2019 and a further offer in writing was presented by St John to the unions on 18 January 2019. Further bargaining with the assistance of a mediator occurred on 5 February 2019.

[22] There have been 7 offers of settlement by St John which have been rejected by the unions. The unions have made counter-offers which have been rejected by St John.

Strike action

[23] There has been strike action by the unions during the course of the bargaining. Strike notices were issued by the First Union on 30 October, 21 November, 7 December, 21 December and 21 December 2018 and on 25 January 2019. The strike action to date, has been partial strike action, is ongoing and St John says it is concerned about patient safety. With the increased use of graffiti on its ambulances, St John is concerned that its relationship with the unions is deteriorating.

Major issues between St John and the unions

[24] The major issues in contention between the parties relate to proposed wage increases and penal rates. St John agrees with the unions that its staff should be paid more for the work they do. The issue for St John is affordability. It says it has exceeded its mandate from the Board. Simply put, there is no further money available for the unions' claims for wage increases and penal rates.

[25] Mr Walkinshaw in his evidence stated that "... at the bargaining, we confirmed that there was simply no further funding available to St John. We had reached the end of our mandate and our affordability..."¹

[26] St John's mandate is set by the Board. In response to questions at the Authority's investigation it appears the mandate has been exceeded by St John. Following the last bargaining session in February 2019, St John requested the Board to review the mandate. The response from the Board was there is no further funding available.

[27] St John says the only option is for it to make a funding bid to the Government in October 2019.

[28] This is unacceptable to the unions and their members who say it is patently unfair that staff continue to be paid less than they are worth. They are insisting on a collective agreement which pays staff what they are worth.

[29] St John says bargaining has reached an impasse. Therefore, the terms of replacement collective agreements have not been agreed.

[30] St John seeks facilitation assistance from the Authority. Facilitation is one of the tools available under the Act to parties who are having serious difficulties concluding a collective agreement.

The issues

[31] The issues for determination by the Authority are as follows:

- (a) Has the bargaining been unduly protracted? and have extensive efforts been made to resolve the difficulties (including mediation)?
- (b) Has there been one or more strikes, and have they been protracted or acrimonious?
- (c) Are the parties having "serious difficulties" in concluding a collective agreement?

¹ Para 18, second Walkinshaw affidavit dated 19 February 2019.

First Issue

Has the bargaining been unduly protracted? and have extensive efforts been made to resolve the difficulties (including mediation)?

Unduly protracted?

[32] The parties initiated bargaining in May 2018. Actual engagement in bargaining occurred on 4 September 2018. The parties have met on eight occasions for bargaining during September, October, November, December 2018, mid-January 2019 and early February 2019. Mediators were present for bargaining on 5 of those occasions.

[33] The delay between the initiation of bargaining and commencement of bargaining was largely the result of the negotiation teams trying to agree a date to meet. The time period during which bargaining actually occurred and this investigation meeting has been five months, due to the Christmas and New Year periods. Even taking into account the entire period of time since the initiation of bargaining, totalling approximately 9 months, it is in my view a relatively short period of time for bargaining. However, time is just one factor for the Authority to consider.

[34] The Employment Court in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited*² referred to research into 21 recorded cases in which the Authority had accepted referrals to facilitation and stated:

The period from initiation of bargaining to the Authority's investigation meeting ranged from nine months to 54 months with the average period being 19.6 months and the median being 19.5 months. The number of bargaining meetings or sessions ranged from between two and 46 with the average number being 15 and the median being eight. In all cases, the parties had bargained with the assistance of a mediator at least once. The number of mediators assisted bargaining sessions ranged from two to 16 with the average number being five and the median number being three.

[35] When compared with the statistics of the cases in which the Authority accepted referrals for facilitation, the current case is below the range of the average period of 19.6 months from initiation of bargaining to the Authority's investigation. However, the number of bargaining sessions and the number of mediated bargaining sessions are within the range.

² [2012] NZEmpC168 at [46].

[36] The Court went on to state at [47] that:

None of these data addresses the important element of the quality of these events, their duration, or the intractability of the parties' positions at any stage.

[37] The Court in *McCain Foods(NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc*³ stated in relation to time as a factor when considering whether bargaining has been unduly protracted that:

...other considerations affect the question of the passing of time. If, as here, it is shown that there have been real attempts to bargain and settle, albeit that the parties' strongly held positions have precluded settlement, the bargaining may also be said in that sense to have been unduly protracted.

[38] St John says it has exceeded its mandate. The mandate was checked following the mediated bargaining session on 5 February 2019 and no more funding is available. The unions accept there is an issue of affordability in respect of their claims. However, the claims for wage increases and penal rates for union members remain. A significant roadblock in the bargaining has been reached.

[39] I consider that there has been unduly protracted bargaining between the parties since May 2018.

Extensive efforts

[40] In addition to the number of bargaining sessions with and without mediated assistance, the parties have made other efforts, which I consider to be extensive, to resolve their difficulties.

[41] St John has written to the Minister of Health, the Hon David Clark requesting his attendance at a meeting between St John and union representatives. This request was not accepted because the Minister was of the view it was not appropriate for him to intervene in "matters internal to St John, including industrial action or rates of pay..."

[42] The parties have:

- Engaged in eight separate bargaining sessions over 13 days, five of which have had the services of a mediator;

³ [2009] ERNZ 28 at [63].

- St John has made seven offers and the unions have counteroffered;
- Twelve strike notices have been issued and industrial action is ongoing;
- St John checked its funding mandate following the last mediated bargaining session. The mandate remains unchanged.

[43] In her letter directly to the Board on 29 January 2019, Ms Stone says:

“I am the Ambulance Sector Co-ordinator at FIRST Union. As you are aware we are currently in negotiation with St John and since September 2018 have reached an **impasse*** ... We currently have strike actions in place such as a uniform ban, no recall to events and staff not collecting billing information and we have just issued another five strike actions that members have voted overwhelmingly for. Members are very angry and, as this dispute continues, conversations have started about withdrawing labour.”

[44] In the statement of reply filed by the unions on 9 February 2019, Mr Fisher states that:

“The consolidation of bargaining and the present offer has the parties **deadlocked** with a significant gap between us all.”

[words in bold are the Authority’s]

[45] Despite these extensive efforts, the parties have reached an impasse in my view.

Second Issue

Have there been one or more strikes, and have they been protracted or acrimonious?

[46] If I am not correct in my view that bargaining has been unduly protracted and there have been extensive efforts to resolve the issues, I consider the criteria set out in s50C(1)(c)(i) and (ii) of the Act have been met.

[47] It is common ground that there has been ongoing industrial action which the unions intend continuing and escalating until a collective agreement is settled. There is a strong indication from the unions that shortly a complete withdrawal of labour will occur.

[48] The strike action has been protracted in my view.

Third issue**Are the parties having serious difficulties in concluding a collective agreement?**

[49] The parties are experiencing serious difficulties in concluding the replacement collective agreements. I accept the submission made by Counsel for St John that there is an impasse between the parties over pay and funding. This is at the heart of the difficulties and is a serious roadblock.

[50] The Employment court in *Sanford*⁴ stated:

The bargaining facilitation sections are therefore 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. Whilst 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 indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

Conclusion

[51] I conclude that the statutory criteria have been satisfied to trigger facilitation of the bargaining process by the Authority. In my view, following the Employment Court's approach in *Sanford* and taking a common sense assessment of the overall position between the parties, a reference to facilitation is desirable.

Costs

[52] The parties should seek to agree between themselves as to how costs are to be dealt with. If the parties cannot agree, St John may lodge and serve a memorandum as to costs within 21 days of this determination. The unions shall have a further 21 days to lodge and serve any reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁴ supra fn 2 at [42].