

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 4
3038898**

BETWEEN FIRST UNION INCORPORATED
Applicant

AND RITCHIES MURPHY
TRANSPORT SOLUTIONS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Oliver Christeller, Counsel for Applicant
Gemma Mayes, Counsel for Respondent

Investigation Meeting: On the papers

Submissions: 10 December 2018 from the Applicant
13 December 2018 from the Respondent

Determination: 7 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for facilitation pursuant to s 50C of the Employment Relations Act 2000 (the Act) in respect of the collective bargaining currently underway between the First Union Incorporated (First Union) and Ritchies Murphy Transport Solutions Limited (RMTS).

[2] First Union claims that pursuant to s 50C of the Act:

- RMTS has failed to comply with the duty of good faith in accordance with s4 of the Act and that the failure was serious and sustained and has undermined the bargaining: s50(1)(a);
- Bargaining was initiated in September 2016 and has since been ongoing and extensive efforts including collective bargaining, mediation, media coverage of the dispute and five separate strike actions have failed to resolve the difficulties that preclude the parties entering into a collective agreement: s 50 (1)(b).

[3] RMTS opposes the application for facilitation on the basis that the threshold for facilitation assistance is high and it disagrees that facilitation assistance is required at the current stage of bargaining.

[4] RMTS disputes that the grounds as set out in s 50C(1)(a) and s 50C(1)(b) of the Act can be satisfied in the circumstances on the basis that facilitation is intended for parties who are stuck, at a deadlock or at an impasse. In the current case, RMTS submits that there is still work to be done between the parties on the outstanding issues between them before the Authority should consider accepting First Union's application for facilitation assistance.

Background

[5] The background has been drawn from the pleadings and submissions of the parties.

[6] RMTS is a 'greenfield' site and a relatively new company which began operating bus services in late 2016. It is a joint venture between two existing bus companies, Ritchies Transport Holdings Limited and Murphy's Buses Limited, both of which are private family-owned bus companies.

[7] Andrew Ritchie and Todd Murphy, Directors of RMTS, comprise its bargaining team. Both are directors of their own separate transport companies and travel extensively in their roles, nationally and internationally. Approximately one third of RMTS's employees are union members.

[8] First Union initiated bargaining for a collective agreement on 21 September 2016 almost immediately after RMTS began operating and provided RMTS with a draft bargaining

process arrangement for consideration. It emailed RMTS on 2 October 2016 suggesting 12 dates it was available in October for collective bargaining, however RMTS did not agree to any of the dates.

[9] On 3 October 2016 First Union raised with RMTS issues of preference and breach of good faith including a breach of s 32(1)(d)(ii) of the Act with reference to individual wage offers on 21 September 2016 to First Union members.

[10] In a response dated 7 October 2016 RMTS accepted that the letters had been sent, but not that they amounted to a breach of good faith.

[11] Following a reminder email on 21 October 2016 RMTS replied to the suggested dates for bargaining rejecting them.

[12] First Union suggested a date of 28 October 2016 for collective bargaining and the parties met on 18 November 2016. First Union made claims in a proposed collective agreement including a wage rate of \$21.00 per hour, backdated to the date of initiation on 15 September 2016.

[13] The parties agreed to further bargaining on 8 December 2016 but this was cancelled by RMTS, which rejected as not suitable four further dates suggested by First Union for collective bargaining. First Union stated that further correspondence to set up a new date was not responded to by RMTS.

[14] The parties met for collective bargaining on 4 April 2017, 15 September 2017 and 6 March 2018. The parties also met for collective bargaining on 3 May 2018.

[15] On 15 May 2018 First Union provided RMTS and the Ministry of Business, Innovation and Employment (MBIE) with a notice of intention to strike for a proposed period of two hours.

[16] The proposed strike action was covered by mainstream media including the New Zealand Herald and Radio New Zealand (RNZ).

[17] The strike took place on 17 May 2018 for a period of two hours. Following the strike action First Union proposed the date of 7 June 2018 for further bargaining. 20 June 2018

was subsequently agreed as the date to meet, however First Union stated that RMTS withdrew the agreement to meet without proposing alternative dates.

[18] A meeting for the purpose of collective bargaining was due to take place on 25 June 2018 but was cancelled by RMTS which did not suggest alternative dates for meeting.

[19] First Union provided RMTS and MBIE with a notice of proposed strike action by email dated 27 June 2018. MBIE invited the parties to attend mediation but it did not take place.

[20] The proposed strike action was covered by mainstream media including the New Zealand Herald and Stuff.

[21] The strike took place on 28 June 2018 for a period of two hours

[22] In June 2018 RMTS made individual wage offers to non-First Union members but not to First Union members either individually or through collective bargaining.

[23] First Union suggested dates in July 2018 for collective bargaining however RMTS rejected the suggested dates and did not, as requested by First Union, supply alternative dates.

[24] First Union wrote to RMTS on 9 August 2018 stating that the bargaining had been unduly protracted, RMTS had breached good faith and was engaged in obstructive bargaining practices, and suggested that the RMTS agree to mediated bargaining, providing dates for this purpose.

[25] RMTS replied on 13 August 2018 refusing to attend mediation, but did not provide any other suggestions for advancing the bargaining.

[26] First Union provided RMTS and MBIE with a notice of strike action by email dated 29 August 2018. MBIE offered mediation to the parties but RMTS rejected the offer.

[27] The strike action was covered by mainstream media including the New Zealand Herald.

[28] By email dated 30 August 2018 First Union asked RMTS to provide dates it was available for collective bargaining but RMTS did not do so and the proposed strike took place on 30 August 2018 from 3.00 p.m. until 11 .59 p.m.

[29] First Union proposed dates for collective bargaining by emails between 29 August and 6 September 2018, and applied to the Authority for facilitation on 11 September 2018. On 12 September 2018 RMTS confirmed that it was available to meet for bargaining on 28 September 2018.

[30] RMTS states that during the bargaining session held on 28 September 2018 the parties concluded going through the entirety of the proposed terms of the collective agreement, which the parties had not previously been able to achieve. This resulted in a settlement offer being made by RMTS which included the offer of a living wage of \$20.60 per hour from ratification and \$21.05 from July 2019.

[31] Mr Richie told First Union that the draft collective agreement would need to be reviewed by its lawyer first, which was confirmed by Mr Murphy in writing following receipt of the proposed collective agreement by email from First Union. As a result RMTS proposed some changes to the draft terms, which it sent to First Union on 12 October 2018.

[32] A ratification meeting was subsequently proposed by a First Union Organiser, Mr Hodzic, to take RMTS's offer to First Union's members. The date of the ratification meeting was confirmed between the parties as 25 October 2018.

[33] However on 22 October 2018, Mr Jared Abbott, one of two Divisional Secretaries for First Union, sent RMTS notice of a 24 hour strike to commence from 4.10 a.m. on the morning immediately following a public holiday, Labour Day, 22 October 2018. The settlement offer was still subject to a ratification meeting by First Union's members at this time.

[34] The strike action was covered by mainstream media including RNZ, Maori Television and The Spinoff.

[35] On the evening of 23 October 2018 which was half way through the strike, another member of First Union's bargaining team, Ms Jones, emailed RMTS about the amendments to the draft collective agreement sent by RMTS on 12 October 2018 and suggested that

mediation was the forum for further negotiation on the outstanding pints, which the parties had already agreed to attend.

[36] The mediation session held on 28 November 2018 resulted in a revised settlement offer to First Union by RMTS. This offer was taken to ratification but was rejected by First Union's members.

[37] RMTS stated that it was not provided with any detail in the notification of rejection of the reasons for the rejection by First Union members.

First Union's application for facilitation.

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

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.

[39] First Union's application for facilitation is based upon the grounds set out in s 50C (1) (a) and s 50C (1)(b).

Section 50C(1)(a) Breach of good faith which has been serious, sustained and which has undermined the bargaining

[40] First Union claims that RMTS has breached the duty of good faith pursuant to s50(1)(a) of the Act. There are three elements to that provision which must apply to this case, namely:

- a. RMTS must have failed to comply with the duty of good faith;
- b. The failure was serious and sustained; and
- c. The failure has undermined the bargaining.

[41] First Union submits that whilst it acted proactively during the bargaining by suggesting dates to meet for the purposes of bargaining, it alleges that RMTS breached the duty of good faith by repeatedly rejecting the dates it offered for collective bargaining and failing to provide alternative dates. In addition RMTS had also ignored the correspondence sent to it by First Union, failing to respond even when prompted.

[42] Further RMTS cancelled agreed dates for meeting for the purposes of collective bargaining on four occasions: 18 April 2018, 11 May 2018, 20 June 2018, and 28 June 2018.

[43] As a result, First Union had raised serious issues with RMTS in the letter dated 9 August 2018 and requested that RMTS attend mediation, however RMTS refused to do so and failed to offer any alternative date.

[44] First Union states that even after RMTS agreed to meet for mediation on 28 September 2018, it had done so only after First Union had applied to the Authority for facilitation.

[45] First Union submits that the behaviours by RMTS during the bargaining process are not active or constructive and clearly breach the relevant sections of the Act and are in conflict with the Code of Good Faith. As a consequence the breaches of good faith given their nature and repetition are serious, sustained and have undermined the bargaining.

[46] In its submissions RMTS disputes that it has failed to act in good faith, submitting that it has repeatedly met with First Union for bargaining, including on four occasions during 2018, one of which was a mediation session. In addition RMTS has presented two settlement offers to First Union, one on 28 September 2018 and 28 November 2018 which RMTS submit underscores its commitment to collective bargaining.

[47] RMTS submits that both parties have contributed to the delays in progressing the bargaining sooner. In regard to RMTS, it submits that the non-availability of its director bargaining team was due to availability problems incumbent upon their roles in their respective companies rather than to bad faith.

[48] Moreover there have been multiple instances of behaviour falling short of good faith requirements on the part of First Union, in support of which RMTS submits that there were multiple times when members of First Union's bargaining team were unavailable, including at the mediated bargaining session held on 28 November 2018 after First Union had applied for facilitation.

[49] RMTS submits in support that not only had First Union's own Organiser been unavailable to attend the bargaining on occasion, but during the period that the parties have been bargaining, the identity of the Organiser on the bargaining team for First Union has changed at least four times.

[50] It is these factors which RMTS submits have contributed to the period of time over which bargaining has proceeded, rather than any failure of good faith on its part.

[51] RMTS submits that in reality the parties are currently in a positive place with their bargaining and very close to concluding a collective agreement. It notes that the mediated bargaining session held on 28 November 2018 was approached constructively by both parties, and resulted in there remaining very few final points of difference between the parties.

[52] I accept RMTS's director bargaining team has been unavailable for bargaining during that period which has delayed the bargaining, but I find that collective bargaining has taken place during the period since initiation on several occasions, and I also find that the changes in the bargaining team members for First Union have had some adverse impact on the progress of the bargaining.

[53] To that extent both parties appear to have impeded the bargaining process, but I do not find a failure of good faith that has been serious and sustained or which has undermined the bargaining. This is especially the case in circumstances in which collective bargaining has progressed to a stage in which an offer was proposed during October 2018 to be taken to First Union members for ratification, and where it is asserted by RMTS that the parties are close to concluding a collective agreement following the mediated meeting on 28 November 2018.

Section 50C(1)(b) – bargaining unduly protracted and extensive efforts, including mediation, have failed to resolve the difficulties

[54] Bargaining was initiated by First Union between the parties on 15 September 2016, two years prior to this application. During that time, the parties have met for the purposes of bargaining and have also been assisted by a mediator for the purposes of bargaining. The parties have been unable to conclude their bargaining.

[55] Pursuant to s 50C(1)(b) First Union must establish three elements namely that:

- a. The bargaining was unduly protracted;
- b. Extensive efforts, including mediation, have been made to resolve the parties difficulties; and
- c. These extensive efforts have failed to resolve the difficulties precluding the parties entering into a collective agreement.

[56] First Union submits that the bargaining has been unduly protracted noting that initiation took place on 15 September 2016 which is more than two years ago. In support First Union cites the case of *First Union Inc v Jacks Hardware and Timber Ltd* in which the Employment Court held that bargaining was unduly protracted which commenced less than two years previously.¹

[57] Two years is a protracted period of time for bargaining, however I observe that the fact that bargaining is protracted does not necessarily infer that a reference to facilitation should be granted, the Employment Court in *McCain Foods (NZ) Ltd v Service and Food Workers Union* stating that: “undue protraction” as referred to in s 50(1)(b)(i) of the Act means: “excessive or disproportionate protraction”.²

[58] First Union also submits that in addition to face to face bargaining, there has been mediation, media coverage and strike action, all of which have failed to resolve the difficulties that have precluded the parties entering into a collective agreement.

¹ *First Union Inc v Jack's Hardware and Timber Limited* [2015] NZEmpC 230

² *McCain Foods (NZ) Ltd v Service and Food Workers Union* [2009] NRNZ 28 at [64], see also this premise applied in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited* [2012] NZEmpC 168

[59] Although First Union has not included s 50C(1)(c) as a ground for accepting facilitation I note the following. There have been five strikes during the progress of the bargaining, on 17 May 2018, 27 June 2018, 28 June 2018, 30 August 2018, and 23 October 2018. The strikes held on 17 May, 27 June, and 28 June 2018 were each of 2 hours duration, that which took place on 30 August 2018 almost 9 hours in duration, and the strike on 23 October 2018 was of 24 hours duration.

[60] RMTS submits that the strikes have caused limited disruption to its business or the public interest given the limited nature of their duration, the impact on the entire Auckland Transport bus network being 0.91% or less. In addition, none of the five strikes involved 100% participation by First Union's members and some involved less than 50% of First Union's members.

[61] In regard to the media coverage, RMTS acknowledges that there has been media coverage but submits that the media coverage submitted to the Authority shows that First Union is pursuing facilitation against multiple other employers within the industry, much of which is the subject of the media articles, rather than just RMTS, and in fact some articles do not mention RMTS at all.

[62] I accept that the bargaining has been protracted given the length of time since bargaining was initiated and it has been accompanied by strikes and media coverage.

[63] However whilst I find extensive efforts have been made to resolve the difficulties, the Act requires in s 50C (1)(c) that the 'extensive efforts' have failed to resolve the difficulties. In this context I note that based upon the submissions of the parties it does not appear that the bargaining between the parties is at a deadlock point or that an impasse has been reached following the mediated session held on 28 November 2018.

Outcome

[64] Standing back and regarding the situation on the basis of the details set out in the application, it is my view that the situation between the parties has not reached the high threshold as set out in the statutory criteria to trigger the facilitation process in the Authority.

[65] In the circumstances I do not grant the application for facilitation.

Costs

[66] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[67] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority