

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 97
3029776

BETWEEN	E TU INCORPORATED Applicant
AND	ALLIED SECURITY LIMITED First Respondent
AND	ALLIED INVESTMENTS LIMITED Second Respondent

Member of Authority: Helen Doyle

Representatives: Simon Meikle, counsel for the Applicant
Damian Black, advocate for the First and Second
Respondents

Investigation Meeting: 25 January 2019 at Dunedin

Submissions received: On the day from both parties

Date of Determination: 22 February 2019

DETERMINATION OF THE AUTHORITY

- A The application for referral for facilitation is adjourned.**
- B Within six weeks from the date of this determination the parties are to advise the Authority in writing of any progress with meeting for the purposes of bargaining.**
- C After meeting for the purpose of bargaining or if there are undue difficulties with that either party may apply for a direction to mediation if it is considered that would be of assistance.**
- D The application for referral for facilitation can be brought back on by either party or jointly after five months.**
- E Costs are reserved.**

Employment Relationship Problem

[1] E tū Incorporated (E tū) is an incorporated society and a Union registered under the Employment Relations Act 2000 (the Act).

[2] Allied Security Limited and Allied Investments Limited are duly incorporated companies having their registered offices in Dunedin. The sole director of Allied Security Limited (Allied Security) is Damian Black. Mr Black is one of two directors of Allied Investments Limited that trades as Allied Security (Allied Investments). The other director is Chris McDowell. Allied Investments carries on the business of provision of security services and employs E tū members.

[3] E tū in an amended statement of problem wants the Authority to resolve issues that followed initiation of bargaining with the First and Second Respondents. E tū alleges that Allied Investments breached the duty of good faith in a variety of ways and that there is a failure to bargain. It wants findings and a referral for facilitation.

[4] Allied Security accepts that E tū gave notice under s42 of the Act to initiate bargaining. It says it then asked in writing for a list of members and there was no response at least until after there was third party intervention. Allied Security says that it was legally entitled to decline bargaining because it was not an employer of any member of E tū. It says that the claim against it should be *disregarded*.

[5] Allied Investments does not accept that there was a failure to bargain. Allied Investments says that it has replied in an affirmative and positive manner and requested further information with respect to the bargaining process. It says a referral for facilitated bargaining under s 50C of the Act is not applicable or required as it has advised it intends to bargain.

The Issues

[6] Before resolving this employment relationship problem I have reflected on the role of the Authority.¹

[7] Section 157 (2) states four things that the Authority must do, in carrying out its role. One is to aim to promote good faith behaviour and another is to generally further the object of

¹ Section 157 of the Employment Relations Act 2000

the Act. The object of the Act is found in s3 – *to build productive employment relationship through the promotion of good faith in all aspects of the employment environment and of the employment relationship*. This is to be done, amongst other matters, by a legislative requirement for good faith (s4 of the Act), promoting collective bargaining and by reducing the need for judicial intervention.

[8] In resolving this employment relationship problem the Authority could assess a number of different good faith issues raised by Mr Meikle and disputed by Mr Black and make findings. That would accord with a traditional legal approach.

[9] I am not persuaded that would be the best way to resolve the employment relationship problem the Authority has before it. For a variety of reasons the parties have not progressed beyond pre-negotiation steps and one attendance at mediation. In resolving the matter the focus should be on progressing the collective negotiations.

[10] E tū and Allied Investments have not entered into bargaining for a collective agreement previously. Mr Black said that he was not adverse to a collective agreement and that Allied Investments was willing to bargain. The evidence was that the number of E tū members in Allied Investments has grown from 19 in August 2018 to, as at the date of the Authority investigation meeting, 80 members. The total number of employees at Allied Investments is approximately 600.

[11] Making findings too soon about whether conduct is or is not good faith unless necessary, may not achieve the promotion of collective bargaining or reduce the need for judicial intervention. It runs the risk of polarising the parties and not resolving the problem I have identified.

[12] In this case even if there have been breaches of good faith I am not satisfied that one or more of the grounds in s 50C of the Act for referral for facilitation are made out.

[13] I shall set out what has occurred to date between the parties because that will be useful. I will make comments about behaviour to guide future conduct and give reasons why the application for referral for facilitation is not made out.

[14] I shall then proceed to set a framework within which tools will be available if required to assist the parties but the parties will also be encouraged to attempt to resolve the matter themselves in the first instance.

The main interactions to date between E tū and Mr Black

[15] The Authority heard evidence from E tū Campaign Lead Organiser Mat Danaher by telephone and from Mr Black in person about what has occurred to date.

13 March 2017

[16] The first notice initiating bargaining from E tū was dated 13 March 2017. The intended employer party to the collective agreement was described as Allied Security (New Zealand Ltd).

[17] Mr Black provided for the first time at the Authority investigation meeting a letter dated 24 May 2017 that he said he had written to the union organiser after this first notice advising that Allied Security was the trading name of Allied Investments which employs the security guards around New Zealand and that the wrong company had been identified. In his letter Mr Black states that Allied Security Limited is a non-trading entity registered to protect its name. Mr Meikle because of the late production of the letter was at somewhat of a disadvantage to confirm its receipt. He did not in the circumstances take issue with it having been sent by Mr Black although noticed it did not have an address for the recipient of the letter.

Concerns about identity of intended employer

[18] I find there is a basis for the concern that Mr Black failed to tell E tū, after the letter above, that it was referring to the wrong intended employer in two further notices initiating bargaining and further in its first statement of problem lodged until at the earliest early August 2018.

[19] This resulted in a total of four notices to initiate bargaining with different intended employers named and an attendance at mediation with Allied Security rather than Allied Investments. It wasted E tū's time and was not consistent with good faith obligations to be communicative and responsive and not to mislead and deceive. Objectively assessed it seems to have reduced the trust between the parties although it is now clear who the intended employer should be.

September – October 2017

[20] A new E tū union organiser, Jill Ovens, became involved from about August 2017. Mr Danaher with his statement of evidence provided copies of 14 emails between Ms Ovens and Mr Black between August 2017 and 26 October 2017.

[21] An initial issue in collective negotiations is that Mr Black indicated in an email dated 7 September 2017 to Ms Ovens that he was not prepared to negotiate a nationwide collective agreement but was willing to negotiate [multiple] site by site agreements. He gave some reasons for this in the email. His evidence at the Authority investigation meeting was to the effect that he would also consider industry specific agreements. Both parties need to bargain about this matter. Mr Black agreed when asked by Mr Meikle that his position was that there would be no bargaining for a national agreement unless the Authority told him to. The parties need to meet for the purpose of bargaining and consider what each other has to say about this matter. It may be necessary to consider how this sort of an impasse has been overcome in other bargaining E tū has been involved in.

Second notice initiating bargaining dated 10 April 2018

[22] On 10 April 2018 there was a second notice initiating bargaining with the intended employer as Allied Security (New Zealand) Ltd. That notice was subsequently withdrawn.

Third notice initiating bargaining dated 2 May 2018

[23] Mr Danaher could not recall what led to the withdrawal of the 10 April 2018 notice and its replacement with the 2 May 2018 notice with an intended employer Allied Security Limited.

Response to third notice

[24] On 2 May 2018 Mr Black declined to bargain and asked for a list of employees who are members of E tū. Mr Danaher when questioned about this said Mr Black had declined to bargain and *there was no duty to provide a list of employees – not of a mind to do so.*

[25] Mr Black in his evidence was critical of, at times, a lack of response to questions raised with E tū and/or a response in a timely manner. The parties need to discuss how they will communicate and their respective expectations for the future. For completeness Mr Black is entitled to a response.

[26] On 3 May, Mr Black declined mediation.

[27] On 8 May E tū lodged a statement of problem with the Authority seeking an order for facilitated bargaining. The Authority then obtained a statement in reply from Allied Security which confirmed that it was prepared to accept mediation and mediation was subsequently undertaken on 6 August 2018. Mediation did not resolve matters.

[28] On 13 August 2018 E tū sent a bargaining process agreement to Allied Investments and a list of members. Mr Black responded on the same day with suggested changes to the process agreement that were not acceptable to E tū. He said in his evidence there was no further response/discussion about his proposed changes from E tū. In those circumstances it is difficult to see how there could be good faith issues about the bargaining process agreement.

Fourth and final notice of initiation of bargaining

[29] On 10 September 2018 the fourth and final notice of initiation of bargaining was issued naming Allied Investments as the intended employer.

[30] On 12 September 2018 Mr Black confirmed to the Authority during a telephone conference that the correct employer is Allied Investments. Mr Black said he confirmed that to E tū on 6 August 2018 at mediation - s 148(5) of the Act as an exception to confidentiality.

[31] On 1 November 2018, E tū lodged an amended statement of problem against Allied Investments for an order for facilitated bargaining and findings.

Code of good faith for public health sector – Schedule 1B of the Act

[32] Along with the communication and correspondence set out above relating to bargaining Mr Meikle submits that an assessment of good faith in this matter can be considered with regard to a code of good faith for the public health sector in Schedule 1B of the Act.²

[33] The coverage of the proposed collective agreement in the final notice of initiation of bargaining is the work of security guards employed by Allied Investments including those employed as team members or in any job classification.

² ss 35 and 39 of the Act

[34] Mr Meikle submits that over half of E tū's members are employed providing security to hospitals. The other members are employed as security guards at other sites including supermarkets and dairy factories.

[35] Mr Black does not accept that the code of good faith in schedule 1B of the Act (the code) applies to Allied Investments and made a number of submissions about why that may be so.

[36] Whether or not the code applies is an interesting legal issue but the resolution of that does not resolve the employment relationship problem at the moment and a determination is not required about whether or not the code applies. I further note that not all members of E tū employed by Allied Investments are security guards at hospitals and the intended coverage clause is wider than members employed as security in hospitals.

Reasons that the grounds for accepting a reference for facilitation are not made out

[37] The Authority must not accept a reference for facilitation unless satisfied that 1 or more of the grounds in s 50C of the Act exist.

[38] E tū relied on the first ground in s 50C in (1)(a) that provides:

- (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.

[39] Bargaining has a wide definition in s5 of the Act and I accept can include communication or correspondence before, during and after negotiations when considering *in the course of the bargaining*.

[40] I accept for present purposes that after the first notice initiating bargaining Mr Black did advise E tū that it had named the wrong intended employer but failed to do so after the next two notices and before mediation. This appears inconsistent with good faith as I have commented on above. It is serious but it is not sustained as it has now been clarified. I am further not satisfied it has undermined the bargaining although I accept it has caused delay. There needs to be negotiation about E tū's position for a national collective agreement and Mr Black's position for site by site or industry based agreements. If there were breaches of good

faith in the matrix set out above then I am not satisfied that they were serious and sustained and undermined the bargaining so as to form grounds at this stage for referral for facilitation. It is too soon for that.

Next steps

[41] The application for referral for facilitation is adjourned.

[42] Within six weeks from the date of this determination I want both parties to advise the Authority in writing of any progress with meeting for the purpose of bargaining. I would hope by that time there has been a meeting for that purpose or that one is arranged. Before involving a mediator again I want the parties to see if progress can be made particularly with the coverage issue.

[43] After meeting for the purposes of bargaining or if there have been undue difficulties in arranging a meeting either party may apply to the Authority if necessary for a direction to mediation.

[44] The application for referral for facilitation can be brought back on by either party or jointly after five months.

Costs

[45] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority