

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 17
3083752

BETWEEN E TU INCORPORATED
Applicant

AND MASONIC CARE LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Peter Cranney, counsel for Applicant
Paul McBride, counsel for Respondent

Investigation Meeting: On the papers before the Authority

Submissions Received: 13 January 2020 from Applicant
15 January 2020 from Respondent

Determination: 16 January 2020

DETERMINATION OF THE AUTHORITY

- A. E Tu Incorporated and Masonic Care Limited are referred to the Authority for facilitation under s 50B of the Employment Relations Act 2000.**
- B. Costs are reserved.**

Employment relationship problem

[1] E Tu Incorporated (E Tu) seeks the assistance of the Authority to resolve the difficulties it is having in concluding a collective agreement with Masonic Care Limited (MCL) through reference to facilitation.

[2] By the consent of the parties this matter has been determined on the papers before the Authority. As permitted by s 174E of the Employment Relations Act 2000

(the Act) this determination has not referred to all submissions received but they have all been carefully considered.

Reference to facilitation

[3] Before a reference to facilitation can be accepted I must be satisfied there have been 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

[4] As will become apparent I am satisfied the parties are experiencing serious difficulties in concluding a collective agreement.

Grounds for reference to facilitation

[5] The grounds relied on by E Tu for referral to facilitation are those contained in section 50C(1)(b) or (d) which require me to be satisfied that:

- a) 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; or
- b) in the course of bargaining a party has proposed a strike which would likely affect the public interest.

Protracted bargaining

[6] On 30 November 2018 bargaining for a collective agreement was initiated by E Tu. There was no previous collective agreement between the parties. E Tu says it has encountered serious difficulties in reaching a concluded agreement with MCL. There are currently eight outstanding claims on which agreement has not been reached including hours of work, rostering, sick leave, long service leave, rest breaks, allowances, redundancy and the term of the agreement.

[7] E Tu says it has met or conducted bargaining at least twenty times during 2019 including four sessions with the assistance of a mediator employed by the Ministry of

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.

Business Innovation and Employment. MCL disputes this and says the parties have met in bargaining ten times, three of which were with the assistance of a mediator.

[8] I have concluded that on balance it is likely the parties have been consistently bargaining throughout 2019. The bargaining has entailed at least seven bargaining meetings with other bargaining taking place outside of those meetings and that the parties have bargained with the assistance of a mediator on at least four occasions.

[9] Concurrently with the bargaining E Tu raised personal grievances and other claims against MCL on behalf of eight of its members and lodged an application with the Authority in April 2019. That application is awaiting investigation and determination. The issues raised in the application largely relate to hours of work and rostering.

[10] The parties have met in mediation to discuss the issues raised in the application lodged in April. E Tu says those mediations included some bargaining because of the issues being discussed. MCL says the mediations were not about bargaining but were focussed solely on the issues raised in the application lodged in April.

[11] The key issues raised in the personal grievances were related to hours of work and rostering provisions. These issues are intermingled with matters being bargained about and cannot be separated. While the parties continue to be unable to reach agreement on the hours of work and rostering provisions for the collective agreement it is unlikely that the personal grievances will be resolved.

[12] I have concluded it is more likely than not that during mediation attempts to resolve the personal grievances would have had to cross the line into areas being dealt with in the collective bargaining. The reality is that it is more likely than not that the parties, while ostensibly attempting to resolve personal grievance matters, would also have been involved in bargaining about the hours of work and rostering claims.

[13] Given the above, I find bargaining has been unduly protracted and that extensive efforts have failed to resolve the serious difficulties that have precluded the parties from entering into a concluded collective agreement.

Strike action and public interest

[14] Members of E Tu have been involved in strike action on at least three occasions and further strike action is planned. E Tu says these strikes are likely to affect the public interest substantially.

[15] The strikes have been undertaken by a limited number of employees (between four and six on each occasion) and for a limited time. There has been some media interest in the strike action but this is not evidence of a substantial affect on the public interest and no other evidence has been proffered.

[16] There is no evidence the strikes are likely to endanger the life, safety or health of any persons or that the strikes are likely to disrupt social, environmental, or economic interests or that the effects of the disruption are likely to be widespread, long-term or irreversible.³

Conclusion

[17] The Authority is required to be satisfied that at least one of the grounds set out in s 50C(1) of the Act exist. I find the ground for a reference to facilitation under s 50C(1)(b) exists.

[18] E Tu Incorporated and Masonic Care Limited are referred to the Authority for facilitation to assist them in resolving the difficulties in concluding a collective agreement for which they have been bargaining under s 50B of the Act.

Costs

[19] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so E Tu shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. MCL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

³ Employment Relations Act 2000, s 50C(2).

[20] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority