

Reference to Authority

[3] Section 50A of the Act states the purpose of ss 50B to 50I is to provide a process enabling parties having serious difficulties in concluding a collective agreement, to seek the assistance of the Authority, in resolving the difficulties.

[4] The Authority must be satisfied that there have been difficulties in concluding a collective agreement.¹ The Court of Appeal has held that reference to difficulties in s 50B of the Act should be read as reference to “serious difficulties”.²

Grounds on which Authority may accept reference to facilitation

[5] To be accepted, a request for facilitation must meet one or more of the criteria specified in s 50C(1) of the Act.

The Union’s claims

[6] The Union relies on the grounds set out in s 50C(1)(a) and 50C(1)(b) which require the Authority to be satisfied that:

- (a) in the course of bargaining, a party has failed to comply with the duty of good faith and the failure has undermined bargaining; or
- (b) 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.

[7] The Union says that Bidfood has breached good faith by unlawfully refusing to meet with it for the purposes of collective bargaining and that its failures have been serious and sustained and have undermined the bargaining. The Union further says that the bargaining has been ongoing since May 2018 and despite extensive efforts, including bargaining, mediation and strike action, the parties have failed to resolve their difficulties and a collective agreement has not been concluded.

¹ Employment Relations Act 2000, s 50B.

² *McCain Foods (NZ) Limited v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] 6 NZELR 426.

Bidfood's response

[8] Bidfood disputes the claims made by the Union. It states that it has acted in good faith and has considered and responded to the Union's proposals during bargaining as required by s 32 of the Act. Bidfood further says that bargaining has not been unduly protracted, and there have not been extensive efforts to resolve the difficulties precluding the parties from entering into a collective agreement. Bidfood says there have been only two occasions on which bargaining has taken place and two mediations. In those circumstances, there is no necessity for intervention by the Authority.

Relevant facts

[9] Bidfood is a global food service business operating within New Zealand. On 18 May 2018, the Union initiated collective bargaining with Bidfood. Bidfood claimed that the Union's notice initiating collective bargaining was not valid.

[10] The Union challenged Bidfood's claim by filing a proceeding in the Authority seeking orders that its notice initiating collective bargaining was valid and that Bidfood had breached its duty of good faith in s 32(1)(b) of the Act by failing to meet with it for the purposes of bargaining. On 29 October 2018, the Authority issued its determination which provides a useful background to the current dispute between the parties.³

[11] The Authority determined that the Union's notice initiating collective bargaining was valid.⁴ The Authority further determined that once Bidfood became aware that there was no error in the initiation notice:⁵

...it was bound by the requirement to act in accordance with s 43 and s 32 of the Act by drawing the attention of all employees to whom the coverage clause applied, by entering into a bargaining process agreement, and by meeting to consider and respond to proposals. It failed to do so."

[12] The Authority issued a compliance order under s 137 of the Act as follows:⁶

Bidfood [is to] comply with s 43 and with s 32 of the Act by drawing the attention of the employees to the initiation of bargaining, and by acting in good faith by entering into a bargaining process agreement

³ [2018] NZERA Auckland 333, paras [4] to [21].

⁴ supra para [55].

⁵ supra para [60].

⁶ supra para [62].

and by meeting with the Union to consider and respond to proposals made by the other.

Breaches of good faith – s 50C(1)(a) of the Act

[13] The Union claims that Bidfood has unlawfully refused to meet for collective bargaining for over five months, from 18 May 2018 when bargaining was initiated, until 29 October 2018 when the Authority delivered its decision about the validity of the notice initiating bargaining and other associated matters. This, the Union says amounts to a breach by Bidfood of its statutory duty under s 32 of the Act, to act in good faith in bargaining for a collective agreement.

[14] The Union says the Employment Court in *First Union Inc. v Jacks Hardware and Timber Ltd* found that Jacks Hardware's refusal to bargain with the Union was sustained and resulted in no collective bargaining for over ten months. The Court found this to be a failure by Jacks Hardware to comply with its duty to act in good faith and, the failure was serious and sustained and had undermined the bargaining.⁷

[15] Counsel for the Union relies on the following statement by the Court in *Jacks Hardware* at para [174]:

Was that failure either serious and sustained or has it undermined the bargaining? Both of those statutory tests are met. Jack's refusal to participate in collective bargaining since February this year has been serious in the sense that it has precluded any bargaining at all from taking place when it should have been. It has also been sustained in that it has resulted in no collective bargaining taking place for almost 10 months. I conclude that the grounds under s 50C(1) (a) are made out

[16] I do not accept the facts of the two cases are sufficiently similar. In *Jacks Hardware*, Jacks Hardware made a unilateral decision to stop bargaining. In the current case, Bidfood objected to the validity of the Union's notice initiating bargaining. The Union brought a proceeding in the Authority to decide the issue. Bargaining did not continue between the parties while this issue was before the Authority. The Authority made no finding that Bidfood had breached the good faith provisions of s 4 of the Act. I accept the submission by counsel for Bidfood that it is not correct for the Union to claim that the period from 18 May 2018 when bargaining was initiated until 28 October

⁷ (2015) 14 NZELR 15.

2018 when the Authority issued its determination was a period when Bidfood breached s 50C(1)(a) of the Act.

Bargaining has been unduly protracted – s 50C(1)(b) of the Act

[17] The Union says bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties. The Union also points to strike action from 24 to 29 October 2019 in the course of bargaining as a factor supporting its argument that there are grounds on which the Authority may accept a reference for facilitation.

Bargaining

[18] Bargaining meetings occurred on 15 and 16 November 2018 and on 28 and 29 March 2019, a total of four days.

Mediated bargaining

[19] On 1 August 2019 the parties attended mediated bargaining, which was unsuccessful. This was a further one day of bargaining bringing the total number of days of bargaining to five days.

Strike action

[20] Immediately prior to strike action the parties participated in mediation. From 24 to 29 October 2019, members of the Union took strike action. There is no evidence the strike action was protracted or acrimonious. On 25 October 2019 there was media coverage of the strike in the Northern Advocate. The Northern Advocate's headline stated "Northland workers of global giant Bidfood strike for fair pay".

Section 50C(1) of the Act - Protracted bargaining

[21] The Authority must be satisfied that at least one of the grounds set out in s 50C(1) of the Act exists before accepting a reference to facilitation.

[22] I am not satisfied that bargaining has been unduly protracted. Bargaining has taken place on very few occasions in the twelve-month period from the time of the Authority's determination in October 2018 that the Union's notice initiating bargaining was valid, to the strike action in October 2019.

[23] The parties met to bargain for two days in November 2018, six months after the notice was issued but just one month after the Authority's determination in October 2018. The parties met again for two occasions on 28 and 29 March 2019 to bargain. There were communications between the parties over their respective positions during the period from April to the end of July 2019, but there were no bargaining meetings, nor were there any requests for bargaining.

[24] Further bargaining occurred on 1 August 2019 with the assistance of a mediator and there was mediation for one day prior to the strike in October 2019. There appears to have been very little in the way of bargaining since October 2019, and New Zealand's state of emergency as a result of the lockdown due to Covid 19 has stalled bargaining from 25 March 2020.

[25] From the documents attached to the statement of problem and statement in reply, it appears that the central issue between the parties relates to agreement on the terms of a coverage clause. The parties appear to have reached a standstill on that issue. However, there are other matters and proposals they can bargain on.

Reference to facilitation declined

[26] I am not satisfied that there have been extensive efforts to resolve the difficulties that have precluded the parties from concluding a collective agreement. For these reasons I am not satisfied the situation between the parties has reached the high threshold set out in the criteria to trigger facilitation. Accordingly, the Union's application for reference to facilitation is declined.

Bargaining to continue. Parties directed to mediation

[27] Bargaining continues and the parties are directed to attend mediation (this may require attendance on more than one occasion) and attempt in good faith to resolve their difficulties in concluding a collective agreement.

Costs

[28] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Bidfood shall have twenty-eight days from the date of this determination in which to file and serve a memorandum on the matter. The Union shall have a further fourteen 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.

Anna Fitzgibbon
Member of the Employment Relations Authority