



[2] MUNZ claims pursuant to s50C of the Act:

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.

[3] ISO opposes the application for facilitation on the basis that:

a) The parties are actively engaged in bargaining;

b) The grounds in s 50(1)(a) of the Act are not established;

c) No other grounds in s 50C of the Act apply; and

d) ISO remains willing to meet MUNZ for the purposes of bargaining.

### **Background**

[4] ISO is an international port logistics company, providing Stevedoring, Marshalling, Warehousing, IT and total supply chain solutions to port industries throughout New Zealand, including at the port of Tauranga. It employs approximately 1200 employees in New Zealand and has recently commenced bargaining with another union which has approximately 900 members in its workplace.

[5] MUNZ is a registered union with three members currently employed at the Port of Tauranga.

[6] There is no existing Collective Agreement (CA) in place between the parties. The bargaining at issue relates only to a CA to cover the work of stevedores employed at the Port of Tauranga.

[7] Bargaining between the parties commenced on or about 25 October 2018 and there have been three mediations to date: on 18 December 2019, 3 June 2020 and 8 October 2021. In addition there has been correspondence between the parties, however the parties have only met on two occasions for purposes of bargaining, these being on 12 February 2021 and the mediation on 8 October 2021.

[8] There have also been a number of judgments in the Employment Court since bargaining commenced between the parties.<sup>1</sup> ISO submits that the two earlier judgments are mainly concerned with litigation in relation to terms and conditions in individual employment agreements. However the judgment in *Lye v ISO Limited* which was issued on 5 August 2021 addressed the legality of the proposed revisions in the draft CA.

[9] The mediation on 8 October 2021 is the first time the parties have met since the Employment Court judgment on 5 August 2021. During that mediation two proposals including proposed pay rates were discussed which ISO intends to review, with a response to be provided by 29 October 2021.

[10] MUNZ submits that focussing on written proposals makes a responsive discussion impossible, and that ISO requiring further time to make a response to the proposals is unnecessarily protracting the process.

### **Should facilitation be granted?**

[11] The application for a referral to facilitation by MUNZ has been made on the basis of a breach by ISO of the duty of good faith, in addition to that of unduly protracting the bargaining.

[12] 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—

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<sup>1</sup> *Seymore v ISO Limited* [2019] NZERA 704; *Lye v ISO Limited* [2020] NZEmpC 231; *Lye v ISO Limited* [2021] EmpC 120

(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:

[13] MUNZ submits that the first test for facilitation has been met, that is, a sustained and serious breach of good faith. ISO submits that MUNZ has failed to establish that there has been any breach of good faith” in the course of bargaining” and that it has continued to be responsive, communicative and engaging in the bargaining discussions.

[14] In regard to the second test set out in s50C(1)(b)(ii) of the Act, MUNZ submits that the bargaining has been unduly protracted in circumstances in which the bargaining has been taking place for nearly three years and that real efforts including mediations, have been made over a very lengthy period.

[15] MUNZ submits that facilitation is part of a bargaining process and there is no reason why an application cannot be referred to facilitated bargaining when there are ongoing discussions. In this case in which positions are so strongly held, facilitated bargaining will be helpful.

[16] ISO submits that it has gone to considerable efforts including mediation to resolve matters and submits that delays in bargaining have occurred as a result of ongoing litigation between the parties or MUNZ’s members.

[17] ISO submits that the parties remain engaged in bargaining and the delay in responding to the proposals tabled at the mediation on 8 October 2021 is due to the key decision makers who are based in both New Zealand and Australia needing to take into consideration the impact on the rest of the ISO workforce.

### **Should facilitation be granted?**

[18] I have considered all the submissions filed in this matter. Of significance is the fact that bargaining was initiated for a first CA on 25 October 2018, which is three years ago.

[19] I appreciate there has been litigation in this matter which has contributed to delay, however during that three year period there has been correspondence between the parties, meetings, and assisted by mediators for the purposes of bargaining. Despite this, the parties have been unable to resolve matters.

[20] In these circumstances, I find that the bargaining has clearly been protracted in circumstances in which this is a first CA rather than negotiations in relation to an existing or expired CA. This is a factor which I have also taken into consideration.

[21] In regard to the issue of a breach of good faith, I have not formed a definite view on this since I have found one of the grounds required for a reference to facilitation to be granted to exist pursuant to s 50C(1). This is an issue that may fall for consideration at a future point.

[22] It is my view that the parties have met the grounds under s50C(1) (c) of the Act. In all the circumstances I grant the application for facilitation which I believe will assist the parties.

[23] The parties will shortly be contracted by an Authority Officer to make arrangements for the facilitation to occur.

#### **Costs**

[24] There is no order for costs.

**Eleanor Robinson**

**Member of the Employment Relations Authority**