

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 241
3124454

BETWEEN REUNITED EMPLOYEES
ASSOCIATION INCORPORATED
Applicant

A N D NELMAC LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Anjela Sharma, counsel for the Applicant
Nick Mason, counsel for the Respondent

Investigation Meeting: 27 May 2021, in Nelson

Submissions Received: 27 May 2021 from the Applicant
27 May 2021 from the Respondent

Date of Determination: 3 June 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Reunited Employees Association Inc (Reunited) and Nelmac Ltd have, over the years, encountered difficulties in agreeing the terms of the collective agreement between them. The current collective agreement, covering the period 1 July 2019 to 31 August 2020,¹ was only agreed after a protracted period of bargaining and intervention by the Authority in various forms including facilitation.

¹ This collective agreement remains in force until 31 August 2021 pursuant to s 53 of the Employment Relations Act 2000.

[2] The bargaining between the parties for the renewal of the current collective agreement commenced with pre-bargaining discussions in June and July 2020 and then there were eight meetings.

[3] From the outset bargaining was fraught, even the notices of commencement of bargaining and negotiation over a bargaining process agreement or a code of good faith for bargaining were problematic.

[4] Despite this, by the eighth meeting the parties had come close to agreeing the collective agreement. But by the end of the eighth meeting Nelmac believed Reunited had back tracked from an almost agreed position, with only a few matters to be settled which they believe they had accounted for with their last offer. In the eighth meeting Reunited had tabled a counter offer that Nelmac believed amounted to “cherry picking” and adding new claims in, particularly a claim for an across the board wage increase which had not previously been raised.

[5] In contrast, Reunited believed Nelmac was being unreasonable and was manoeuvring it into a “take it or leave it” ultimatum position. It also believed Nelmac was using bargaining tactics that amounted to a breach of good faith, which included walking out of the eighth meeting. After the eighth meeting, in the evening of 14 September 2020, Reunited sent an email to Nelmac advising it that Reunited would lodge an application with the Authority for it to fix the terms of the collective agreement on the basis of Nelmac’s breaches of good faith in bargaining.

[6] On 15 September 2020, Nelmac sent Reunited its “final offer” asking Reunited to put it to its members to ratify. Nelmac also denied the alleged breaches of good faith and advised that Reunited’s repeated threats to lodge claims in the Authority during the bargaining process was difficult to reconcile and if the offer was not accepted then Nelmac would apply to the Authority for a reference to facilitation.

[7] Nelmac’s offer was not negotiated further and Reunited lodged an application in the Authority alleging that Nelmac had breached the duty of good faith and seeking for the Authority to impose penalties and fix the terms of the collective agreement. Reunited’s application also included additional claims alleging breaches of the collective agreement and seeking compliance orders and penalties.

[8] Nelmac responded, denying the alleged breaches of good faith and seeking a reference to facilitation.

[9] After consultation with counsel both prior to the investigation meeting and during it, I decided that the investigation meeting on 27 May 2021 would only deal with evidence about the bargaining for the renewal of the current collective agreement. This would enable me to determine:

- (a) The allegation of breaches of good faith by Nelmac in relation to the current bargaining.
- (b) The applications for the Authority to impose penalties and fix the terms of the collective agreement if there has been a breach of good faith.
- (c) The cross application for a reference to facilitation.

[10] At the conclusion of the evidence on 27 May 2021:

- (a) I indicated that I could not make an order for the Authority to fix the terms of the collective agreement as the evidence did not indicate that the parties had exhausted all other avenues for reaching agreement, primarily because they had not been to facilitation.²
- (b) I reserved my determination on the application for a reference to facilitation agreeing to issue that as soon as practicable.
- (c) I also reserved my determination on the question of breaches of good faith by Nelmac pending written submissions; following which I will determine if there have been any breaches of good faith and if so whether penalties should be imposed.

[11] The remaining claims relating to alleged breaches of the collective agreement will be investigated at later date with directions to be set for the required investigation meeting in due course.

[12] This determination deals with the application for a reference to facilitation.

² Section 50J of the Employment Relations Act 2000.

Reference to Facilitation

[13] The Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds in s 50C(1) of the Employment Relations Act 2000 (the Act) exist.

[14] The grounds in s 50C(1) of the Act are:

50C 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.

[15] The application for a reference to facilitation is advanced on the grounds set out in s 50C(1)(b) of the Act.

Analysis of application

[16] The parties have been attempting to bargain since July 2020. The parties have adopted approaches to bargaining that have been problematic, unproductive and antagonistic. There has been miscommunication and misunderstanding about what has been offered, what has been negotiated and what has been agreed. There has, at times, been too much focus on formal requirements and expectations of the bargaining process and unnecessary and unhelpful arguments over breaches of expectations and obligations.

[17] The end result of all of this is the parties do not appear to trust each other and do not accept each other's positions on face value. Each party has a different view on what has been agreed and each party thinks the other has back-tracked or is not accepting what should have been, or has been agreed, on various claims between them.

[18] I believe the level of mistrust and scepticism between the parties is exacerbated by the history of bargaining and various applications to the Authority, including the current unresolved application for breaches of the collective agreement

[19] From my perspective there are many parallels to the position the parties were in in early 2019 when bargaining broke down and the Authority dealt with an application for a reference to facilitation.³ The same issues prevent the parties from bargaining constructively and reaching an agreement and the only way for these issues to be overcome and reconciled is through some intervention, as was required then.

[20] The parties are now in a position where history is repeating and it appears that further bargaining or even mediation will not resolve matters between them.

[21] On the question of mediation, I note that whilst the parties have not been to mediation on this current round of bargaining, they undertook mediation in the previous bargaining, which did not resolve the issues. As I have indicated, I see the issues preventing the parties from reaching an agreement as being similar as those impacting last time. There is a continuum of dysfunction between the parties that was not resolved in mediation and there are similar differences in claims that they have mediated in the last round. So, I am satisfied that they have used mediation to try and resolve the issues, albeit in a prior round of bargaining.

³ *Nelmac Limited v Reunited Employees Association Incorporated* [2019] NZERA 123.

Section 50C(1)(b) of the Act

[22] I am satisfied that bargaining between the parties has become unduly protracted.

[23] And, I am satisfied that extensive efforts, including bargaining meetings, correspondence, and now Authority applications have so far failed to resolve the difficulties that have prevented the parties from agreeing their collective agreement.

[24] I believe it is appropriate to refer the parties to facilitation. I believe facilitation will assist the parties to conclude their collective agreements, as it did in the last round of collective bargaining.

[25] It follows that I accept the reference to facilitation.

Conclusion

[26] I have concluded that the grounds under s 50C(1)(b) of the Act are established. The bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties.

[27] For these reasons, I accept the reference for facilitation and, as required by s 50D of the Act, another Member will provide facilitation of the collective bargaining.

Costs

[28] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority