

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 410
3169902

BETWEEN MIDWIFERY EMPLOYEE
 REPRESENTATION & ADVISORY
 SERVICE
 Applicant

AND BIRTHING CENTRE LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Simon Mitchell, counsel for the Applicant
 Stephen Langton, counsel for the Respondent

Investigation Meeting: 22 August 2022 by videoconference

Submissions Received: 9 August 2022 from the Applicant
 9 August 2022 from the Respondent

Date of Determination: 24 August 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for facilitation pursuant to s 50B Employment Relations Act 2000 (the Act) made by the Midwifery Employee Representation & Advisory Service (MERAS) in relation to stalled collective bargaining with the Birthing Centre Limited (BCL).

[2] MERAS asserts as per s 50C of the Act that:

- (i) In the course of attempting to bargain, BCL has failed to adhere to the duty of good faith; and:
- (ii) The failure is serious and sustained and has undermined bargaining.

- (iii) The attempts to set up bargaining have been unduly protracted.
- (iv) Efforts including correspondence and mediation have failed to resolve the issue of the parties commencing bargaining with the aim of concluding a collective agreement.

[3] BCL opposes the application primarily because they consider it is premature, as apart from a recent mediation (15 July 2022) no qualitative bargaining discourse has occurred since November 2019. BCL suggest preliminary work on a bargaining process agreement, clarity on the scope of coverage, an updating of claims and a stalemate in actual bargaining is required before a threshold stage is reached of the parties experiencing serious difficulties sufficient to warrant a referral to facilitation.

Brief context

[4] BCL is a company owned by a registered trust (The Wright Family Foundation) that provides midwifery services at birthing centres located in Tauranga (Bethlehem) and Mangere (Nga Hau), with a focus on natural childbirth and primary aftercare and support. BCL employs registered midwives. MERAS is a registered union acting for employed midwives and is an associated organisation of the New Zealand College of Midwives. MERAS engages in collective bargaining in both the state and private sectors.

[5] In October 2015, MERAS initiated bargaining with BCL for a first or 'greenfield' collective employment agreement for their members employed at the Bethlehem centre (then BCL's only location). For various reasons that I do not fully traverse, no collective employment agreement was concluded despite a draft agreement being presented by MERAS in September 2016, a mediation in August 2018 and various email exchanges up to November 2019. MERAS say they then placed bargaining on hold to deal with other pressing restructuring issues and cited COVID as causative of a further interregnum.

[6] Bargaining did not recommence in earnest until mid- January 2022 when MERAS' counsel suggested mediation – a request BCL did not acknowledge or substantively respond to. Further, on 23 March 2022, MERAS initiating bargaining for a collective agreement at Nga Hau Birthing Centre, Mangere and sought that the bargaining be consolidated to cover both BCL sites.

[7] Unfortunately, BCL did not acknowledge the latter bargaining request. Instead, by memorandum of 6 April 2022, distributed to both work sites, headed “Dear Midwife staff members”, Ms Wright, BCL’s director, whilst purporting to formally bring the initiation of bargaining to the midwives’ notice made what MERAS consider undermining comment. This included that: BCL has “been commanded” to bring the bargaining initiation to your attention and: “The Union is grounded in the collective voice. The Union has zero investment or support for the social investment that has occurred for birthing women’s best outcomes”.

[8] Ms Wright then in the memorandum, urged staff to adhere to “our unshakable philosophy, our support of mothers” and that this “must take precedence over control by a body who has no investment in our purpose or future”. The communication concluded by making an explicit offer to by-pass the union, indicating management and directors “are happy to meet and consult with our teams of midwives on the way forward”.

[9] MERAS view Ms Wright’s stance as being philosophically opposed to collective bargaining. The latter view was arrived upon according to Ms Ovens affidavit, after charting the relationship since her involvement with BCL in May 2018, that also included BCL’s past overtures to MERAS members to bargain individually whilst MERAS sought a collective agreement.

[10] Ms Wright’s affidavit by contrast confirmed communication with MERAS as being at times dysfunctional, due to a perception of a poor relationship with a MERAS official prior to Ms Ovens taking over. Ms Wright’s affidavit displayed a lack of understanding of MERAS’ role and a frustration with the union not understanding BCL’s operating philosophy. Two comments that stuck out, were Ms Wright suggesting MERAS had a primary focus on midwives’ pay and they also wanted to be a conduit of communication on their behalf – two standard union functions. Ms Wright suggested the latter “was inconsistent with BCL’s philosophy of freedom of speech for midwives”.¹ I observe BCL’s Ms Wright, in making such comment and attempting at various junctures to bargain directly, including presenting individual agreements to MERAS members at Bethlehem in July 2021 is not in accord with s 32(1)(d) of the Act that specifies an employer acting in good faith must (in summary):

- Recognise the “role and authority” of the chosen bargaining representative.

¹ Para 4, Affidavit in Reply of Chloe Angela Wright.

- Refrain from directly or indirectly bargaining terms of employment without the representative's permission.
- Desist from conduct that undermines or is likely to undermine the bargaining underway or a chosen representative's authority.

[11] MERAS then applied to the Authority on 12 April 2022, seeking a referral to facilitation for bargaining, "including the Bethlehem Birthing Centre in Tauranga and Nga Hau in Mangere". The Authority in view of the significant lapse in time of contact between the parties, directed them to mediation on 5 May and adjourned an investigation of the request for facilitation that BCL opposed in a 12 May 2022 statement to the Authority. The mediation took place on 15 July 2022 but resulted in no progress toward re-commencing bargaining. After receiving written and oral submissions from counsel and considering affidavits from Jill Ovens, union co-leader of MERAS and Chloe Wright, co-founder, and director of BCL, I now determine the request. As permitted by s 174E of the Act I state findings without recording all evidence and submissions received but record I have carefully considered such.

Should facilitation be granted?

[12] MERAS essentially submitted that BCL is unduly protracting the process of entering bargaining by adopting tactics that are not in accord with good faith principles and that BCL when the issue is looked at in all the circumstances, display a hostility to the union and misunderstanding of the legal process of collective bargaining and an unwillingness to constructively engage with their employees' chosen bargaining agent. MERAS clarified in submissions that the current application only relates to the Bethlehem site but any coverage extension could be a matter best dealt with by mutual agreement once bargaining commences.

[13] For a successful referral to facilitation, section 50C(1) of the Act in relevant part, provides:

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:

[14] MERAS says firstly that the circumstances taken as a whole, establish a sustained and serious breach of good faith reinforced by recent communication to their members from BCL’s director. BCL’s submission, dealt specifically with the 6 April 2022 memorandum, suggesting it was innocuous and only designed to apprise its employees of BCL’s “genuine concerns about the applicant’s approach to its primary philosophy” and that it positively affirmed the role of MERAS as being responsible for “getting you more money and better working conditions”.

[15] BCL suggested overall that the alleged failure of good faith was not ongoing, serious, or sustained and that the threshold for any finding requiring a referral to facilitation, is a very high one as described by then Chief Judge Colgan, in *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc.*²

[16] *McCain Foods* was the first court case occurring under the legislative amendment providing for facilitation as an aid to bargaining and it dealt with protracted bargaining. Whilst this decision provides ample assistance where the parties have commenced bargaining and are facing a roadblock to settlement, I find it does not assist the unique circumstances the Authority is being asked to determine here where bargaining has essentially stalled before commencing.

[17] BCL suggest referral would be premature as the preliminary step of entering a bargaining process agreement (BPA) as envisaged under s 32 of the Act and a fresh exchange

² *McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28.

of claims, has not happened and thus MERAS has not established “extensive efforts” have been engaged in to resolve bargaining difficulties to meet the provisions of s 50C(1)(b) of the Act.

[18] However, MERAS point to the absence of a BPA only being raised once their facilitation request was made and that extant though stalled bargaining, has proceeded without such and it is not uncommon for bargaining to occur without a BPA. In terms of meeting the test of grounds for a reference to facilitation under s 50C of the Act, MERAS invited the Authority to view the totality of correspondence and assess BCL’s reluctance to accept collective bargaining as a philosophical concept, that has in their view been the predominant reason preventing any progress being made. MERAS also pointed to facilitation as an aid to bargaining rather than being prescriptive and the reality that bargaining is a fluid process once it has started.

Assessment

[19] I have carefully considered all disclosed correspondence and the helpful and comprehensive submissions of both parties and, acknowledge this is an unusual request given the lack of any identified progress to explore each other’s bargaining positions. For this reason, I directed the parties to mediation but neither party has reported any ongoing progress to recommencing bargaining.

[20] In a circumstance such as this, the high threshold test of s 50C(1)(b) is unhelpful when assessing protracted bargaining. I take a wider approach to the matter, by considering s 50A that sets the purpose of facilitated bargaining which is to assist parties having “serious difficulties in concluding a collective agreement”. Whilst I acknowledge that s50A (as envisaged in *McCain Foods*) should be read consistently with s 50C, it would be inconsistent with the objects of the legislation to confine an analysis of bargaining behaviour to exclude a situation where a party is effectively failing to recognise the other and commence bargaining.

[21] Here the serious difficulties I have identified are preventing the bargaining from starting and it would be inconsistent with interpreting the Act including the s 3(a)(iii) object of promoting collective bargaining to adopt a narrow and restrictive approach where a unique

circumstance exists. Even in *McCain Foods* it was alluded to the Act giving no explicit assistance for what is encompassed by “unduly protracted” bargaining.³

Good faith

[22] I consider that pursuant to s 50C (1)(a) of the Act, that the totality and tone of communication over a sustained period and, recently both the delay in communication and the direct communication with MERAS members and the nature of such, objectively breached good faith obligations which in the context of a newly sought collective employment agreement are aggravating features and a ground for a referral to facilitation. I note s 50C(1) specifies the applicant only has to make out “1 or more” of the identified grounds.

[23] Notwithstanding as outlined above, it is my view that the fact bargaining was initiated by MERAS in October 2015 does provide an additional ground of protraction in relation to the Bethlehem site as per s 50C (1)(b) of the Act, in the unique circumstance where because of explicit good faith breaches, bargaining has not yet commenced.

Finding

[24] In considering all the circumstances, I find that sufficient grounds under s 50C of the Employment Relations Act 2000 have been met and a reference to facilitation is granted, which I believe will prompt and assist the parties to focus on the necessary steps to work toward a mutually agreed outcome.

Costs

[25] There is no order for costs.

David G Beck

Member of the Employment Relations Authority

³ At para [62].