

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 324
3226659

BETWEEN	E TŪ INCORPORATED Applicant
AND	TAHAROA IRONSANDS LIMITED Respondent

Member of Authority: Andrew Gane

Representatives: Garry Pollack counsel for the Applicant
Meagan Richards, counsel for the Respondent

Investigation Meeting: By submissions hearing 23 May 2023

Other material received: 19 and 20 June 2023

Determination: 21 June 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] E Tū Incorporated (E Tū) and Taharoa Ironsands Ltd (TIL) are party to a now expired collective employment agreement – the Taharoa Ironsands Ltd Collective Employment Agreement 1 June 2020 to 31 May 2022. They are currently engaged in bargaining for a new collective agreement which they have not been able to conclude.

[2] E Tū has applied to the Authority under s 50B of the Employment Relations Act 2000 (the Act) for assistance by way of urgent referral to facilitation to resolve difficulties the parties are having concluding bargaining. It says three of the four grounds for the Authority to accept a reference to facilitation are made out.

[3] The grounds advanced by E Tū for referral are summarised as:

- (a) during the course of the bargaining TIL has failed to comply with its duty of good faith owed to the E Tū and this failure was serious and sustained;¹ and
- (b) the bargaining has become unduly protracted and extensive efforts have failed to resolve the difficulties;² and
- (c) during the course of the bargaining there have been one or more strikes.³

[4] TIL opposes the application. It says the request for facilitation should be declined as the grounds upon which the Authority may accept a reference for facilitation (under s50C of the Act) are not satisfied in the current circumstances.

The Authority's Investigation

[5] The application for referral to facilitation was lodged on 28 April 2023. A case management conference was held with the parties on 3 May 2023 to progress the application and timetabling directions were made including directing the parties to mediation.

[6] The parties have complied with those timetabling directions including filing affidavit evidence. The following affidavits and attachments thereto have been filed with and considered by the Authority:

- (a) two affidavits of Joe Gallagher. Mr Gallagher is an E Tū union official and involved in the current bargaining;
- (b) affidavit of Tutunui King. Mr King is the elected senior E Tū delegate at TIL and involved in current bargaining;
- (c) affidavit of Wayne Coffey, the managing director and owner of TIL;
- (d) affidavit of Maria Moran. Ms Moran is the human resources manager for TIL.

[7] On 23 May 2022 at the investigation meeting I heard submissions from the parties representatives. As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has carefully considered

¹ Employment Relations Act 2000, section 50C(1)(a).

² Employment Relations Act, section 50C(1)(b).

³ Employment Relations Act, section 50C(1)(c).

all the material before it, including all the evidence provided by the parties and their submissions.

Background

[8] On 13 April 2022 E Tū initiated bargaining for a collective agreement. On 12 May the parties entered a bargaining process agreement. Since 10 August 2022 bargaining sessions have been held and the parties have exchanged correspondence regarding and in furtherance of bargaining.

[9] On 21 September 2022 TIL presented an offer to settle a new collective employment agreement. On 29 November 2022 E Tū conducted a ratification meeting. The offer was not accepted by E Tū members.

[10] On 1 December 2022 E Tū issued strike notice and industrial action commenced on 16 December 2022. TIL withdrew the settlement offer. Despite several attempts by E Tū to arrange mediation through December 2022 no further meeting was arranged between the parties until 20 April 2023.

[11] On 3 May 2023 I directed the parties to mediation. For various reasons this did not occur on 10 May 2023, the allocated date for mediation.

[12] On 23 May 2023 at the end of the investigation meeting the parties agreed to meet and further discuss collective bargaining. As the parties were engaging in further discussions, I agreed to defer issuing my determination until I had heard back from the parties.

[13] On 19 June 2023 E Tū requested that I issue my determination.

Facilitation

[14] The purpose of the Authority facilitating bargaining is set out in s 50A(1) of the Act:⁴ ...

...to provide a process that enables 1 or more parties to collective bargaining who are having difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

⁴ Employment Relations Act, section 50A.

[15] In considering a reference for facilitation the Authority must be satisfied that one or more of the grounds set out in s 50C exist.⁵ Those grounds reference the statutory framework for collective bargaining established under the Act including the good faith obligations to which parties engaged in bargaining must adhere. The overall circumstances of the bargaining are to be assessed in light of this statutory framework. Whether the assistance of the Authority by way of facilitation is appropriate requires a balancing of all these factors.

Discussion

[16] In technical terms the parties' bargaining has been ongoing for almost 14 months. The parties' bargaining appears to have reached an impasse from at least December 2022, and despite their extensive efforts to move the bargaining forward, including mediation, this has not proved possible and I am satisfied, has precluded them from entering a collective agreement.

[17] Having carefully considered the material before the Authority, I am satisfied that the ground for facilitation set out in s 50(C)(1)(b) of the Act is made out. The bargaining has become unduly protracted and despite their extensive efforts, the parties have been unable to move forward. Facilitation is intended to assist the parties in such circumstances.

[18] For completeness, as I have found one of the grounds for referral for facilitation is made out, it is not necessary to further consider the other ground advanced by E Tū.

[19] I refer the bargaining between E Tū and TIL for facilitation. An Authority Officer will now contact counsel to make the necessary arrangements for facilitation to take place.

⁵ Employment Relations Act 2000, section 50C.

Costs

[20] The Authority's presumption with referrals to facilitation is that parties will bear their own costs.⁶

Andrew Gane
Member of the Employment Relations Authority

⁶ Employment Relations Authority, Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, 29 April 2022, para 5.