

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 160  
3254399

BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INCORPORATED Applicant
AND	MCKAY LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Lou Yukich, representative for the Applicant Anthony Drake, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	9 November 2023 and 5 March 2024 from the Applicant 23 November 2023 and 16 February 2024 from the Respondent
Determination:	19 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Eastern Bay Independent Industrial Workers Union Incorporated (the Union) is engaged in collective bargaining with McKay Limited (McKay). The Union and McKay have not been able to conclude a collective agreement.

[2] The Union lodged an application for reference to facilitation under s 50B of the Employment Relations Act 2000 (the Act) on 1 October 2023, based initially on the grounds set out in s 50C(1)(b) and s 50C(1)(d) of the Act. The Union's submissions of 9 November 2023 also referred to the grounds set out in s 50C(1)(a) and s 50C(1)(c), meaning that all four grounds for an application for reference to facilitation needed to

be considered, although the Union's supplementary submissions of 5 March 2024 relied solely on the grounds set out in s 50C(1)(b) and s 50C(1)(d) of the Act.

[3] McKay denies that any of the grounds in s 50C(1) of the Act have been met and opposes the application for reference to facilitation.

### **The Authority's investigation**

[4] The Authority held a case management conference on 25 October 2023 on this matter where it was agreed that it be investigated and determined on the papers, based on the Statement of Problem, Statement in Reply, the parties' submissions and supporting affidavits.

[5] Initial submissions were received on behalf of the Union, supported by affidavits from Jon Gebert and Bradley Tutua, and on behalf of McKay, supported by two affidavits from Ross Rowe.

[6] On 4 December 2023 a second case management conference was held, where I directed that the parties attend mediation as they had not yet done so. Mediation occurred on 7 February 2024 but did not resolve this matter. A third case management conference was held on 12 February 2024, where I timetabled for supplementary submissions and affidavit evidence to be provided and directed that the representatives advise if they wished to be heard further.

[7] Supplementary submissions from McKay and the Union, and affidavit evidence from Mr Rowe and Mr Tutua were received. Neither party advised that they wished to be heard further so this matter has been determined on the papers, which was the approach I indicated at the conference on 12 February 2024 would be taken in the absence of a request from either party to be heard.

[8] 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 matter and specified orders made. It has not recorded all evidence and submissions received.

### **Relevant law**

[9] Section 50C(1) specifies four grounds on which an application for reference for facilitation may be accepted, if I am satisfied that one or more of the specified grounds exist:

### **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.

(2) For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if—

(a) the strike or lockout is likely to endanger the life, safety, or health of persons; or

(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

### **History of bargaining and other matters referred to by the Union**

[10] The Union and McKay were parties to an expired multi-union collective agreement (MUCA), with a second union party, which expired on 31 March 2023. Bargaining was initiated for a replacement MUCA “informally” in November 2022, with a bargaining process agreement reached at that time, followed by an exchange of claims in December 2022. The Union and the second union party represent members at

two different sites where McKay's employees perform work under a contract (or contracts) with a third party.

[11] Bargaining for the MUCA occurred on three days in December 2022, March 2023 and May 2023. Following this the second union party settled a single-union collective agreement (SUCA) in early August 2023, which included backdating. At that time an offer was made by McKay to settle a SUCA with the Union which did not include backdating, but that offer was rejected by the Union. McKay presented a rationale for the differential treatment in relation to backdating being that the other union accepted McKay's offer and withdrew its notice of strike action.

[12] In late August 2023 McKay says that it met with representatives of the Union, following which McKay presented a further offer to settle on similar terms to that offered in early August. Since then several counteroffers have been presented by both sides and the parties attended mediation in February 2024.

[13] The parties have starkly different views on the extent of bargaining that has occurred and whether this bargaining has been unduly protracted or that there have been extensive efforts to resolve the issues. Both the Union and McKay have said at times that they have presented offers which have not been responded to. I do not consider that I need to make a finding on which offers have and have not been responded to, as it is clear that the parties have not been able to reach agreement on the basis of either parties' offers or counter-offers. This includes a proposal raised at mediation by the Union for a four-day week with 10 hour working days (the 4x10 roster).

[14] The Union's supplementary submissions say that:

[McKay] erroneously relies on a non-existent initiation of bargaining by [the Union] for a single union collective agreement.

[The Union] have never initiated bargaining for a SUCA.

There are still two Unions that are party to the pre-existing collective agreement, i.e. [the Union] and [the other union party].

[15] In addition the Union submitted that it had notified McKay of an affiliate union, which meant it considered that bargaining was proceeding for a MUCA. I do not consider I need to make any findings in relation to this point including whether bargaining is ongoing for a MUCA or not, given the application for reference for

facilitation was made by the Union only and not on behalf of the second union party, which I understand has settled a SUCA with McKay, or the affiliate union. In addition, both the Union and McKay have proceeded on the basis that bargaining of some form is ongoing, with the issue of what type of bargaining not being focussed on.

[16] The Union has also referred to bad faith behaviour and potential disadvantage claims, including against the third party that McKay has commercial contracts with and at whose work sites the Union's members perform work. Those potential disadvantage claims by the Union are context for why the collective bargaining has not been able to be concluded but, so far as I am aware, have not been progressed and are not directly advanced as part of this application for reference for facilitation. I can make no findings in relation to those potential disadvantage claims.

### **Unduly protracted bargaining (s 50C(1)(b))**

[17] For reasons that will become apparent I have considered this ground first.

[18] The measurement of whether bargaining has been unduly protracted or that there have been extensive efforts to resolve the issues is not intended to be precise. The Court has observed:<sup>1</sup>

Whilst the Authority must ensure that the statutory grounds exist, it should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

[19] The Union says that there has been bargaining since late 2022, with the parties having met on several occasions "until it was acknowledged that an impasse had been reached." This timeframe combines bargaining for the MUCA and for either the SUCA with the Union or a MUCA with the Union and the affiliate union.

[20] The Union initially said that McKay had refused to attend mediation and that: ... significant outstanding matters precluding a ratified agreement are a reasonable percentage adjustment and a valid compliant coverage clause.

[21] McKay initially said that bargaining had not become unduly protracted and its most recent submissions say that "it cannot be said that extensive efforts have been made". McKay does not consider that the bargaining for the MUCA should be taken

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<sup>1</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [2012] NZEmpC 168 at [42].

into account. While McKay has acknowledged that its advocate said bargaining was at an impasse and that it previously refused to attend mediation, it says that it has now been to mediation and bargaining is ongoing.

[22] The Union's supplementary submissions were that:

An impasse has been reached in bargaining attributable in part to the terms of the commercial contract with [the third party] and a refusal by McKay to formally seek a variation to a term of that arrangement which would secure a settlement.

... [The Union] have requested [McKay] seek variation to the terms of its commercial agreement that poses a roadblock to settlement and it has refused.

[23] McKay's supplementary submissions and supporting affidavit evidence said that it had approached the third party to see if it would agree to a variation and the third party is "not willing to consider that option". In those circumstances McKay says that:

... it is constrained by commercial realities. That is common to many employers engaging in collective bargaining and cannot constitute bad faith, let alone serious and sustained breach of good faith.

### *Finding*

[24] I have carefully considered the material before the Authority. For the reasons set out below, on balance I consider that the bargaining has now become unduly protracted and that extensive efforts, including mediation, have failed to resolve it.

[25] I consider that it is reasonable to take into account both bargaining for the MUCA up until August 2023 and the subsequent bargaining, as the Union have submitted I should. Bargaining was initiated in late 2022, to replace the MUCA that expired on 31 March 2023, with four days of bargaining over a period of approximately nine months, followed by approximately two months where offers and counteroffers were exchanged by email, prior to the application for reference to facilitation being made on 1 October 2023.

[26] As noted in paragraph [15] the parties have proceeded on the basis that bargaining is ongoing, albeit with there potentially now being a difference between the parties as to whether the ongoing bargaining is for a SUCA between the Union and McKay or a MUCA between the Union, the affiliate union and McKay.

[27] Section 53(3) of the Act indicates that 12 months should suffice to replace a collective agreement, which has otherwise expired. It is now approaching the time when the collective agreement will no longer be in force for the Union's members and McKay, and it is more than 12 months since bargaining commenced for the MUCA. While the number of bargaining interactions has not been high, I consider that the timeframe over which bargaining has occurred and the nature of the impasse that appears to have emerged supports a finding that this bargaining has become unduly protracted.

[28] In reaching this finding I have reviewed the email correspondence provided by the parties between bargaining meetings and following the last bargaining meeting in August 2023. This shows that the parties have evolved their positions, including several claims appearing to have been withdrawn by the Union following responses by McKay to those claims. The Union and McKay appear to have been relatively close in their respective positions on pay increases (taking into account backdating), but both parties appear unable to resolve the impasse in this bargaining.

[29] Since November 2023 the parties have exchange proposals by email and have attended mediation, which was not successful. Including the 4x10 roster proposal made by the Union at mediation, both parties appear to be re-presenting offers that have previously been tabled. McKay's submissions presented the reason why it does not consider that the 4x10 roster proposal can be agreed, being a lack of willingness from the third party that McKay contracts with to vary their commercial contract to allow for that proposal. There does not appear to be any prospect of further bargaining on that point between the parties.

[30] Having been unable to resolve their differences through mediation, I consider that the Union and McKay have made extensive efforts, including mediation, that have failed to resolve the collective bargaining between them. I consider that this ground for accepting the referral to the Authority for facilitation has now been met.

## **Conclusion**

[31] I am satisfied that the grounds for referral in s 50C(1)(b) of the Act have been established and do not therefore need to consider further the other grounds on which referral to facilitation was sought. The referral to the Authority for facilitation is

accepted in relation to the named parties, being the Eastern Bay Independent Industrial Workers Union Incorporated and McKay Limited.

### **Next steps**

[32] The Authority will communicate with the parties as to the convening of a case management conference and in accordance with s 50D of the Act, the member of the Authority who facilitates collective bargaining will not be the member who accepted the reference for facilitation.

### **Costs**

[33] The Authority's presumption with referrals to facilitation is that parties will bear their own costs.<sup>2</sup> Accordingly there is no order as to costs.

Shane Kinley  
Member of the Employment Relations Authority

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<sup>2</sup> Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6.