IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 340
3296019

	BETWEEN	FIRST UNION INCORPORATED Applicant
	AND	ASB BANK LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Peter Cranney and Grace Liu, counsel for the Applicant Don Mackinnon, counsel for the Respondent
Investigation Meeting:	7 June 2024 by AVL
Submissions received:	24 May 2024 from the Applicant 31 May 2024 from the Respondent
Determination:	11 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] First Union Incorporated (the Union) is engaged in collective bargaining with ASB Bank Limited (ASB). The Union and ASB 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 8 May 2024, based on the grounds set out in s 50C(1)(b) and s 50C(1)(c) of the Act.

[3] ASB denies that the grounds in s 50C(1)(b) and s 50C(1)(c) 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 13 May 2024 on this matter where it was agreed that it be investigated and determined following oral presentation of submissions, with consideration of the Statement of Problem, Statement in Reply, the parties' written submissions and supporting affidavits.

[5] Written submissions were received on behalf of the Union on 24 May 2024, supported by affidavits from Miles William (Bill) Bradford, President of the Union, and from a Union delegate who is a member of the Union's bargaining team. Written submissions were received on behalf of ASB on 31 May 2024, supported by affidavits from Wisam (Sam) Audeau, Head of Employment Relations and Policy, and from a staff member at an ASB contact centre.[1] An affidavit in reply was also received from Mr Bradford on 4 June 2024.

[6] 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

[7] Section 50C(1) of the Act 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. For the purposes of this application s 50C(1)(b) and s 50C(1)(c) are relevant:

> **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: …
>
> (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

[1] I have chosen not to name the union delegate or ASB staff member, as I do not consider naming them is necessary for the purposes of this determination. Counsel agreed to this approach during the investigation meeting to orally present submissions.

(ii) the strikes or lockouts have been protracted or acrimonious: …

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

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

[9] 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:[2]

> 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.

[10] Both parties agree the Union initiated bargaining on 10 May 2023 to replace a collective agreement which expired on 30 June 2023, with a bargaining process agreement entered on 6 June 2023 and claims presented on 16 June 2023.

[11] Counsel representing both parties agreed during oral presentation that there had been two full-day bargaining sessions in June and July 2023, one day of mediated bargaining in November 2023, two shorter meetings with a smaller group of attendees for ASB to present or elaborate on positions in August 2023 and February 2024, and a further day of mediated bargaining in May 2024. During oral submissions counsel for ASB acknowledged that all these activities were clearly related to the bargaining.

[12] The parties maintained differing views of whether a working group meeting in March 2024 was bargaining. Mr Bradford's affidavit said "It was unreasonable for ASB to claim [the working group] discussions about ASB's pay system were not part of the bargaining, considering the discussions were held to discuss a key claim of the union". In contrast, ASB's Statement of reply said "The Working Party met on 20 March 2024 to discuss ASB's remuneration methodology. This was a Working Party meeting, not collective bargaining".

[13] The Union submitted that the parties are having serious difficulties resolving differences related to pay increases and remuneration systems, ASB "has failed and/or refused to meaningfully bargain about changes to its remuneration system", there have

---

[2] *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd* [2012] NZEmpC 168 at [42].

been extensive efforts and allegations of obstructive behaviour and acrimonious strike action, with the parties failing to resolve their differences and to conclude bargaining.

[14] Oral submissions for the Union referred also to background difficulties in progressing matters related to ASB's remuneration system, which had been committed to during collective bargaining over a number of years but had not progressed. Reference was also made to ASB having asserted in April 2024 that bargaining was "exhausted" and that ASB had said it had presented its "final position", meaning this was a common-sense situation of when facilitation was necessary.

[15] The Union also referred in oral submissions to Court judgments saying where "… it is shown that there have been real attempts to bargain and settle, albeit that the parties' strongly held positions have precluded settlement, the bargaining may also be said in that sense to have been unduly protracted".[3]

[16] ASB submitted that the grounds for an application for reference for facilitation were not met, the Union has not established that serious difficulties exist, that bargaining had been unduly protracted or that extensive efforts had been made to reach resolution of the collective bargaining. ASB orally submitted that the application for reference to facilitation was premature and that its objection to the application was not about whether facilitation was a good idea, rather it did not consider that the thresholds for an application to be granted had been met. While ASB's oral submissions acknowledged that it had said bargaining had reached an end, it also said it never refused to bargain, had in fact continued to bargain and had been to mediation following the application for reference to facilitation. ASB submitted bargaining was ongoing, meaning facilitation was not appropriate.

[17] The Union orally submitted in response that the Court went close to saying an application for reference for facilitation should be granted where it was a good idea, with references to a "common sense" assessment of "desirability".[4]

---

[3] *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (2009) 6 NZELR 426 at [63].
[4] Note 2 above, at [42].

Finding

[18] I have carefully considered the material before the Authority. I consider that this determination turns on whether bargaining has been unduly protracted and whether extensive efforts have been made but have failed to resolve the difficulties.

[19] 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.

[20] Section 53(3) of the Act indicates that 12 months should suffice to replace a collective agreement. As the last collective agreement between the Union and ASB expired on 30 June 2023, it is now approaching the time when the collective agreement will no longer be in force for the Union's members and ASB. 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.

[21] In reaching this view, I have also taken into account the fact that at least the last three collective agreements have been for a one-year term. ASB arguably acknowledged through its action that this bargaining is protracted, by offering following mediation a two-year term for a replacement collective agreement, with Mr Audeau's affidavit saying that this was because "ASB is conscious we are now at a point where we would typically be negotiating a Collective Agreement for 2024/2025".

[22] In reaching this finding I have also reviewed the submissions and affidavits, and email correspondence provided by the parties in relation to bargaining including following the mediated bargaining on 20 May 2024. The parties have evolved their positions, including ASB offering a package of no further pay increases for 2023,[5] combined with what it considers is an "above market" pay offer for 2024. The Union says it modified its claims in response to ASB's offers and response to earlier claims.

[23] ASB has also modified its position in relation to the remuneration working party to include a commitment to a working party process in the collective agreement meaning it would be an enforceable obligation, where that process was previously

[5] The parties agreed to pay increases for Union members occurring in 2023 as part of an ASB-wide process for all employees, while agreeing to also progress collective bargaining.

outside the terms of the collective agreement. Mr Audeau's affidavit says the "differences between the parties is now relatively narrow, with the only dispute left being the quantum of the offer".

[24] Mr Bradford's affidavit in reply advised that the Union's bargaining had significant problems with ASB's most recent offer, which he described as "a significantly water-downed version of the bank's commitment to important issues such as changes to its remuneration system" and not meeting members' needs in relation to pay increases. While oral submissions for ASB reiterated the remuneration system changes were now a more enforceable commitment, Mr Bradford referred to multiple commitments over a number of years to that process and said "We are very concerned that by proposing a working party in this latest settlement offer, the bank is simply trying to delay any meaningful changes to its remuneration system again".

[25] The Court has observed in relation to extensive efforts:[6]

> As the judgment of this Court in *McCain* illustrates, the statutory requirement for bargaining being "unduly protracted" is a temporal consideration. "Extensive efforts", whilst these may include temporal elements, focus more upon the quality and dynamism of bargaining and the nature and quality of attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement.

[26] I am satisfied that a qualitative analysis (as referred to by the Court[7]) of these efforts supports, by a fine margin, a finding that the test of extensive efforts is met in this case. I make this finding taking into account the divergent views of the parties as to whether progress has been made and the parties are close to resolution of the bargaining, the longer-term dissatisfaction of the Union over what it considers is lack of progress in reviewing ASB's remuneration system, and ASB's assertion that bargaining had come to an end, albeit acknowledging that was followed by a continuation of bargaining.

[27] I also consider the working party session should be taken into account as part of those extensive efforts, notwithstanding ASB's contention that it was not part of the bargaining and that it has broader implications for non-Union members. While any changes to ASB's remuneration system undoubtedly will have broader implications,

---

[6] Ibid at [72].
[7] Ibid at [73].

this remuneration system is a key issue for the Union, which has been raised in collective bargaining over a number of years. ASB have now acknowledged that it may be appropriate to include enforceable obligations to review its renumeration system in the collective agreement. While the parties will need to agree what these obligations should be during collective bargaining, I consider a clear connection existed between the working party and the collective bargaining, and the Union genuinely believed that they were attending the working party session as part of the collective bargaining.

[28] For completeness, I do not accept the submissions for ASB that the parties are experiencing ordinary difficulties in concluding collective bargaining, rather than serious difficulties. The two key issues which remain outstanding between the Union and ASB are pay increases and changes to ASB's remuneration system. While ASB's suggestion of a longer term for the collective agreement appears to be sensible, given the pattern of bargaining between the parties, this has not been enough for the parties to conclude a collective agreement. On a qualitative basis I consider that the parties have had serious difficulties in making progress on these issues, which is precluding them from entering into a collective agreement, analogous to the finding of the Court in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Ltd*.[8]

[29] Having been unable to resolve their differences through mediation, I consider that the Union and ASB 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

[30] 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 ground on which referral to facilitation was sought.

[31] The referral to the Authority for facilitation is accepted in relation to the named parties, being First Union Incorporated and ASB Bank 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

[8] Ibid at [79].

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.[9] Accordingly there is no order as to costs.

Shane Kinley
Member of the Employment Relations Authority

[9] Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6.