

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 158  
3358003

BETWEEN	E TŪ INCORPORATED Applicant
AND	MARLBOROUGH LINES LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Emily Griffin, counsel for the applicant Penny Shaw, counsel for the respondent
Investigation Meeting:	On the papers
Submissions received:	4 March 2025 from the applicant 11 March 2025 from the respondent
Determination:	14 March 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] E Tū Incorporated (E Tū) is engaged in collective bargaining with Marlborough Lines Limited (MLL). E Tū and MLL agree they are having serious difficulties in concluding a collective agreement, as required under s 50A(1) of the Employment Relations Act 2000 (the Act) for an application for referral to facilitation to be accepted.

[2] E Tū's application for reference to facilitation under s 50B of the Act lodged on 17 February 2025 is based on the grounds set out in s 50C(1)(b) of the Act:

**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:

[3] MLL say it is for the Authority to determine whether the grounds in s 50C(1)(b) of the Act have been met and do not oppose the application for reference to facilitation.

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

[4] The Authority held a case management conference on 21 February 2025 on this matter where it was agreed that it be investigated and determined on the papers, based on E Tū's application, MLL's statement in reply, the parties' written submissions and supporting affidavits.

[5] Written submissions were received on behalf of E Tū on 4 March 2025, supported by affidavits from an E Tū member and delegate, and from an E Tū organiser. Written submissions were received on behalf of MLL on 11 March 2025, supported by affidavits from two managers at MLL.<sup>1</sup>

[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 grounds exist. E Tū say the ground at s 50C(1)(b) of the Act (set out at paragraph [3] above) is met.

[8] 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>2</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

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<sup>1</sup> I have chosen not to name the individuals who provided affidavits as I do not consider naming them is necessary for the purposes of this determination.

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

sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

[9] The timeline and key activities in bargaining appear to be agreed by the parties, with E Tū initiating bargaining on 6 May 2024 to replace a collective agreement which expired on 30 June 2024. A bargaining process agreement was entered on 13 June 2024, with claims exchanged on 13 and 14 June 2024.

[10] Direct bargaining between the parties occurred on 20 June 2024, 25 June 2024, 13 August 2024 and 21 November 2024, with mediated bargaining on 19 September 2024. Offers to settle have also been issued by MLL on 19 August 2024 and 22 November 2024. Strike notices have been issued on four occasions, with partial strikes involving overtime bans occurring from 7 September 2024 to 7 October 2024, and 7 October 2024 to 11 November 2024. The other two strike notices were withdrawn.

[11] E Tū says that the parties are having serious difficulties resolving differences related to remuneration, backpay, coverage and arrangements for the on-call roster system. E Tū's submissions concluded:

The parties remain far apart and have made little progress in resolving their difficulties and in achieving a settlement. Despite industrial action and mediation there has been little progress made to conclude the bargaining.

[12] MLL's submissions concluded:

MLL agrees that the parties do not yet have agreement, and the contentious issues appear to be remuneration, back pay and the on-call roster.

[13] The Court has said 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".<sup>3</sup>

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<sup>3</sup> *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (2009) 6 NZELR 426 at [63].

## *Finding*

[14] I have carefully considered the material before the Authority, particularly the parties' submissions, supporting affidavits and email correspondence in relation to bargaining including following the mediated bargaining on 21 November 2024.

[15] For the following reasons I consider that the bargaining has now become unduly protracted and that extensive efforts, including mediation, have failed to resolve it. I consider that the ground under s 50C(1)(b) of the Act for accepting the referral to the Authority for facilitation has been met.

[16] Section 53(3) of the Act indicates that 12 months should suffice to replace a collective agreement. As the last collective agreement between E Tū and MLL expired on 30 June 2024, it is now approaching the time when the collective agreement will no longer be in force for E Tū's members and MLL. 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.

[17] The Court has observed in relation to extensive efforts:<sup>4</sup>

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.

[18] I am satisfied that a qualitative analysis (as referred to by the Court<sup>5</sup>) supports a finding that the test of extensive efforts is met in this case. I make this finding particularly based on the divergent views of the parties as to what approach should be taken to how remuneration increases should be determined including whether a general wage increase is appropriate or individual pay increases based on a salary survey are appropriate.

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<sup>4</sup> Above n 2 at [72].

<sup>5</sup> Ibid at [73].

## **Outcome**

[19] I am satisfied that the grounds for referral in s 50C(1)(b) of the Act have been established.

[20] The referral to the Authority for facilitation is accepted.

## **Next steps**

[21] The Authority will communicate with the parties as to next steps, and in accordance with s 50D of the Act, another member or other members of the Authority will facilitate the collective bargaining.

## **Costs**

[22] The Authority's presumption with referrals to facilitation is that parties will bear their own costs.<sup>6</sup> Accordingly there is no order as to costs.

Shane Kinley  
Member of the Employment Relations Authority

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<sup>6</sup> Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6, available at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>.