

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 381
3062293

BETWEEN

E TŪ
Applicant

AND

IDEA SERVICES LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Cranney, counsel for the Applicant
Paul McBride, counsel for the Respondent

Investigation Meeting: 25 June 2019

Submissions Received: On the day from the Applicant
and from the Respondent

Determination: 27 June 2019

DETERMINATION OF THE AUTHORITY

Application for facilitation

[1] E Tū has applied to the Authority for reference to facilitation under s 50B of the Employment Relations Act 2000 (the Act), and asks that its application be accorded urgency. E Tū is a trade union registered under Part 4 of the Act. Most of the members it represents in this application are employed as Support Workers by Idea Services Limited (Idea Services) to provide residential and vocational support to the intellectually disabled (service users).

[2] Others covered by the collective agreement are E Tū members employed by Idea Services who hold roles as Service Coordinators, Administrative Coordinators

and Administration Assistants. The parties to the relevant collective agreement are IHC/Idea Services and E Tū.

[3] Idea Services is wholly owned by IHC New Zealand Incorporated (IHC). Both are registered charities. Idea Services is contracted by the Ministry of Health, which funds it on a targeted basis. It neither supports nor opposes the application for facilitation, taking a neutral position, and making clear it will abide by the Authority's decision. It does, however, deny that three of the grounds cited by E Tū in its application are made out.

Grounds for Facilitation

[4] The Act provides that, where parties to collective bargaining have serious difficulties in concluding a collective agreement, one or more of them may apply to the Authority for reference to facilitation to help them resolve those difficulties.¹

[5] The relevant parts of s 50C (1) of the Act provide that the Authority must not accept a reference for facilitation unless satisfied that one 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

¹ 50A and 50B of the Act.

- (ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

[6] S. 50C (2) provides that 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.

[7] E Tū has cited all four grounds in its application. Idea Services denies the grounds in s 50(1)(a),(b) and (c) are made out but will abide the Authority's determination as to whether s 50C(1)(d) is made out.

[8] In the course of a telephone conference with the parties on 31 May 2019 I agreed to accord the matter urgency and, given E Tū wished to be heard in person, an investigation meeting was convened at the earliest opportunity to hear evidence and submissions.

Events in the bargaining to date

[9] The collective agreement expired on 20 October 2018. E Tū initiated bargaining with Idea Services on 27 August 2018. The parties met for bargaining on three full days before the end of 2018. They were unable to agree on a bargaining process agreement.

[10] In 2019 they have met for bargaining, with the assistance of a mediator, on eight further occasions, most recently on 20 June. Evidence from two members of the Idea Services' bargaining team is that the bargaining is progressing and is not too different from that of other years where the parties have managed to reach agreement.

[11] E Tū has a different perspective. Evidence from the advocate leading the bargaining for the union is that negotiations have been protracted, challenging and acrimonious. He was pessimistic about the progress that had been made to date in bargaining.

[12] The union has accused the employer of breaching good faith on three occasions by bypassing the authority of the bargaining team and engaging directly

with members. Idea Services rejects the allegations and says any statements made by it, or on its behalf, have been in accordance with the law and have had no effect on the bargaining.

[13] What is agreed between the parties is that strikes have occurred. At the time E Tū lodged its application in the Authority, the union had held at least three strikes, each of one to four hours' duration. At the date of the investigation meeting a number of further strikes had been held, two of which were respectively for 12 and 24 hours. It was acknowledged by Idea Services that strike action could affect the public interest.

Should a reference for facilitation be accepted?

[14] I am not satisfied that all four grounds for accepting a reference for facilitation have been made out as E Tū submits. However, that is not fatal to its application, as the Act requires that I need be satisfied one or more of the specified grounds exist.

[15] I accept, notwithstanding the optimism expressed by Idea Services, that the parties are having serious difficulties in concluding the bargaining. I find the evidence is inconclusive on the first two grounds relied on by E Tū, being those under s 50C(1)(a) and(b).

[16] In relation to the third ground, the evidence shows there to have been several strikes over a period of 12 weeks. I am satisfied those strikes can be described as protracted. Not only has the period over which they have occurred been protracted, but the length of the strikes has increased over that period from the initial one hour strikes to the most recent 24 hour strike. I therefore find grounds exist under s 50C(1)(c).

[17] I also find grounds would exist for accepting a reference to facilitation under s 50C(1)(d). Strikes were proposed during bargaining that were likely to affect the public interest substantially in relation to the endangerment of the "...safety, or health of persons".² I come to that conclusion after considering evidence regarding the impact on service users who, as both parties noted, were extremely vulnerable members of society.

² Section 50C(2)(a) of the Act.

[18] The evidence does not suggest that the strikes that have occurred to date have in fact had such adverse effects, which may be due to a mixture of good luck and good management. However, that does not detract from the likelihood of such endangerment occurring in the future if further strikes were to occur.

Conclusion

[19] I am satisfied that grounds exist under s 50C (1)(c) of the Act which enable me to accept E Tū's application.

[20] Accordingly I refer to facilitation the current bargaining between E Tū and Idea Services Ltd. The matter should be progressed urgently

[21] Another Member will contact the parties shortly to organise the facilitation process.

Costs

[1] There is no issue as to costs.

Trish MacKinnon
Member of the Employment Relations Authority