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Unite Union Inc v Gateway Motel Limited (Auckland) [2007] NZERA 184 (28 August 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 263/07 5093006

BETWEEN

AND

UNITE UNION INC
Applicant

GATEWAY MOTEL LIMITED
Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

Determination:

MarijaUrlich

Helen White, Counsel for Applicant Mark Ryan, Counsel for Respondent

20 August 2007

20 August 2007 from Applicant

27. 27 August 2007 from Respondent

28. 28 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Unite Union Inc is a registered union under the [Employment Relations Act 2000](#). Unite applies to the Authority for reference for facilitation in respect of its bargaining with Gateway Motel Limited for a collect employment agreement. It relies on grounds under [subsections 50C\(1\)\(a\)](#), (b) and (c) of the [Employment Relations Act 2000](#) which provides:

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:

[2] Gateway Motel Limited owns and operates an accommodation motel located near Auckland Airport. Gateway does not oppose facilitated bargaining. It accepts that there has been significant acrimony between the parties as a result of the industrial action but rejects that there has been a serious and sustained breach of good faith.

[3] Unite has about 15 members employed by Gateway in positions potentially covered by a collective agreement; housekeeping, kitchen and restaurant. Union membership is at 100% potential.

[4] On 6 July 2007 Unite lodged an application in the Authority seeking orders regarding alleged breaches of the agreed bargaining process. On 6 August 2007 Unite lodged a supplementary application for facilitated bargaining. On 7 August 2007 the Authority held a telephone conference call with the parties to discuss the application. The parties were directed to attend mediation by 16 August 2007. In the event mediation was not successful, an investigation meeting was scheduled for Monday 20 August 2007.

[5] The investigation meeting proceeded as scheduled. I received evidence from Daphna Whitmore, Unite's organiser at Gateway, Vincent Sweet and Mariana Rakuraku, the Unite delegates and Rakesh Sharma, Gateway's owner. Ms White made submissions at the close of the evidence. Mr Ryan filed his submissions later.

Bargaining

[6] Gateway purchased the motel at which the Unite members in September 2006. It took over the business in October 2006 and entered individual employment agreements with those workers. Unite initiated bargaining with Gateway on 7 November 2006 having initiated bargaining with the previous owner in August 2006. Since 7 November 2006 there have been two bargaining sessions of one hour's duration, two mediations, correspondence, industrial action and a lockout which continues. There is no concluded collective agreement.

[7] The key events in the parties' bargaining history follow; details of email and telephone conversations between the representatives are not included:

Unite initiates bargaining 7 November 2006

Unite applies to Authority for direction to mediate 15 December 2006

Direction to mediate issued 10 January 2007

Parties attend directed mediation,

bargaining process signed 15 May 2007

Parties meet for bargaining 30 May 2007

Parties meet for bargaining 18 June 2007

Strike action 1- 3 August 2007

Lockout notices served 3 August 2007

Alleged replacement labour 4 August 2007

Contracting out proposal 10 August 2007

Parties attend mediation 15 August

Analysis

[8] [Section 50A\(1\)](#) provides the purpose of facilitating collective bargaining:

(1) The purpose of sections [50B](#) to [50I](#) is to provide a process that enables 1 or more parties to collective bargaining who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.

[9] I must be satisfied that the bargaining between Unite and Gateway has been:

(i) undermined by serious and sustained breaches of the good faith obligations;

(ii) has been unduly protracted and extensive efforts have failed to resolve

the difficulties between the parties including mediation; and (iii) in the course of the bargaining there have been one or more strikes or

lockouts which have been protracted or acrimonious¹.

(i) Serious and sustained breaches of good faith undermining bargaining

[10] Unite says that Gateway has breached good faith obligations by:

(i) initially illegally refusing to bargain with Unite;

(ii) counselling workers not to join Unite;

(iii) breaching the agreed bargaining process entered following mediation

directed by the Authority;

(iv) undermining the personal job security of the delegates; (v) failing to participate actively and constructively in the limited bargaining sessions;

(vi) by the end of July 2007 not replying to Unite's invitations to bargain; (vii) presenting a proposed collective agreement, for the first time, as an

attachment to a lockout notice;

(viii) Using replacement labour during the lockout period; and (ix) Proposals to contract out the kitchen and restaurant first presented

during the lockout period and invitations to meet to discuss the proposal delivered directly to members.

[11] In response Mr Sharma said in evidence that having recently purchased the business he did not feel able to enter bargaining because he did not yet understand the business and its seasonal fluctuations. He said there is no acrimony towards Unite but he is not ready to bargain.

[12] I accept that it was reasonable for Gateway to have a period to settle into the business before bargaining commenced. Unite has accommodated that request.

[13] I am not satisfied that Gateway has engaged in collective bargaining with Unite in the manner required by legislation, that it, in good faith. The bargaining agreement

has been breached without reasonable explanation. The delegates have been disciplined with express reference to their union activity. A proposed collective agreement was first tabled as an attachment to the lockout notice. Gateway communicated directly with Unite members about the contracting out proposal before the matter was discussed with their union. These breaches of the good faith are serious and ongoing.

[14] This may not be the end of the matter; in an effort to determine this issue quickly I have not made findings where the allegations are disputed or the claims are not supported by unquestionable documentary evidence.

(ii) Bargaining unduly protracted and unresolved despite extensive efforts

[15] Unite says the bargaining has been unduly protracted despite extensive efforts, including mediation, to move forward. It says this protraction has not been due to Unite's actions and it has continued to try to bargain in the face of Gateway's resistance. Unite says the imminent nature of the contracting out proposal should be a factor to weigh in a consideration of protraction; there may not be time for the parties to resolve this issue themselves.

[16] The parties have attended mediation twice during the course of the bargaining. The first time was following a direction from the Authority that the parties mediate. At this mediation a bargaining process was entered and a date for the first bargaining set. The second mediation was also at the direction of the Authority and attended by the parties in the knowledge that this application for reference to facilitation was before the Authority.

[17] I accept that with the assistance of the mediator the parties were able to discuss the bargaining but were unable to overcome the difficulties between them. There are no issues arising from the mediation that need to be responded to by either side. The parties are stuck; all the union members are locked out and have been since 3 August and the parties have not been able to resume bargaining.

1 Section 50C (1)(a), (b) and (c) [Employment Relations Act 2000](#)

(iii) Protracted and acrimonious strikes

[18] Unite says the lock-out has been acrimonious in that:

(i) trespass orders have been issued;

(ii) acrimonious confrontations regarding the use of staff from the next

door motel to perform the work of the locked-out workers; (iii) threat of contracting out; and (iv) filing of a damages claim against Unite by Gateway regarding its

contractual relations.

[19] Gateway accepts that the industrial action has been acrimonious.

[20] I am satisfied that the industrial action between the parties is protracted and acrimonious. All the kitchen, restaurant and housekeeping staff of the Gateway have been engaged in industrial action since 1 August 2006 and locked out since 3 August 2007. A picket has been held outside the motel since the industrial action commenced. The industrial action has been punctuated by the issuing of trespass notices, a scrap about replacement labour, the delivery to workers of invitations to discuss a contracting out proposal (in the face of their nomination of a representative) and the lodging of a significant damages claim in the District Court on the day of the investigation meeting. During the investigation meeting the parties exchanged information across the table concerning a dispute occurring at that time on the picket line and the possibility that the police would be called.

Determination

[21] I find that the grounds set out in [section 50C\(1\)\(a\)](#), (b) and (c) of the [Employment Relations Act 2000](#) exist.

[22] Unite and Gateway are referred under [section 50B](#) of the [Employment Relations Act](#) 2000 to the Authority for facilitation to assist them in resolving the difficulties in concluding the collective agreement for which they have been bargaining.

Costs

[23] Costs are reserved.

MarijaUrlich

Member of the Employment Relations Authority