

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 197
3031237

BETWEEN WENDCO (NZ) LIMITED
Applicant

A N D UNITE INC
Respondent

Member of Authority: Rachel Larmer

Representatives: Tim Oldfield, Counsel for Applicant
Peter Cranney, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 20 June 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. The parties are referred to facilitation.

B. Costs are reserved.

Employment Relationship Problem

[1] Wendco Limited and Unite Inc both seek the assistance of the Authority to resolve the difficulties they say they are having in concluding a new collective agreement.

[2] Wendco seeks a reference to facilitation under s50C(1)(a) and (b) of the Employment Relations Act 2000 (the Act).

[3] Unite supports the reference to facilitation under s50(1)(b) of the Act but it denies the allegations that Wendco based its application under s50(1)(a) of the Act on.

[4] Unite says that the s50(1)(a) issues shouldn't be substantively investigated by the Authority at this stage because there is no point in that occurring when both parties are clear that they want and need facilitation assistance, and that the s50(1)(b) grounds in the Act have been met.

[5] Unite says that if the s50(1)(a) grounds are to be substantively investigated by the Authority then it (Unite) will be challenging the information about such matters that Wendco has put before the Authority. Unite further says that it would also be pursuing a counterclaim against Wendco.

Reference to Facilitation

[6] The Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds in s50C(1) of the Act exist.¹

[7] The parties were party to a collective agreement that expired on 21 May 2017. Unite initiated collective bargaining with Wendco for Unite members in April 2017. The expired collective agreement continued by virtue of s.53 of the Act until 21 May 2018.

[8] Unite members employed by Wendco, who were covered by the expired collective agreement, are now covered by individual employment agreements based on the expired collective agreement.

[9] The parties agreed on a Bargaining Process Arrangement ("BPA") on 17 May 2017. The parties met for bargaining on 15 and 30 August 2017, 5 September 2017, 10 November 2017 (by telephone conference), 6 December 2017 and 23 February 2018.

[10] The parties attended bargaining mediation on 30 April 2018 during which one of the two outstanding matters was apparently agreed upon.

[11] Strikes and pickets relating to the bargaining occurred on 26 May 2018, 2 June 2018 and 9 June 2018. On 8 June 2018 the Employment Court issued an interim injunction prohibiting trespass related to certain picketing by Unite.

[12] I am satisfied that the bargaining has become unduly protracted.

¹ Section 50B of the Act.

[13] The parties have been bargaining since 15 August 2017 and extensive efforts (including mediation) have failed to resolve the difficulties that have prevented the parties from entering into a new collective agreement.

[14] The focus of the s.50C(1)(b) is upon the quality and dynamism of bargaining in the nature and quality of the attempts that may have been employed by or both of the parties to achieve settlement of a new collective agreement.

[15] The Employment Court and *Service and Food Workers Union Nga Ringa Totta Inc v Sanford Limited*² stated that a qualitative analysis is a significant element of this test for a reference to facilitation.

[16] In this case the bargaining period has extended over a period of almost fifteen months, the parties have attended six bargaining sessions, they have exchanged bargaining correspondence, the parties have attended bargaining mediation and there have been strikes and pickets which gave rise to Employment Court litigation and an Employment Court injunction.

[17] Wendco has now made allegations that Unite has engaged in regressive bargaining in breach of clause 3.10 of the Code of Good Faith and Collective Bargaining in Clause 5(c) of the BPA by withdrawing agreement to matters that have already been agreed without compelling reasons or by tabling new proposals. Unite denies these allegations.

[18] I consider that I do not need to set out the disputed allegations put forward by Wendco as grounds under s50C(1)(a) of the Act because I am satisfied the grounds for a reference to facilitation under s50C(1)(b) of the Act have already been met.

[19] I am therefore satisfied that the test for a reference to facilitation by the Authority as set out in s.50(c)(1)(b) of the Act has been met because the bargaining has been unduly protracted and extensive efforts including mediation have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

[20] I consider it is now time for the facilitation process to be used to assist the parties in concluding a collective agreement.

² [2012] NZEmpC 168.

Costs

[21] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority