

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 142
3003433

BETWEEN FIRST UNION
 INCORPORATED
 Applicant

AND BRAND DEVELOPERS
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Peter Cranney and Grace Liu for Applicant
 Andrew Caisley for Respondent

Investigation Meeting: On the papers

Determination: 11 May 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The parties are referred to facilitation.**
- B. Costs are reserved.**

Employment relationship problem and summary of findings

[1] First Union Incorporated (the Union) seeks the assistance of the Authority to resolve the difficulties it is having in concluding a collective agreement, through reference to facilitation.

[2] I am satisfied there have been serious difficulties in concluding a collective agreement, the bargaining has been unduly protracted and extensive efforts have failed to resolve the difficulties and I have accepted the reference to facilitation.

[3] By the consent of the parties this matter has been determined on the papers before the Authority. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Reference to facilitation

[4] Before a reference to facilitation can be accepted I must be satisfied there have been serious difficulties in concluding a collective agreement.¹ The Court of Appeal has held that reference to difficulties in section 50B of the Act should be read as a reference to “*serious difficulties*”.²

[5] Brand Developers employs approximately 500 employees in both New Zealand and Australia. It has never been a party to any collective agreement.

[6] The Union initiated bargaining on 24 July 2015. Brand Developers met with the Union after the bargaining had been initiated but a bargaining process agreement was not signed until five months later, in December 2015. The first bargaining meeting was held on 14 December 2015.

[7] The notice initiating bargaining states that the collective agreement is to cover all work done by any employee of Brand Developers. Brand Developers has two main locations. A Call Centre located in Takapuna and a Distribution Centre located at Avondale.

[8] The parties agreed to have two collective agreements. One to cover the work done at the Call Centre and the other to cover the work done at the Distribution Centre.

[9] There have been a number of matters that have significantly impacted on the bargaining process:

- a) a remuneration review;
- b) restructuring; and

¹ Employment Relations Act 2000, section 50B.

² *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc.* [2009] 6 NZELR 426.

- c) change of Brand Developers' bargaining team members

Remuneration review

[10] Brand Developers engaged a consultant in April 2016 to review its remuneration policies. This review impacted on the ability of the parties to negotiate over the wage rates during collective bargaining because Brand Developers advised the Union that while the remuneration review was being undertaken it would not bargain on wages for the collective agreements.

[11] The review was completed in October 2016 and resulted in a proposed new remuneration framework. During October and November 2016 Brand Developers held meetings with all of its employees to present the details of the proposed remuneration framework so employees could provide feedback on it. The framework included a remuneration matrix.

[12] The framework put all roles into pay bands with a salary range. Each pay band has identified minimum, midpoint and maximum salary points.

[13] In assessing where each employee sits in the band Brand Developers intends to consider the performance of the employee in the role, the tenure of employment, and the current wage rate and position within the band.

[14] Under the framework it is intended that each employee's salary would be reviewed annually or when there is a change in role. A review of the band ranges is to be done annually taking into consideration market data, whole company performance, and any other factors the company regards as relevant.

[15] In November 2016 Brand Developers met with non-union employees individually to discuss where each employee sat in the bands applicable to their roles and their appropriate salary. Employees received salary increases of between 0% and 2%.

[16] The Union were provided with a copy of the new remuneration matrix. The information from the matrix was used to formulate an amended wages claim from the Union. The Union adopted most of the pay rates set out in the matrix for the roles that would be covered by the collective agreements. It also agreed to adopt the Brand

Developers proposed 90-day trial period clause. Brand Developers rejected both proposals.

[17] Brand Developers proposed a set wage for the collective agreements of \$16.50 per hour. This was rejected by the Union because most of its members were already in receipt of an hourly rate in excess of \$16.50.

Restructuring

[18] In April 2016 Brand Developers implemented a restructuring of the Call Centre that impacted on employees employed in sales support and those employed as inbound operators.

[19] A further proposal to restructure the Call Centre has been advised to the Union in April 2017. If the restructure goes ahead it will be implemented in May or June and involves outsourcing the sales of low value products to a call centre based in the Philippines.

[20] The restructuring in 2016 and the proposed restructuring for this year have created significant uncertainty for employees employed in the Call Centre.

Change of bargaining team members

[21] Throughout the bargaining process a number of members of the bargaining team for Brand Developers have left the company and been replaced by others. These members included the lead advocate for the company, one of the management team and the HR Manager. This has caused significant disruption to the bargaining process.

Conclusion

[22] I am satisfied the delay of five months in concluding a bargaining process agreement and starting the bargaining process, combined with the refusal to negotiate about wages, the restructuring processes and the changes to Brand Developers' bargaining team has caused serious difficulties in concluding a collective agreement.

Grounds for reference to facilitation

[23] The grounds relied on by the Union for referral to facilitation are those contained in section 50C(b) which requires that I am satisfied that:

- a) the bargaining has been unduly protracted; and
- b) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

Unduly protracted bargaining

[24] In total the parties have met 12 times for the purpose of bargaining. Some of the bargaining related to the bargaining for the Call Centre collective agreement while other bargaining related to the Distribution Centre collective agreement. Bargaining sessions have been held with the assistance of a mediator. These bargaining sessions included negotiations for both collective agreements.

Call centre bargaining

[25] To assist with the bargaining process Brand Developers drafted a proposed collective agreement based on its standard individual employment agreement. Following receipt of the proposed collective agreement the Union tabled 40 claims for the bargaining.

[26] The parties met nine times for the purposes of bargaining for the Call Centre collective agreement on:

- 14 December 2015 – full day
- 2 February 2016 – 5 hours
- 3 February 2016 – 45 minutes
- 19 April 2016 – 2 hours
- 21 July 2016 – full day
- 8 November 2016 – with the assistance of a mediator
- 5 December 2016 – with the assistance of a mediator
- 13 December 2016 – with the assistance of a mediator
- 31 January 2017 – with the assistance of a mediator, and
- 28 February 2017 – with the assistance of a mediator.

Distribution centre bargaining

[27] In April 2016 the Union and Brand Developers agreed to start bargaining for the distribution centre collective agreement. The Union tabled 11 claims for this bargaining.

[28] The parties met seven times for the purposes of bargaining for the Distribution Centre collective agreement on:

- 21 April 2016 – 1 hour
- 4 July 2016 – ½ day
- 21 July 2016
- 8 November 2016 – with the assistance of a mediator
- 5 December 2016 – with the assistance of a mediator
- 13 December 2016 – with the assistance of a mediator
- 31 January 2017 – with the assistance of a mediator, and
- 28 February 2017 – with the assistance of a mediator.

Strike action

[29] Employees have taken strike action in pursuit of a collective agreement five times on:

- 6 October 2016
- 7 October 2016
- 10 October 2016
- 14 December 2016
- 15 December 2016, and
- 16 December 2016.

Extensive efforts

[30] The focus of this test is upon the quality and dynamism of bargaining and the nature and quality of the attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement. A qualitative analysis is a significant element of this test.³

³ *Service and Food Workers Union Nga Ringa Tota Inc. v Sanford Limited* [2012] NZEmpC 168 at [72] and [73].

[31] An analysis of 13 cases since 2013 where the Authority has accepted a reference to facilitation shows that the period of initiation of bargaining ranged from seven months to 48 months with the average period being 20.8 months. This is comparable to the statistics relied on by the Court in 2012 which showed an average period of 19.6 months.⁴ The number of bargaining sessions ranged between 4 and 21 with the average being 7.8 and the number of mediator assisted bargaining sessions ranged from 1 to 4 with the average being 2.1.

[32] In this case the bargaining period has extended over a period of 22 months, they have attended 12 bargaining sessions, with five of these sessions being conducted with the assistance of a mediator.

[33] I am satisfied the Union has established not only that no effective progress in bargaining has been made but that it is regressing. There are at least 8 outstanding issues:

- a) wages including a remuneration clause
- b) hours of work
- c) sick leave
- d) bereavement leave
- e) long service leave
- f) first aid allowance
- g) funeral insurance, and
- h) union access.

[34] Before Brand Developers embarked on its remuneration review the parties had been bargaining over the wage rates for the Call Centre collective agreement. The Union organiser leading the Union's bargaining team met with two Brand Developers managers to discuss salary scales. Following that discussion the Union provided examples from various call centre collective agreements and Brand Developers worked on a pay scale which was then provided to the Union for feedback. As set out earlier, no progress has been made to address wages in the collective agreements.

⁴ Above n 3 at [46].

[35] There were also some informal discussions about the Union's claims relating to sick leave, bereavement leave, long service leave, first aid allowance, funeral insurance and union access. The Union believed that by the end of March 2016 the parties had reached an agreement in principal on each of these issues and draft clauses were provided to Brand Developers for their review and feedback. No further progress has been made to finalise these claims and there is some doubt about whether agreement has actually been reached.

Conclusion

[36] The bargaining for a collective agreement has extended over the period of the last 22 months and has been unduly protracted. The parties have had 12 face to face bargaining sessions, five of them conducted with the assistance of a mediator and there is evidence of some bargaining by correspondence. There have been six days of strike action.

[37] There are serious difficulties in bargaining and these serious difficulties have precluded the parties from entering into a collective agreement. The extensive efforts by the parties have failed to resolve the serious difficulties and it is now time for the facilitation process to be used to assist in the conclusions of a collective agreement.

Costs

[38] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Union shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Brand Developers shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[39] The parties could expect me to determine costs, if asked to do so, on the usual 'daily tariff' basis after taking into account that this matter was dealt with on the papers and did not necessitate an investigation meeting. .