

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 78A/10
5297130

BETWEEN NATIONAL DISTRIBUTION
UNION
Applicant

AND FOODSTUFFS SOUTH
ISLAND LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cranney, Counsel for Applicant
Neil McPhail, Advocate for Respondent

Investigation Meeting: 7 May 2010

Submissions Received On the day

Determination: 10 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The National Distribution Union (the Union) applies to the Authority for reference for facilitation under s.50B of the Employment Relations Act 2000 to assist in resolving difficulties in concluding a collective agreement with Foodstuffs South Island Limited (Foodstuffs).

[2] The Union relies on the ground set out in s.50C(1)(b) that 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.

[3] Foodstuffs do not consider that bargaining has been unduly protracted or that extensive efforts have failed to resolve the difficulties.

[4] The application first came before the Authority on 26 March 2010 and following a discussion it was agreed that the parties would undertake further mediation. The application for facilitation was therefore adjourned until 7 May 2010. Mediation did not resolve the difficulties that have precluded the parties from entering into a collective agreement. My assessment is that even with further mediation it is unlikely that the issues between the parties precluding settlement could be resolved. Perhaps consistent with that, there was no suggestion that further mediation would assist the parties during the investigation meeting from either party.

Background to the bargaining

[5] Bargaining for a collective agreement was initiated under s.42 of the Employment Relations Act 2000 on 31 December 2008 in a notice to Foodstuffs signed by Paul Watson, Southern Regional Secretary, National Distribution Union during the term of the 1 March 2008-28 February 2009 collective agreement.

[6] John Mullins is the General Manager, Wholesale Operations and Procurement at Foodstuffs who also has a responsibility to represent Foodstuffs in collective bargaining. He notes that bargaining between the parties has not always concluded promptly and the 2007 bargaining rounds continued for eleven months after the expiry of the collective agreement.

[7] The Union and Foodstuffs do not agree whether all meetings referred to relate to the bargaining or indeed whether there were two or three mediations specifically related to bargaining. I shall therefore set out in a little more detail than usual the meetings the Union say were held and Foodstuff's view about them.

[8] There was a meeting on 5 February 2009 following the initiation of bargaining. A Union document dated 5 February supports the matters discussed including what I consider preliminary issues with respect to bargaining such as payment of delegates, dates for negotiation to be set in mid February and dates for when report back meetings following negotiation to members would take place.

[9] Bargaining took place on 19 and 20 February 2009. The first day was a full day and the second ended at 2pm.

[10] Foodstuffs say that the next meeting on 27 April 2009 was a discussion about bonuses and not related to bargaining. The Union on the other hand say that the

discussion about bonuses was intricately related to bargaining because the reason put forward for failing to pay the bonus was that bargaining was continuing. An agreement was reached in terms of bonuses at the meeting on 27 April 2009 and recorded in a letter from Mr McPhail to Mr Cranney dated 28 April 2009.

[11] There was a full days bargaining on 1 May 2009.

[12] On 22 June 2009 there was a mediation that both parties agree was in relation to bargaining.

[13] On 21 September 2009 there was a meeting with the Union but Foodstuffs say this was primarily to discuss issues around the company's annual wage review and whether it should apply to Union members and some good faith issues that the company had. It is clear that on the agenda for that meeting there was reference to discussing a pathway to *resolving current impasse in bargaining*. Although this agenda item may have only occupied a short time I accept that there was discussion about how to move matters forward.

[14] Foodstuff's position following the 21 September 2009 meeting in relation to collective bargaining was put in a document dated 25 September 2009 to Mr Watson from Mr McPhail. The company's position was that it was available to return to the bargaining table and was prepared to meet in October 2009. Dates were provided. Mr McPhail identified in that document the main barrier to agreement being, broadly put, around the wage structure and wage increase.

[15] There was then a further bargaining meeting on 14 October 2009 which was of about two and a half hours duration and on 20 November 2009 the parties met to consider a Union proposal and a company counter-proposal to settle a collective agreement. That meeting was only about 30 minutes duration.

[16] On 24 November 2009 Foodstuffs put a proposal to settle. That was not accepted by the Union and Mr McPhail noted in his email dated 27 November 2009 that the barrier to agreement remained firmly in place.

[17] There was some strike action of a limited nature on 3 September 2009 and 12 and 13 November 2009 and some limited picketing. There was also correspondence between the negotiating parties outside of meetings.

[18] There was then very little activity in terms of bargaining between the parties.

[19] The Union and Foodstuffs disagree about whether a mediation on 22 January 2010 was related to bargaining. The Union says it was but Foodstuffs say it was about an unrelated matter. I accept that it is likely that mediation was to discuss a matter arising from the strike action in November 2009 about bargaining.

[20] There was then the April 2010 mediation.

[21] For current purposes I conclude that two mediations have been specifically focussed on the issue that has prevented a resolution of the bargaining.

Determination

[22] There have been serious difficulties between the parties in concluding a collective agreement. It is clear that there is an impasse between the parties and negotiations have therefore stalled. The impasse arises over wage rates, how they are fixed, quantum and movement through various merit based levels. That this was to be an issue for the next round of bargaining was foreshadowed by the memorandum attached to the 1 March 2008-28 February 2009 collective agreement with respect to a working party to be set up to examine the merit scheme.

[23] The Authority must however not accept a reference for facilitation unless satisfied the grounds relied on by the Union exist.

[24] The ground relied on by the Union requires the Authority to consider whether bargaining has been unduly protracted and whether extensive efforts have been made by the parties to resolve these issues.

[25] Both Mr Cranney and Mr McPhail referred to the Employment Court judgment of *McCain Foods (NZ) Ltd v. Service & Food Workers Union Nga Ringa Tota Inc* [2009] ERNZ 28. Chief Judge Colgan in that judgement had to consider the same ground as I am asked to consider and the meaning of unduly protracted and extensive efforts. It was held in *McCain* that undue protraction (the statutory test) is excessive or disproportionate protraction as opposed to reasonable or expected or common protraction.

[26] Bargaining in this matter has taken place over some 14 months from February 2009 to early May 2010. There were not as many bargaining meetings held over the

14 month period as in other bargaining situations that fall to be considered under this ground. Nevertheless meetings were held on a fairly regular basis, every two months or so until negotiations stalled in November 2009. In terms of whether the bargaining was protracted it is also necessary to consider the nature and scope of the bargaining. It is clear that by at least September 2009, that there was one main issue between the parties that had precluded them entering into a collective agreement. Prior to that there seemed to have been real attempts to bargain and settle.

[27] I conclude that there has been unduly protracted bargaining in the sense that the bargaining has not been expected or common but disproportionate.

[28] I have then considered whether the efforts to resolve the difficulties have been extensive. There were fairly regular bargaining meetings until bargaining stalled in November 2009. There was a clear identification of the issue precluding a settlement by at least September 2009. There was also in June 2009 a mediation. After the different perspectives about wage issues were identified as being a barrier to concluding a settlement there were further meetings, correspondence putting offers and counter proposals and another mediation in April 2010.

[29] In the context of this bargaining I find that the efforts were extensive and they failed to resolve the difficulties between the parties that preclude them entering into a collective agreement.

[30] I find in conclusion that bargaining in this matter has been unduly protracted and that despite extensive efforts including mediation the parties have not been able to conclude a collective agreement.

[31] I therefore accept the reference for facilitation of bargaining in respect to the issues that have prevented a settlement being concluded between the Union and Foodstuffs. I shall refer the matter to the Chief of the Employment Relations Authority for a facilitator to be appointed to enable that facilitation to begin as soon as possible.

Costs

[32] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority