IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 191
5477221

BETWEEN	SOUTHERN LOCAL GOVERNMENT OFFICERS UNION Applicant	
A N D	ASHBURTON DISTRICT COUNCIL Respondent	

Member of Authority:	Helen Doyle
Representatives:	Nigel Wombwell and Joe Davies, Advocates for Applicant Neil McPhail, Advocate for Respondent
Investigation Meeting:	21 November 2014 at Christchurch
Submissions Received:	On the day from Applicant and Respondent
Date of Determination:	25 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Southern Local Government Officers Union (the Union) seeks a determination from the Authority about the meaning of a term in an offer to settle reached during mediated negotiations of a collective agreement.

[2] Ashburton District Council (Ashburton DC) does not accept that the Authority has jurisdiction to determine that matter.

[3] Bargaining for a renewed collective agreement has been ongoing between the parties from June 2013 with some difficulties. Two previous applications have been

made to the Authority including an application under s 50J of the Employment Relations Act 2000 (the Act).

[4] The Union and Ashburton DC met in mediation on 17 June 2014 following a direction from the Authority to attend mediation. They reached what they considered was an offer that settled the collective agreement.

[5] The Union took the offer of settlement of the collective agreement to its members on 19 June 2014 and the members voted by a majority vote to ratify the collective agreement. The following week Ashburton DC forwarded a draft of the new collective agreement to the Union for checking before it was signed. The Union was concerned that although the wording in the body of the collective agreement was as expected the schedule of Union members who had their hours grandparented did not include Union members who worked in the library.

[6] Further mediation was unable to resolve the matter.

[7] This application was then made to the Authority to determine that the agreement reached in mediation means that all *existing members' hours be grand parented not just the 37.5 hour members who are listed in the schedule of the collective agreement.* It was suggested in the statement of problem that the wording of schedule 3 in the new draft collective agreement could be amended and the six existing employees from the library added to the schedule, so the new collective agreement could be signed and implemented.

[8] Urgency was sought from the Union as the union members under the collective agreement have not received annual market based salary increases and the matter was given priority by the Authority in the circumstances.

[9] The Authority was provided with the relevant documents and was assisted by careful submissions in the determination of this matter.

The issues

[10] The first issue is whether or not the Authority has jurisdiction to make the determination requested. If the Authority does have jurisdiction then there is an interpretation issue about the meaning of the offer of settlement.

Does the Authority have jurisdiction to make the determination requested?

[11] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally as set out in s 161 of the Employment Relations Act 2000 (the Act). This includes jurisdiction under s 161 (1) (a) to make determinations about a dispute about the interpretation, application, or operation of an employment agreement.

[12] The Authority is specifically prohibited from making determinations in bargaining situations, as set out in s 161(2) of the Act:

> *Except as provided in subsection 1(ca), (cb), (d), (da), and (f), the Authority does not have jurisdiction to make a determination about any matter relating to –*
>
> *(a) bargaining; or*
> *(b) the fixing of new terms and conditions of employment.*

[13] There is a need to consider whether the determination the Union is asking the Authority to make falls outside of that prohibition.

[14] The Union and Ashburton DC accept in this case that bargaining has not concluded in light of the issues in dispute around the offer to settlement. The Union does not argue that the collective agreement was ratified.

[15] It is helpful notwithstanding to briefly set out what is required for ratification of a collective agreement. The full Court of the Employment Court in *Waikato District Health Board v New Zealand Public Service Association Inc.* [2008] ERNZ 80 considered the requirements in s 51 of the Act for ratification of a collective agreement. The Court stated at [34] and [35] of the judgment amongst other matters that it did not agree with counsel's submission that terms of settlement may be ratified as was the position under the 1991 legislation. It stated that *The 2000 Act has expressly set a different and arguably higher standard for ratification. What must be ratified is the "collective agreement" which must include the various statutory minima required to constitute such an agreement.*

[16] The parties bargaining process agreement in this case, which deemed bargaining to have been completed when a provisional settlement has been ratified by the parties before writing up of the collective agreement, arguably does not comply with the Act. As the Court stated in *Waikato District Health Board* parties cannot

modify the statutory requirement to settle a collective agreement by way of the bargaining agreement under s 32 (1)(a) of the Act.

[17] There is no ratified collective agreement between the parties for the Authority to determine a dispute about under s 161 (a) of the Act. I understand that the previous collective agreement has now expired under s 53(3) of the Act.

[18] Mr Davies and Mr Wombwell say that the Union is not asking the Authority to make a determination about any matter related to bargaining or the fixing of new terms and conditions but is simply asking for interpretation about a term agreed in the mediated settlement offer.

[19] Mr McPhail referred the Authority to the examination of s 161 (2) by the Court of Appeal in *Canterbury Spinners Limited v. Vaughan* [2002] 1 ERNZ 255. In [41] it was stated, amongst other matters that:

> ...
> *The Authority may not become involved in the bargaining which precedes the formation or variation of a contract. It may not, for example, intervene in the negotiations and order a party conduct itself, perhaps by making an offer, in a certain way. Nor may it act as arbiter and, where the bargaining does not lead the parties to agreement, settle for them the outstanding issues and thus complete the term or terms for them.*
>
> And further at [44]
>
> *The proper question for the Authority to ask itself, when considering whether the disputed provision brought before it is one upon which it is prohibited from giving a determination is whether, correctly interpreted, the provision already creates rights which are legally enforceable and, if so, what those rights are. Or is it merely an agreement to agree, or an agreement which directs a certain procedure but does not go so far as to indicate sufficiently an end result, so that, in either case, it is incapable of creating contractual rights? If so, any determination would in law create a new term or condition and the Authority may not intervene.*

[20] I consider whether the mediated offer of settlement creates rights which are legally enforceable. The offer to settle was ratified by the Union membership but under s 51 of the Act the collective agreement must be ratified. It was not. Without ratification of the collective agreement the offer of settlement does not create rights which are legally enforceable. Bargaining has not concluded because there are different views about what the offer to settle means. Any determination of the

Authority in those circumstances would be a determination about bargaining or new terms or conditions of employment which the Authority is prohibited from making.

[21] The offer to settle in this case which arose from mediated negotiations is different for the reason set out above from agreed terms of settlement under s 149 of the Act which do create rights that are legally enforceable.

[22] There was a further argument by the Union that the difference in interpretation raises matters of good faith. Under s 50J of the Act a party in bargaining for a collective agreement may if there are grounds, including a breach of the duty of good faith, apply to the Authority for a determination fixing the provision of the collective agreement being bargained for. There is no application under s 50J before the Authority in respect of the offer of settlement from the 17 June mediation for it to determine. I note that one of the grounds specified in s 50J is that all other reasonable alternatives for reaching agreement have been exhausted. The parties have not undertaken the process of facilitation but they have, in the event that the Authority concludes it does not have jurisdiction, jointly made application for facilitation. That application will be determined separately.

[23] In conclusion, for the reason set out the Authority does not have jurisdiction to make the determination requested because it is related to bargaining and/or the fixing of new terms and conditions of employment.

Costs

[24] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority