IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 168
CRC 32/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC Plaintiff
AND	SANFORD LIMITED Defendant

Hearing: 25 September 2012
(Heard at Nelson)

Appearances: Timothy Oldfield, counsel for plaintiff
Neil McPhail, advocate for defendant

Judgment: 25 September 2012

Reasons: 28 September 2012

REASONS FOR JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] These are the reasons for the oral judgment[1] delivered at the conclusion of the hearing on 25 September 2012. That allowed the parties to know where they stand and an opportunity for further collective bargaining with the assistance of a mediator before the Employment Relations Authority facilitated bargaining takes place.

[2] The issue for decision in this challenge by hearing de novo to a determination[2] of the Employment Relations Authority is whether the parties should have facilitated collective bargaining pursuant to s 50B of the Employment Relations Act 2000 (the Act).

[1] [2012] NZEmpC 164.
[2] [2012] NZERA Christchurch 184.

[3] A preliminary issue, raised by Sanford's cross-challenge, is whether the collective bargaining the subject of an application for referral to facilitation can only be bargaining that has taken place since, and pursuant to, the second of two notices initiating bargaining.

[4] Following an investigation meeting the Authority issued its determination on 29 August 2012 declining to refer the parties to facilitated collective bargaining, essentially because the Service and Food Workers Union Nga Ringa Tota Inc (the Union) had failed to establish that "extensive efforts (including mediation) [had] failed to resolve the difficulties that [had] precluded the parties from entering into a collective agreement": s 50C(1)(b)(ii) of the Act.

Background facts

[5] Sanford owns and operates a mussel processing plant at Havelock located between Blenheim and Nelson, about 41 kilometres from the former and about 73 kilometres from the latter. The Sanford plant is the major industry in the town, although it is fed by aquacultural farms in the vicinity which also employ people. The Union has officials based in Nelson where there are larger numbers of union members. Any meetings at and about the Sanford plant at Havelock need to be arranged specifically to suit the convenience of these union officials as well as the availability of plant management and its employment adviser, Paul Tremewan, who is based in Auckland.

[6] Some of the plant's employees are members of the Union which had a series of collective agreements with Sanford covering those employees. The last collective agreement expired on 9 April 2009. Shortly before then, the Union initiated bargaining for a replacement collective agreement. By operation of s 53 of the Act, this caused the expiring collective agreement to continue in force for a further 12 months.

[7] The first negotiation session in collective bargaining with Sanford took place on 29 June 2009 with two further bargaining meetings taking place in late August

and early September 2009. On 23 September 2009 this Court delivered a judgment[3] resolving a dispute about the interpretation of the parties' collective agreement which was intended to clarify a contentious issue between them.

[8] On about 14 September 2009 Sanford offered its non-union employees on individual employment agreements a backdated wage increase together with a further percentage increase to be paid from 1 December 2009 if those employees agreed to increase their weekly hours of work from 40 to 45. On or about 27 October 2009 a similar offer was made by Sanford in bargaining with the Union but this was later rejected. All non-union employees agreed to these terms and conditions as did a number of union members who resigned their union memberships, thus taking them out of the collective bargaining. At that time, about 18 employees refused the employer's offer and remained covered by the collective bargaining.

[9] There were two further bargaining meetings in October 2009 and one in April 2010. By mid-June 2010 the Union considered that bargaining had stalled, coinciding with a significant drop in its membership at the Sanford plant. There was also to be a major upgrade to the plant requiring it to be shut down between October 2010 and January 2011. Production recommenced on 20 January 2011.

[10] On 15 July 2011, the Union re-initiated collective bargaining by issuing a fresh notice under s 42 of the Act. There were four further bargaining meetings on 7 and 8 September and 4 and 5 October 2011, during which latter month three strikes of employees took place at the plant. The parties met again in bargaining in early December 2011 and in January 2012 following which, on 31 January 2012, the plant manager addressed all staff at a meeting about its position in the bargaining. Over the Christmas/New Year period, the parties bargained by exchanges of emails. In this way, on 16 December 2011, the company made an amended offer in respect of the night shift allowance payments and back pay. This was considered but rejected by the Union in an email of 20 December 2011 but the response included a proposal for a further face to face meeting between the bargaining teams on 24 January 2012.

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[3] *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited*, CC12/09,

The employer's emailed proposal was formal, considered and comprehensive. On 26 April 2012 the parties met in bargaining with the assistance of a mediator.

[11] There were a number of email communications between the parties to the bargaining relating to it. These included a formal letter from the company on 29 October 2009, a less formal but nevertheless significant email from the company to the Union on 11 June 2010, and the exchange of emails between the bargaining teams between 16 and 21 December 2011 already referred to.

[12] Although these communications were of a very different nature to face to face bargaining sessions, they were not unimportant and constitute further elements of real bargaining between the parties. They should, therefore, be added to the account of negotiations.

[13] The present application for facilitation was lodged with the Employment Relations Authority on 18 May 2012. On 5 September 2012, after receipt by the Court of the challenge, the Court referred the parties to further urgent mediation about the bargaining. They met in further bargaining with the assistance of a mediator for most of 13 September 2012 but no resolution of their outstanding collective bargaining issues has been able to be achieved.

[14] The period from first initiation of bargaining to this point includes 14 bargaining sessions. That number falls to eight bargaining sessions if one takes the start of the period as the re-initiation of bargaining in July 2011. Added to these must be the bargainings by email. The respective periods over which bargaining has taken place are 41 months and 15 months. The parties have had the assistance of a mediator in two bargaining sessions, both since July 2011.

[15] There are four major issues outstanding in the bargaining. The first involves a claim by the employer to increase the weekly hours of work from 40 to 45. Second, the Union seeks retention of a night shift allowance for new night shift staff. Third is the amount and scope of wages increases for employees. The fourth is the extent of retrospectivity of pay increases once a collective agreement is settled. Three of these four 'road block' issues have been present from the outset of

bargaining in mid-2009. Although other issues have arisen in the bargaining, these have either been settled or withdrawn or at least appear to be soluble. It will, however, require a resolution of all four major outstanding issues for a collective agreement to be settled.

The Authority's determination

[16] The Authority accepted the Union's case that, under s 50C(1)(b)(i) of the Act, the "bargaining has been unduly protracted". In reaching this conclusion, the Authority rejected the employer's argument that the re-initiation of collective bargaining by the Union in early July 2011 meant that the statutory tests apply only to events after that date. The Authority accepted the Union's case that the whole history of relevant collective bargaining, including that which had taken place in 2009 and 2010, had to be considered.

[17] The Authority also accepted the Union's position, and rejected the employer's narrower case, that bargaining included not only face to face meetings, but a range of other relevant communications between the parties about their proposals for a collective agreement. That must be right given the definition of "bargaining" in s 5 of the Act to which I will refer later.

[18] Even so, the Authority concluded that "extensive efforts" had not been made to resolve the parties' difficulties. It appears to have concluded that the Union failed to provide it with content and other detail of those non-face to face communications.

[19] The Authority determined that, since April 2009, the parties had then met to bargain on 13 occasions including once with the assistance of a mediator. As to additional communications, the Authority concluded that "the evidence suggests that it has been rather exiguous over the 41 months since bargaining was first initiated."

[20] The Authority also considered whether the October 2011 strikes at the plant affected the "extensive efforts" test. The strikes were said to have lasted for a total of 12 hours over three separate days involving both night and day shift workers,

although on two of the three occasions the plant was able to continue production, albeit at a reduced level.

[21] What appears to have weighed significantly with the Authority was that no attempts had been made to continue bargaining after April 2012 and that the mediated bargaining had occupied only four hours on one occasion. Accepting that the statutory test for "extensive efforts" does not necessarily require more than one mediated bargaining session, it concluded that "how and the extent to which mediation has been used does play a material role …". Notwithstanding the Union's assessment that the mediated bargaining contributed to the parties being further apart than when it started, the Authority concluded that "the mediation process has not been thoroughly utilised in my view." Despite having determined that the second cumulative requirement under s 50C(1)(b) had not been made out, the Authority went on to consider whether the parties were having serious difficulties in concluding a collective agreement. It concluded:

> … the term *serious difficulties* connotes a degree of hindrance in concluding the collective agreement amounting to a series of significant hurdles to overcome. Whilst I accept that the parties have not moved together significantly over the extensive period of the bargaining, and may even be drifting apart, I do not see an *impasse* which extensive efforts could not overcome.

[22] It is regrettable, in my view, that in this case the Authority does not appear to have directed further mediation under s 159(1)(b) of the Act in accordance with the spirit of the collective bargaining philosophies of the Act set out later in this judgment. In many cases, and in this no less, resorting to litigation can often put the issue in dispute on hold as appears to have happened here. It is, however, important to keep in mind that the objective of the disputed question in this litigation is the settlement of a collective agreement. It is not inimical to the decision of litigation to assist the parties to continue to resolve their real differences in other ways as well.

Should the Authority's facts be preserved in formalin?

[23] A further preliminary argument advanced at the hearing by Mr McPhail for the defendant was that the Court should consider only the relevant facts and events up to the time of the Union's application to the Authority for referral to facilitation,

or at least at the time of the Authority's investigation of that application. Such an approach would exclude reference to subsequent events and, in this case in particular, to the bargaining which took place with the assistance of a mediator on 13 September 2012.

[24] Mr McPhail conceded, however, that he could not advance this proposition strongly. That was first because of the tight timeframe within which the Authority, and now the Court, heard these proceedings. Second, and more importantly as a matter of principle, he accepted that this approach is apparently inconsistent with the relevant legislative provisions and the way in which the Court treats other cases of information acquired subsequent to events in the Authority.

[25] That was an appropriate concession by the advocate and I do not accept the submission about the restricted scope of events for consideration. That is for the following reasons.

[26] First, this is a challenge to a determination of the Employment Relations Authority in which the Union has elected a hearing de novo pursuant to s 179(3)(b) of the Act. This entitles the plaintiff to "a full hearing of the entire matter" which was before the Authority. The "matter" that was before the Authority was whether it should accept the Union's referral to facilitation. This is not an appeal in the traditional sense of an examination of the correctness of the Authority's decision on the facts before it. Rather, a party electing to challenge by hearing de novo is entitled to a consideration of the "matter" (whether there should be a referral) that was before the Authority. That is consistent with the statutory requirement in s 183(1) of the Act that the Court must make its own decision on the "matter" and any relevant issues and, under subs (2), that the Authority's determination is automatically set aside by the Court making its own decision, whether the challenge is successful or not.

[27] Employment relations issues, and in particular those relating to collective bargaining that is ongoing, are dynamic and progressive. It would be unrealistic and contrary to the interests of justice to draw an artificial veil across those processes so as to ignore potentially important developments affecting the justice of the case

between the parties. It would also be inconsistent with the Court's approach to other similarly or even arguably less dynamic issues that it determines. For example, when an Authority determination, either allowing or refusing an order for reinstatement, is made, the Court's practice is to consider relevant evidence of developments that have occurred since the Authority determined the issue. It is part of the Court's unique role in the promotion of productive employment relationships (and, in this case in particular, in the promotion of collective bargaining) that its decisions and the reasons for them are practicable, realistic and sensitive to change.

[28] Not only is there no legislative mandate for the Court to so limit the scope of issues and evidence on challenges, but to do so would be contrary to the statutory scheme and longstanding practice.

[29] For these reasons the Court heard, and the judgment was informed by, evidence of events that have occurred after the application for a referral to conciliation was made and the Authority's determination was issued.

Referrals to facilitation – the statutory provisions

[30] The following are the relevant statutory provisions.

> **50A 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.
>
> (2) Sections 50B to 50I do not—
>
> (a) prevent the parties from seeking assistance from another person in resolving the difficulties; or
>
> (b) apply to any agreement or arrangement with the other person providing such assistance.
>
> **50B Reference to Authority**
>
> (1) One or more matters relating to bargaining for a collective agreement may be referred to the Authority for facilitation to assist in resolving difficulties in concluding the collective agreement.
>
> (2) A reference for facilitation—
>
> (a) may be made by any party to the bargaining or 2 or more parties jointly; and
>
> (b) must be made on 1 or more of the grounds specified in section 50C(1)

50C Grounds on which Authority may accept reference

(1) 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:
- (d) that—
  - (i) in the course of bargaining, a party has proposed a strike or lockout; and
  - (ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

(2) For the purposes of subsection (1)(d)(ii), a strike or lockout is likely to affect the public interest substantially if—

- (a) the strike or lockout is likely to endanger the life, safety, or health of persons; or
- (b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

(3) The Authority must not accept a reference in relation to bargaining for which the Authority has already acted as a facilitator unless—

- (a) circumstances relating to the bargaining have changed; or
- (b) the bargaining since the previous facilitation has been protracted.

[31] The subsequent statutory provisions address the process of facilitated bargaining if it is directed by the Employment Relations Authority and are, therefore, not at issue on this challenge.

The statutory scheme

[32] This is important in the interpretation and application of the facilitation provisions because s 5 of the Interpretation Act 1999 requires statutory interpretation to be an analysis of text in light of purpose. Sections 50A-50J were introduced into the Act by s 14 of the Employment Relations Amendment Act (No 2) 2004 with effect from 1 December 2004. Their purpose is set out in s 50A, but s 3 is also relevant. The object of the Act includes "to build productive employment

relationships through promotion of good faith in all aspects of the employment environment and of the employment relationship … by promoting collective bargaining": s 3(a)(iii).

[33] Also relevant is s 31 which sets out the object of Part 5 (collective bargaining) of the Act. This includes, at (aa),[4] "to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to …" and at (d) "to promote orderly collective bargaining …".

[34] Also relevant to the interpretation of the bargaining facilitation sections of the Act is s 32 which expands on the requirement of good faith collective bargaining under s 4 of the Act materially as follows:

> **32 Good faith in bargaining for collective agreement**
>
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> (a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and
>
> (b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and
>
> (c) the union and employer must consider and respond to proposals made by each other; and
>
> (ca) even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and
>
> (d) the union and the employer—
>
> (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
>
> (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
>
> (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and

[4] Inserted by s 10 of the Employment Relations Amendment Act (No 2) 2004.

(e) the union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

(2) Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.

(3) The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include—

(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and

(b) the provisions of any agreement about good faith entered into by the union and the employer; and

(c) the proportion of the employer's employees who are members of the union and to whom the bargaining relates; and

(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

(4) For the purposes of subsection (3)(d), circumstances, in relation to a union and an employer, include—

(a) the operational environment of the union and the employer; and

(b) the resources available to the union and the employer.

(5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.

(6) To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4.

[35] Linked to this is the requirement in s 33 of the Act for the parties to conclude a collective agreement unless there are genuine reasons not to. That provides:

33. Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

(2) For the purposes of subsection (1), genuine reason does not include—

(a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or

(b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

[36] The statutory scheme for collective bargaining contemplates that parties will bargain collectively, progressively, and in good faith with the objective of settling a collective agreement, and that a collective agreement will be the outcome of their bargaining. The statute recognises that parties are to engage in the collective bargaining process themselves including deciding how their collective negotiations will proceed by requiring them to enter into a bargaining process arrangement or agreement. The statutory scheme also contemplates that external assistance should be available to parties who cannot continue to bargain collectively in this way and, more particularly, where a settlement (and therefore the opportunity to conclude a collective agreement) cannot be reached by the parties themselves within a reasonable time and after reasonable attempts to achieve a settlement in bargaining.

[37] What are the mechanisms provided to achieve those objectives? There are almost always the so-called self-help remedies of strike and lockout available to the parties to attempt to make progress in difficult negotiations.

[38] There is also a hierarchy of interventions to assist the parties in these circumstances. First, a mediator from the statutory Mediation Service can assist the parties in their negotiations as has occurred in this case.

[39] Next is the statutory process of bargaining facilitation at issue in this case. That is arguably less party-controlled than mediation assistance but still leaves the bargaining outcomes in the hands of the parties themselves.

[40] Finally, there is the ultimate sanction of the Employment Relations Authority fixing the terms and conditions of a collective agreement if all other attempts at settlement (including bargaining facilitation) have failed, and upon the attainment of very rigorous statutory tests.

[41] The statute recognises that collective bargaining can be a fraught process which strains the good employment relations that should otherwise exist between the parties. It also contemplates that collective agreements will not only be for their stated terms, but may continue for up to a year beyond their expiry to allow for their replacement by further collective bargaining. There is therefore an expectation that

collective bargaining initiated shortly before the expiry of a collective agreement should usually conclude with a replacement collective agreement within that statutory life extension period of 12 months. Collective agreements are to be for a maximum term of three years, although extendable to allow for replacement, as already noted. This, too, is a pointer to the timeframes within which bargaining should be conducted: collective bargaining should not take up more time than the statutory maximum period of the collective agreement being bargained for.

[42] The bargaining facilitation sections are therefore to be seen as part of a scheme that allows, encourages and assists collective bargaining and the timely and orderly settlement of collective agreements. This will inform the approach of the Employment Relations Authority to a reference under s 50B. Whilst the Authority must ensure that the statutory grounds exist, it should not be astute to find reasons to refuse a reference to facilitation where a common sense assessment of the overall position indicates its desirability in light of the statutory scheme for collective bargaining and collective agreements.

Relevant case law

[43] The only previous judgment of the Court on the subject of bargaining facilitation is *McCain Foods (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc.*[5] That was also a case in which only s 50C(1)(b) was in issue. At [65] the Court addressed the requirement at issue in this case that efforts that have failed to resolve the difficulties that precluded the parties from entering into a collective agreement, must have been "extensive". The Court stated: "This implies having a wide scope, being far-reaching or comprehensive, covering a large area or time range of activities." In *McCain* the Court found that the participation by a mediator in no fewer than four (of 10) bargaining meetings held between the parties went "significantly towards constituting "extensive efforts" under s 50C(1)(b)(ii)." At [68] the Court concluded:

> So the legislation requires a combination of temporal and activity elements. There must have been unduly protracted bargaining (the temporal element) and extensive efforts must have been made in the bargaining (the "activity"

[5] [2009] ERNZ 28.

> requirement) that have, nevertheless, failed to resolve the difficulties that have precluded the parties from entering into a collective agreement. One constituent of those extensive efforts must have been mediation assistance. All elements of the tests must have occurred before the grounds under s 50C(1)(b) for a reference to facilitation are established.

[44] Although factual comparisons are not determinative, it is noteworthy that the collective bargaining in the *McCain* case (which was with the same union as in this and also in the food processing industry) took place over 34 months consisting of 10 bargaining meetings of which four included participation of a mediator.

Facilitation applications generally

[45] Although each case must be decided on its merits by applying the statutory tests to the relevant facts, a review of the circumstances of other cases in which the Authority has referred parties for facilitations assists in assessing this case in context.

[46] Research undertaken for me of the 21 recorded cases in which the Authority has accepted referrals for facilitation in collective bargaining under s 50C(1)(b) reveals the following relevant statistics. The cases were all decided under s 50C(1)(b) as is this case. The period from initiation of bargaining to the Authority's investigation meeting ranged from nine months to 54 months with the average period being 19.6 months and the median being 19.5 months. The numbers of bargaining meetings or sessions ranged between two and 46 with the average number being 15 and the median being eight. In all cases, the parties had bargained with the assistance of a mediator at least once. The number of mediator assisted bargaining sessions ranged from two to 16 with the average number being five and the median number being three.

[47] None of these data addresses the important element of the quality of these events, their duration, or the intractability of the parties' positions at any stage. However, when placed alongside those data, the relevant circumstances of this case are not so unusual that to accept a referral to facilitated bargaining could be said to be out of step by reference to the Employment Relations Authority's practice.

Facilitated bargaining – the benefits?

[48] What does a reference to facilitation offer the parties in addition to, or substitution for, the benefits of unassisted bargaining or of mediated bargaining, apart from an obviously different independent person being involved with them?

[49] The facilitator (a member of the Employment Relations Authority) can make non-binding recommendations to the parties about the process of their bargaining and/or the collective terms and conditions of employment being bargained about. The facilitator may publicise beyond the parties the recommendations that the facilitator has made. Depending upon a variety of circumstances including the nature of the industry, the locality, and the parties' sensitivity to positive or adverse publicity, such recommendations may have a coercive effect on either or both of the parties to modify their positions in bargaining.

[50] The statute requires that parties deal with the ERA facilitator in good faith as well, of course, as between themselves during the bargaining. A party is obliged to consider a facilitator's recommendation before responding to it.

[51] Counsel and advocate were agreed that, compared to mediation, facilitation by an Authority member is a more formal and structured process directed by the Authority Member, although the decision whether to accept a recommendation is that of the parties, so that any collective agreement settled is theirs. I think it is fair to say also that there is a degree of uncertainty (and therefore reluctance to venture into uncharted waters) about the facilitation process and a greater familiarity with the Mediation Service – perhaps a case of "better the devil you know..."[6]

[52] The only academic study of bargaining facilitation in New Zealand is contained in a paper by Ian McAndrew entitled "Collective bargaining interventions: contemporary New Zealand experiments" in The International Journal of Human Resources Management.[7] Dr McAndrew's sample was of 14 facilitations in

[6] Not be taken literally – both parties expressed their confidence in, and admiration for, the mediators.
[7] Vol. 23, No. 3, February 2012, 495–510.

collective bargaining up to the end of 2009. Interviews were conducted with representatives of the parties and with the facilitators. As Dr McAndrew notes:[8]

> Once parties have been referred to facilitation, there is little guidance from the Act as to what is to happen. The Authority is primarily an inquisitorial adjudication body, dealing with matters of employment rights as a public forum. However, the Authority is not acting in its investigative role, with attendant powers, when conducting a facilitation, and facilitation is – with the exception of the possible public release of recommendations – a matter private to the parties.

[53] Dr McAndrew identifies three basic models for facilitation which he describes as "an (advisory) adjudication model, a mediation model, and a conciliation model". There are some common features to all or most facilitations including beginning with a joint organising meeting followed by separate briefings and usually with written submissions. Most facilitators are said to issue draft recommendations for reaction by the parties and final recommendations are initially issued privately to the parties but subject to public release on the facilitator's own initiative or on the application of one of the parties.

[54] Dr McAndrew concludes that facilitators' recommendations have generally been a mix of substance and process although the issuing of substantive recommendations that clearly favour one of the parties runs the risk of having the other rejecting or ignoring these although, in some cases, even rejected recommendations played some role in eventual settlement. In most cases, Dr McAndrew found that facilitators attempted to mediate a settlement, sometimes at length, in what he describes as "the conciliation model". Other cases were subject to what the author describes as a "med-arb" approach following a mediation effort that was brief and fruitless. This appeared to reflect a wish on the part of the parties to move quickly to recommendations and/or that the nature of the issues made them unsuited to a mediated compromise.

[55] Addressing the results of the facilitation process, Dr McAndrew reports that in only about one-third of facilitations was there a settlement directly and relatively immediately. In other facilitations, however, the intervention was instrumental in

[8] At p502.

bringing about an eventual resolution of the dispute. At p505 Dr McAndrew concludes:

> In most cases facilitation elevated the seriousness of the dispute. The application for facilitation, bringing in the lawyers to argue the case, and the decision referring the matter to facilitation all contributed to that. The introduction of a 'judicial officer' into the negotiations, someone statutorily authorized to intervene, capped it off. If the facilitator also brought personal presence and authority to the proceedings, so much the better. Both parties, those who experienced it and some who did not, saw the conciliation approach – 'the investigative, questioning approach, a more searching approach than mediators take', as one employer advocate put it – as consistent with and enhancing the elevation of the seriousness of the dispute that came with the referral to facilitation. This increased formality and gravitas was credited with getting the attention to the dispute of players higher in the bargaining organizations, or those behind them. They, in turn, often brought more settlement authority to the dispute.

[56] The author acknowledges, however, that the aura or gravitas of the Authority was not always a trump card. As Dr McAndrew notes:

> The key advantage that the facilitator has over even an experienced mediator is the power to issue and publicize a report and recommendations. Parties were very conscious of the audiences that would be influenced by the facilitator's recommendations, and of the potential benefits and harms they could do to a party. Much of the criticism of facilitators taking a simple mediation approach centered on the facilitator making too little use of the ability to issue recommendations to challenge and move the parties from their positions. …
>
> Fundamentally, facilitation brings to bear the views of a credible neutral third party on the issues that divide the bargaining parties, and the value of that was widely acknowledged. The facilitators can often convey a party's interests and positions to the other party with more credibility and persuasion than could the party itself. Of course, mediators regularly do this too. The difference in facilitation is that the facilitator's own assessment of an issue during the conciliation or recommendation-shaping phases of the process can also be a powerful tool, introducing a 'reality check' for one or both parties. And the recommendations, even if they do not form the basis for an immediate settlement, can close down arguments or ambitions on one side or the other, and change the dynamics of the negotiations, paving the way for agreement down the track.

Decision of cross challenge

[57] Logically the defendant's cross challenge should be decided first because it will affect the decision of the Union's challenge.

[58] As already noted, Sanford has cross-challenged the Authority's conclusion that the abandonment of bargaining by the Union and its subsequent re-initiation do not confine its case to the period beginning with the re-initiation. Had the Authority accepted Sanford's argument on this point, it would have been more difficult for the Union to establish that the significantly shorter period of bargaining was "unduly protracted" and also that the "effects" required had been "extensive".

[59] I have concluded that the Authority correctly identified the whole of the period starting in 2009 with the first initiation of bargaining as being that to which the tests under s 50C(1)(b) should be determined.

[60] Just why the Union chose to re-initiate bargaining under s 42 of the Act in these circumstances is enigmatic, at least when legal requirements are considered. There does not appear to have been any reason in law why the temporarily stalled previous collective bargaining could not simply have been re-invigorated by a request of Sanford to resume bargaining, even including for some claims that had not previously been made. There is no statutory requirement for fresh initiation of bargaining in circumstances of its absence for a specified period or other like cause.

[61] There is scant but some evidence about how or why the parties arrived at the position (which has now become significant in the litigation) of fresh bargaining being initiated under s 42 of the Act in mid-2011. The following is a summary of the evidence to the extent that it goes.

[62] As already noted, the last bargaining session between the parties had been in April 2010. Two months later, in mid-June, the Union considered that bargaining had stalled. This was not unrelated to a contemporaneous fall in union membership at the plant. The Union's assessment of the position was that it was not worthwhile continuing bargaining with Sanford unless and until its critical mass of members there increased. There is no evidence of this view, or the reasons behind it, being conveyed to Sanford.

[63] The union official who re-initiated the bargaining had not been involved with it previously. He was instructed to start the bargaining again once the Union had

accumulated a sufficiently critical mass of members at the Sanford plant. No bargaining had taken place for some time and the official, John Cumming, elected to issue a new notice under s 42 initiating collective bargaining. No issue was taken with this course by the company. A new bargaining process arrangement or agreement was settled and the parties exchanged claims and counterclaims, some of which were a repetition of their previous claims and some of which were new. The approach of both parties was, however, to use the collective agreement which had expired in 2009 as a template and to propose additions or alterations to, or deletions from, that document with a view to the collective agreement that would hopefully be settled being a successor to a series of earlier collective agreements dating from 2001.

[64] The position in bargaining was also affected by the plant's closure for upgrading between October 2010 and January 2011. Employees, after they had exhausted accumulated leave, were engaged on a number of other tasks, both around the plant and on local community projects, for which Sanford continued to pay them. The plant upgrade included more mechanisation for which staff had to be trained and there must have been a degree of uncertainty about how their jobs might be affected when the plant reopened. These events also contributed to a disinclination to address collective bargaining during that period.

[65] There is no evidence that the parties agreed about the state of their bargaining before mid-July 2011 when the second s 42 notice of initiation was issued. The Union's view was that it had stalled and should not be re-started until it had more members for whom to bargain. There is no evidence of a manifestation by the company of its view of the negotiations if it had any. I assume that it was content to allow the absence of bargaining to continue. The earlier collective agreement finally expired by mid-2010 so that all employees were on individual employment agreements and the company was free to, and did, re-negotiate with them individually. By this process, the company achieved in many respects what it had sought in collective bargaining and the plant continued to operate satisfactorily.

[66] In examining the question of when collective bargaining can be said to have ceased in *New Zealand Public Service Association Inc v Secretary for Justice*,[9] the Court held that statutory collective bargaining may cease in one of three possible ways. These are by:

- the settlement and ratification of a collective agreement;

- when a settlement cannot be reached because one or more of the parties has a genuine reason or reasons, based on reasonable grounds, not to conclude a collective agreement; and, although expressed more tentatively;

- that the parties to collective bargaining agree to its cessation other than by their entry into a collective agreement.[10]

[67] Here, none of those events occurred. There was obviously no collective agreement settled. The Union did not have a genuine reason or reasons based on reasonable grounds not to conclude a collective agreement. Indeed, its strategy was to regroup and to continue to try to do so. There is no evidence that the employer had decided not to conclude a collective agreement for genuine reasons based on reasonable grounds. Finally, there is no evidence of agreement between the parties to cease their collective bargaining: indeed, my assessment is that no such agreement would have been forthcoming on the part of the Union.

[68] The answer to this issue challenged by Sanford lies in the statutory emphasis not upon difficulties (or serious difficulties) in bargaining but, rather, on "serious difficulties in concluding a collective agreement": s 50A(1). That is reiterated in the closing words of s 50B(1). Likewise, the particular grounds at issue in this case under s 50C(1)(b)(ii) addressing the "extensive efforts" relate to the parties being precluded "from entering into a collective agreement".

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[9] [2010] ERNZ 46.
[10] At [47], [49]-[50].

[69] In the first-initiated bargaining, the parties clearly had difficulties in concluding or entering into a collective agreement. In the re-initiated bargaining, which is for the same collective agreement, the parties have continued to have the same and additional difficulties or serious difficulties in attaining the same objective, that is concluding and entering into a collective agreement to replace the previous expired collective agreement.

[70] It is appropriate to consider the broader picture in the sense that the re-initiated bargaining was still for a replacement collective agreement between the same parties despite there being some changes to parties' claims. Collective bargaining is an evolving and dynamic process which includes such changes on the parts of parties without the necessity, or even any good reason, for bargaining having to be re-initiated. The resumption of collective bargaining by the parties in mid-2011 did not mean that its duration is to be judged only from that point. The statutory emphasis is on the achievement of a collective agreement by collective bargaining, not on the bargaining process alone.

[71] So for the purpose of determining both whether bargaining has been unduly protracted and whether extensive efforts have gone into concluding the bargaining, it is to be assessed from its commencement shortly before the expiry of the previous collective agreement between the parties in 2009. Sanford's cross challenge is dismissed accordingly.

"Extensive efforts"?

[72] As the judgment of this Court in *McCain* illustrates, the statutory requirement for bargaining being "unduly protracted" is a temporal consideration. "Extensive efforts", whilst these may include temporal elements, focus more upon the quality and dynamism of bargaining and the nature and quality of attempts that may have been employed by one or both of the parties to achieve settlement of a collective agreement.

[73] I have already noted that a qualitative analysis of the bargaining is a significant element of the "extensive efforts" test. The evidence, including evidence

about the latest bargaining session with a mediator's assistance, establishes not only that no effective progress in bargaining has been made but that, in some respects, it is regressing. That is in the sense that what was previously perceived to be a positive, albeit difficult, bargaining relationship is now one in which previous gains are perceived to have been lost. This is a not insignificant element of the "efforts" that the parties have made and, in a broad sense, the extensiveness of those efforts.

[74] As already noted, despite not taking account of them because of a paucity of information about their contents, the Authority was right to include, within the bargaining that had taken place, bargaining communications by email. The definition of "bargaining" in s 5 of the Act:

> (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and
> (b) includes—
> (i) negotiations that relate to the bargaining; and
> (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.

[75] The emails fall fairly and squarely within the statutory definition of bargaining being correspondence between the parties before, during or after negotiations related to the bargaining.

[76] A combination of modern methods of communication and the relative isolation of the plant, the location of the employer's adviser/advocate all make negotiations by email, in conjunction with more traditional face to face meetings, a sensible and practical way of progressing the bargaining.

[77] The statutory scheme is that it is the responsibility of both parties in collective bargaining for a collective agreement to progress the bargaining in order to achieve that outcome. Although, in the nature of these things, a party wishing to preserve the status quo will naturally be reluctant to do much, if anything, to advance the bargaining, the statutory scheme nevertheless expects that party to participate in good faith (as broadly defined in relation to bargaining). Resistance to bargaining by one party is a relevant consideration when examining the statutory tests for reference to facilitation.

[78] In this case, the position is not of one party seeking to change terms and conditions in an expired collective agreement (and so with an incentive to bargain) and the other party resisting any or at least more than very modest change to wage rates (and, therefore, with a natural disinclination to bargain). Of the four major outstanding issues, one (the increase to weekly working hours) provides the employer with an incentive to bargain.

[79] Bargaining for a collective agreement that has extended over the period of the last 41 months has been unduly protracted. The "extensive efforts" test that is at the heart of this challenge has included 14 face to face bargaining sessions, two of them conducted with the assistance of a mediator, some bargaining by correspondence, three periods of strike action, and an address by the plant manager directly to affected employees in an attempt to persuade them of the company's position. There are serious difficulties in the bargaining and, in particular, over four issues that will need to be resolved together and on which the parties are now no further forward than they have been for some time and arguably further apart in some respects. These serious difficulties have precluded the parties from entering into a collective agreement. The extensive efforts outlined above have failed to resolve those serious difficulties. It is now time for the facilitation process described earlier in this judgment to be used to achieve a settlement of a collective agreement.

Decision of challenge

[80] Although I agree with the Authority's other conclusions, I respectfully disagree with its assessment that efforts (including mediation) to resolve the difficulties that have precluded the parties from entering into a collective agreement, have been insufficiently extensive. To the extent that the Authority may also have observed that the parties' difficulties were not "serious", I also disagree with that conclusion.

[81] I acknowledge that the position has changed since the Authority's determination in that there has been further bargaining with the assistance of a mediator at the Court's direction. However, this has not progressed the bargaining significantly and in some respects it may even have reinforced the road blocks to a

settlement. I acknowledge, also, that the Court has been able to explore in evidence the parties' bargaining communications other than at face to face sessions that the Authority considered had not been sufficiently revealed by them in evidence. This, too, has provided a more complete and, therefore, different picture to that against which the Authority determined the application.

[82] Although I considered, after hearing the evidence and submissions, that the challenge should succeed and that the Union had made out its case for referral to facilitation, the evidence was also that the most recent mediator assisted bargaining on 13 September 2012 did not conclude in a complete stalemate. The Union, in conjunction with the Mediation Service, offered a number of dates for the continuation of that bargaining but the company did not regard any of these as suitable and, more particularly, because its attentions were then devoted to preparing for this case. Sanford would prefer to be bargaining collectively with the assistance of a mediator and considers that progress can be made. The Union's concern is that further delay will not assist in obtaining a settlement.

[83] In these circumstances, I allowed the challenge, directed that the Authority should accept a reference to facilitation, but delayed implementation of that order for one calendar month. That was to allow for further urgent mediated collective bargaining which I directed take place within that period. This was intended to both allow the company to continue to negotiate in its preferred fashion but also to ensure that this was not an open-ended process, thus addressing the Union's concerns also.

[84] For the foregoing reasons, the Court is satisfied that the parties' bargaining has been unduly protracted and that extensive efforts (including mediation) have failed to resolve the serious difficulties that have precluded them from entering into a collective agreement. In these circumstances, and after the expiry of one month from 25 September 2012, the Authority must now accept the plaintiff's reference for facilitation to assist in resolving difficulties in concluding the collective agreement.

[85] Although the provisions of s 50D do not strictly preclude the Member of the Authority who refused to accept the reference for facilitation from being the same Member who facilitates collective bargaining, the spirit of s 50D, which is to bring a

fresh and uninfluenced mind to the task of facilitation, will be met if another Authority Member now undertakes the role of facilitator.

[86] I reserve questions of costs in both the Authority and this Court. The parties' focus should now be on settling and entering into a collective agreement and if the absence of an award of costs may assist that objective, then the Court would not wish to put it at risk of further failure by making an award. If, however, facilitation is unavailing, then the reservation of costs will allow an application to be brought by memorandum without limitation as to time.

GL Colgan
Chief Judge

Judgment signed at 8.45 am on Friday 28 September 2012